



EXECUTIVE LEADERSHIP IN THE DEPARTMENT OF
HOMELAND SECURITY: PROTECTING THE
HOMELAND THROUGH STRENGTHENING
MANAGEMENT

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The Department of Homeland Security (DHS) faces substantial challenges to fulfilling its mission. When it falls short, the stakes are often life-or-death.

To address these challenges, DHS must bolster its professional executive ranks and reduce political involvement. Members of the professional Senior Executive Service have proven value in government performance, but these employees have been short-staffed in DHS. Meanwhile, though political appointees often reduce effectiveness, DHS has had an abundance of these positions. This political impact is further amplified through the staggering number of congressional bodies to which DHS reports.

Some of these problems were written into the Homeland Security Act of 2002, while others predate it to predecessor agencies. But through understanding a presidential assassination that happened nearly 140 years ago, the problems of the newest cabinet-level agency can be understood and rectified.

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INTRODUCTION

For weeks, Charles Guiteau¹ made himself clear: he helped elect a president, and he expected a plush new job in return. This was typical in the late 1800s – an age of patronage. Unsurprisingly, he did

¹ Charles Julius Guiteau (1841-1882) was an enterprising man who likely suffered from a serious mental illness. His childhood included a mother who suffered from psychosis and who died when Charles was age 7, and his own experiences with speech disorders and attention deficit disorder. His early adulthood saw him attending the University of Michigan (though leaving after a year), a member of a utopian religious sect, a religious lecturer who composed his sermons naked, and a debt collection attorney. His entire contribution to the Garfield campaign appears to have been trips to the campaign headquarters and a single, hyperbolic speech to a small group of voters. See Douglas O. Linder, *The Trial of Charles Guiteau: An Account*, FAMOUS TRIALS, <http://famous-trials.com/guiteau/2197-home> (last visited Apr. 26, 2020).

not expect President James Garfield's rebuff. The requests turned to pleas, pleas to demands, and demands to silence. And it was in the silence that Guiteau heard the voice of God commanding him: Garfield should die.² So, after days of tracking the president across Washington, D.C., Guiteau shot President Garfield the morning of July 2, 1881. Eleven agonizing weeks later, the president died.³

Numerous links between the assassination of President Garfield and the Department of Homeland Security (DHS) lay buried in history. Guiteau's actions exploited President Garfield's lack of a protective detail in a highly political workforce. Consequently, today's Secret Service (a DHS agency composed of professional career employees) is the preeminent protective force in the United States. Guiteau murdered over a perceived violation of patronage, but his crime ushered in the nation's first career civil servants.⁴ And while Guiteau obsessed over political jobs, the most substantial challenges to DHS today relate to the relationship between political problems and career managers.

This article begins by tracing the arc of American civil service from a spoilage system to meritocracy, the rise of "supergrades," and the ambitious plan to supercharge the American bureaucracy by investing in the executive corps. Second, it assesses the Senior Executive Service (SES), the weighty criteria used to select its members, its evolution over time, the challenges it faces, and the strengths it brings to service. Third, it examines the critical and continuing need of professional government leaders in the newest, most controversial cabinet-level department: DHS. Finally, this article

² See L. Renee Faust Rohe, *The Charles Guiteau Trial: A Chronology*, FAMOUS TRIALS: CHARLES GUYTEAU (GARFIELD ASSASSINATION) TRIAL 1881-82, <http://law2.umkc.edu/faculty/projects/ftrials/guiteau/guiteauchrono.html> (last visited Apr. 22, 2020).

³ Evan Andrews, *The Assassination of President James A. Garfield*, <https://www.history.com/news/the-assassination-of-president-james-a-garfield> (last visited Apr. 22, 2020); see Norm Ornstein, *How the Assassination of James A. Garfield Haunts VA Reform*, THE ATLANTIC, (July 10, 2014), <https://www.theatlantic.com/politics/archive/2014/07/how-the-assassination-of-james-a-garfield-haunts-va-reform/374202/>.

⁴ Ornstein, *supra* note 3 (noting that the system of political patronage existed until "a massive public uprising" over Garfield's assassination).

broadly analyzes DHS from its creation in 2002 to the present, including the challenges it faces and how reducing political interference and bolstering career SES ranks will allow it to better protect the country. In so doing, this article illustrates the link from patronage-motivated assassination to a department of professional civil servants tasked with protecting the American homeland.

I. FROM SPOILAGE TO CIVIL SERVICE

Guiteau may have killed a president, but, in doing so, he spurred tremendous change. Not only did his simple but successful plot illustrate the high costs of not having a professional protective service, but his motivation – killing an American president for failing to honor a patronage contract – demanded attention. Newly designated President Chester Arthur (like many Americans) was horrified by the action, retracted his prior support for patronage, and became a champion of reforming the civil service.⁵

The resulting Pendleton Act of 1883 marked the first time America ventured toward a professional civil service.⁶ It was widely supported, codifying meritocracy and professionalism and prohibiting firing or demoting covered employees for political reasons.⁷ Although originally covering only 10% of the federal workforce, it created important civil service bodies and became the backbone of the modern American civil service.⁸

⁵ Ornstein, *supra* note 3.

⁶ Civil Service (Pendleton) Act of 1883, ch. 27, 22 Stat. 403 (amended 1978) (codified in part across §§ 5, 18, & 40 U.S.C.)

⁷ See Andrew Glass, *Pendleton Act inaugurates U.S. civil service system*, *JAN. 16, 1883*, POLITICO (JAN. 16, 2018, 12:00 AM EST), <https://www.politico.com/story/2018/01/16/pendleton-act-inaugurates-us-civil-service-system-jan-16-1883-340488>.

⁸ See Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *YALE L.J.* 1362, 1391 (2010) (noting the importance, but also limitations, of the Pendleton Act). There were also additional bodies created that enhanced meritocracy for future generations, such as re-funding the United States Civil Service Commission—the precursor to the Office of Personnel Management, Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, and the Office of Special Counsel—to determine which positions should also be meritorious. Glass, *supra* note 7.

A. *The Rise of Supergrades*

Over the next seventy years, the civil service evolved to identify positions and compensation based on duties and responsibilities.⁹ In 1949, Congress passed the Classification Act, dividing the “white-” and “blue-collar” workforce, creating the General Schedule (GS) pay scale, and establishing supergrades for white-collar workers.¹⁰ While almost all of these employees would range from GS grades 1-15, the highest grades were GS 16-18.¹¹ These GS 16-18 supergrades were positions that required highly specialized technical skills, divorced from leadership or management requirements.¹² The compensation for such highly specialized skills was, by government standards, exceedingly high: nearly on par with political appointees and members of Congress.¹³

Over time, the supergrades class grew dramatically in size but remained entrenched in technical classifications. When the Classification Act of 1949 was passed, the civilian federal workforce (excluding the Postal Service) reached roughly 1.57 million in population, only 400 of which, or .025% of the workforce, were supergrades.¹⁴ By 1978 there were more than 9,000 supergrades in the pool of 2.24 million civilian federal employees (excluding the Postal Service), or 0.41% of the workforce.¹⁵ While the ranks of highly specialized technicians grew, leadership and management to harness

⁹ See generally George T. Milkovich et al., *Pay for Performance: Evaluating Performance Appraisal and Merit Pay*, THE NATIONAL ACADEMIES PRESS 13-33 (1991), <https://www.nap.edu/read/1751/chapter/4#15>.

¹⁰ *Id.* at 15.

¹¹ *Id.* at 16.

¹² MAEVE P. CAREY, CONG. RSCH. SERV. R41801 THE SENIOR EXECUTIVE SERVICE: BACKGROUND AND OPTIONS FOR REFORM 2 (2012).

¹³ *Id.*

¹⁴ *Id.* (reflecting 400 supergrade positions in 1949); U.S. Office of Pers. Mgmt., Historical Federal Workforce Tables: Total Government Employment Since 1940, <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/> (last visited Apr. 22, 2020) (reflecting roughly 1.57 million federal employees).

¹⁵ Letter from James Carter, President, to the Congress of the United States (Mar. 2, 1978), <https://babel.hathitrust.org/cgi/pt?id=uc1.b4177359&view=1up&seq=453> (reflecting 9,200 supergrades in 1978); see CAREY, *supra* note 12 (reflecting 2.24 million federal employees).

these technicians were inconsistent and subject to substantial political interference.¹⁶

The supergrades era came to a slow and cumbersome end. As early as the 1950s, President Dwight Eisenhower proposed creating a Senior Civil Service and reforming the supergrades.¹⁷ But this proposal was stymied by legislative action.¹⁸ After these repeated efforts, every presidential administration supported the proposal, but the initiative always faltered.¹⁹ It was not until the issue found its way into the campaign promises of President Jimmy Carter that the political momentum found traction.²⁰

B. *Executives Wanted*

The Carter Administration brought weight to bear on changing the federal workforce. After Carter incorporated civil service reform into his campaign promises, a post-election presidential taskforce highlighted numerous proposed changes, among which “executives” were key.²¹ President Carter created the Federal

¹⁶ For example, Senator Edward Derwinski lamented the need for SES at all. During the debate over the Civil Service Reform Act of 1978, he was upset that “every committee, every sub-committee, has played around like little crown princes knighting people and sending them off as supergrades. As a result, all through Government in every appropriation and authorization bill we are creating supergrades. Nobody has a hold on them—not even the President or the Office of Management and Budget—nobody.” LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978, Vol. 1, at 971 (1979).

¹⁷ See CAREY, *supra* note 12 at 2 (summarizing the support of the administrations); *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearing on S. 2640, S. 2707, and S. 2830 Before the Comm. On Gov. Affairs, 95th Cong. Appendix 660* (1978) (A Brief History of Reform Efforts) (noting the recommendation of the Second Hoover Commission and the “active support” of President Eisenhower).

¹⁸ LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978, *supra* note 16. President Eisenhower, building off committee ideas generated during the Hoover Administration, provided support to the idea. But Congress rebuffed the action and instead, in a “familiar rider” in appropriations bills Congress expressly prohibited any actions to create a Senior Civil Service. See *generally id.* at 660.

¹⁹ *Id.* (finding the support of Presidents Nixon, Ford, and Carter failing); CAREY, *supra* note 12 at 2 (finding the same of Presidents Kennedy and Johnson).

²⁰ See CAREY, *supra* note 12 at 2.

²¹ See Charles S. Clark, *After 40 Years, A look Back at the Unlikely Passage of Civil Service Reform*, GOVERNMENT EXECUTIVE (July 3, 2010),

Personnel Management Project and tasked it with assessing the federal executive ranks.²² The subsequent report and critique raised damning issues to be addressed, concluding:

1. Neither the Congress nor the President has effective control over the total numbers of the executive cadre.
2. The numbers of executives authorized have little relationship to current needs and the system cannot adapt rapidly to program changes.
3. The multiplicity of hiring authorities with different requirements and provisions results in individuals with substantially similar responsibilities being employed and compensated under very different standards. It is susceptible to manipulation and fosters the use of questionable, albeit legal, maneuvers.
4. Individuals with little or no adequate managerial expertise can be placed in positions responsible for managing billion-dollar federal programs and for supervising thousands of employees.
5. Career employees have little opportunity to undertake positions of the highest responsibility without relinquishing their career tenure.
6. Whenever there is a change in political leadership, there is a period in many agencies during which the work of the Government is done at a minimum maintenance level. New initiatives are rare and even on-going programs operate in low gear.
7. There are critically important executive positions classified as “career” which new administrations would like to fill with executives of their own choosing, but

<https://www.govexec.com/management/2018/07/after-40-years-look-back-unlikely-passage-civil-service-reform/149458/>; CAREY, *supra* note 12 at 3. See also Stuart Eizenstat, *Jimmy Carter and Civil Service Reform*, CSAS Working Paper 19-16, <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2019/05/Eizenstat-Working-Paper-19-16.pdf>.

²² CAREY, *supra* note 12 at 3.

reassignments of incumbents are very difficult to make, principally because of the existing protection of 'rank' and system inflexibilities.

8. It is commonly observed by both career and noncareer executives that some career managers are functioning in less than an optimum manner, in some instances because they are in positions which make greater demands on them than they are capable of meeting, in other cases because they have no incentive to do their best. It is difficult to remove such managers.

9. Compensation of executives has been a serious problem in recent years, with most senior executives frozen in pay for long periods, while their subordinates' pay, compensation for comparable positions in the private sector, and the cost of living have all risen dramatically.

10. The present process for establishing and filling an executive position is time-consuming and inefficient.

11. Minorities and women have been virtually excluded from top management ranks.²³

Given the seriousness of the conclusions, the decades of momentum, the Carter Administration's campaign promises, and congressional support, change was due.

II. THE SENIOR EXECUTIVE SERVICE

A. *Origin and Impetus*

The SES was born during a time of national need. Years of civil unrest, unpopular war, and national scandal weighed heavily. In 1964, 77% of Americans had strong faith in government; by 1980, that number had fallen to just 25%.²⁴ A plan was necessary to restore faith in leading and managing the workforce for the American people.

²³ PERSONNEL MANAGEMENT PROJECT, VOLUME 2: APPENDICES TO THE FINAL STAFF REPORT APP. II, (Dec. 1977) at 1-2.

²⁴ The question was whether they trust the government in Washington to do what is right "just about always" or "most of the time." Pew Research Center, *Public Trust in*

At the time, the only executives in American civil service were political. All other employees were either administrative or technical.²⁵ So, in 1978, President Carter made the case to Congress to create a new executive level for the civil service. He noted:

A critical factor in determining whether Federal programs succeed or fail is the ability of the senior managers who run them. Throughout the executive branch, these 9,200 top administrators carry responsibilities that are often more challenging than comparable work in private industry. But under the civil service system, they lack incentives for first-rate performance that managers in private industry have. The civil service system treats top managers just like the 2.1 million employees whose activities they direct. They are equally insulated from the risks of poor performance, and equally deprived of tangible rewards for excellence.²⁶

That same year, Congress moved forward with civil service reform, including the creation of the SES.²⁷ But it was far from seamless. Although the SES concept had broad support overall, amendments to limit and “trial” the concept for two years were adopted.²⁸ Some federal agencies, including the storied Federal Bureau of Investigation (FBI), forcefully and successfully lobbied political leaders to prevent SES in their leadership.²⁹ Numerous other agencies followed suit.³⁰

Government: 1958-2019, U.S. Politics and Policy (Apr. 11, 2019), <https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019/>.

²⁵ Carter, *supra* note 15 (noting that the highest level federal managers lack incentives for performance and are treated the same as those they manage); CAREY, *supra* note 12 at 1 (noting that before SES were created, “a centralized cadre of senior leaders in the government did not exist.”).

²⁶ Carter, *supra* note 15.

²⁷ 5 U.S.C. § 3131 (1978); *see generally* LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978, *supra* note 16.

²⁸ LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978, *supra* note 16 at 648.

²⁹ *Id.* at 970-72.

³⁰ Ultimately, exemptions from SES leadership were eventually made for the FBI, Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, Transportation Security Administration, Federal Aviation Administration,

Though imperfect, the Civil Service Reform Act (CSRA) of 1978 codified the SES, raising an innovative approach to leadership in government service.³¹ The text provided, in part, that “a Senior Executive Service should be established to provide the flexibility needed by agencies to recruit and retain the highly competent and qualified executives needed to provide more effective management of agencies and their functions, and the more expeditious administration of the public business.”³² It further noted that this new cadre was needed “to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality.”³³

For the first time in 200 years of American bureaucracy, a professional cadre of managers and leaders would work in service to the nation.

A. *Senior Executive Service Qualifications*

Congress apparently believes it found perfection, because the SES has remained mostly unchanged since 1978. All SES positions are either “career reserved” or “general”, with the former consisting solely of career employees and the latter being either political or career employees.³⁴ While appointments into these positions are “career,” “noncareer,” or “limited”/“term,” at least 90% are career (i.e. non-

Government Accountability Office, Foreign Service, and government corporations. Most are now excluded by statute at 5 U.S.C. § 3132(a)(1) (2015).

³¹ The approach was innovative for the United States, which had been through two World Wars, the Great Depression, and most of the Cold War since the Pendleton Act. But career executive managers have a long tradition in countries like France and Japan. Mashaw, *supra* note 8 at 1377.

³² 5 U.S.C. § 3131 (1978) (note 6 of Findings and Statement of Purpose).

³³ 5 U.S.C. § 3131 (1978).

³⁴ Certain positions must remain career only if “necessary to ensure impartiality, or the public’s confidence in the impartiality, of the Government.” 5 U.S.C. § 3132(b)(1) (2015). Certain positions are explicitly career reserved, such as positions involving audits, inspections, civil or criminal law enforcement, grants administration, investigation and security matters. 5 C.F.R. § 214.402 (1980).

political) employees.³⁵ The remaining appointments are noncareer (i.e. political), with few “limited” employees.³⁶

Career SES appointments are selected on merit. The Office of Personnel Management (OPM) has established five Executive Core Qualifications (ECQ) that represent executive qualifications for success in the federal government: (1) Leading Change, (2) Leading People, (3) Results Driven, (4) Business Acumen, and (5) Building Coalitions.³⁷ The ECQs were created by OPM in 1997 after evaluating successful executives in private and public sectors. They were revised in 2006 to “represent the best thinking of organizational psychologists, human resources professionals both at OPM and other agencies, and Senior Executives themselves.”³⁸ Further, “[t]he ECQs were designed to assess executive experience and potential—not technical expertise.”³⁹ Each of the ECQs relate to twenty-two wide ranging executive competencies, from strategic thinking to conflict management to technology management.⁴⁰ An additional six competencies are the foundational competencies for the ECQs.⁴¹

Today, SES candidates are recruited through a published announcement on the federal jobs website, www.USAJobs.gov.⁴² Agencies may elect to post vacancy announcements, calling for “resume-based” (effectively, a resume drop), “accomplishment record” (a resume and a narrative addressing selected competencies and technical qualifications), or “traditional” (a resume and a narrative addressing selected competencies and technical qualifications) applications.⁴³ After the conclusion of the job announcement, a human resources specialist completes an initial

³⁵ See CAREY, *supra* note 12.

³⁶ Limited SES may consist of no more than 5% government-wide, and no more than 3% in any agency. 5 U.S.C. § 3134(e) (1978).

³⁷ U.S. OFFICE OF PERS. MGMT., GUIDE TO SENIOR EXECUTIVE SERVICE QUALIFICATIONS 1-2, https://www.opm.gov/policy-data-oversight/senior-executive-service/reference-materials/guidetosesequals_2012.pdf (last visited Apr. 22, 2020).

³⁸ *Id.*

³⁹ *Id.* at 1.

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² *Id.* at I.

⁴³ OFFICE OF PERSONNEL MGMT., *supra* note 37, at 6.

review of the applications.⁴⁴ Next, a panel of individuals with in-depth knowledge of the position reviews the qualified candidates to rate and rank the applications.⁴⁵ Each agency maintains an Executive Resources Board (ERB) to review the top candidates for SES qualifications.⁴⁶ The ERB then makes a recommendation to the agency's Selection Official for the position.⁴⁷ After an individual is conditionally selected by an agency, the agency then refers the candidate to OPM for assessment of the candidate's ECQs through an SES Qualifications Review Board (QRB).⁴⁸ OPM convenes a QRB weekly.⁴⁹ Its members serve three-month appointments and consist of three SES members, each from a different agency and at least two of which are career members.⁵⁰ The QRB does not rate or rank candidates against each other but strictly determines whether the proposed applicant's experience sufficiently meets the ECQs.⁵¹ This multi-tiered vetting ensures only the most capable and qualified candidates are selected into the SES corps.

III. THE VALUE OF THE SENIOR EXECUTIVE SERVICE

The goals of the SES are as lofty as the class itself. By statute, the SES is charged with ensuring "the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality."⁵² In support of this mission, the statutory objectives require "compensation, retention, and tenure" contingent on executive success, accountability for the success of their organizations,

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 5 U.S.C. § 3393(b) (2015).

⁴⁷ CAREY, *supra* note 12, at 8.

⁴⁸ OFFICE OF PERSONNEL MGMT., *supra* note 37, at 7.

⁴⁹ *Id.*

⁵⁰ *Id.*; *Policy, Data, Oversight, Senior Executive Service: Qualifications Review Board*, OFFICE OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/senior-executive-service/selection-process/#url=Qualifications-Review-Board>. (stating each member is from a different agency) (last visited Oct. 8, 2020); *see also* OFFICE OF PERSONNEL MGMT., EXECUTIVE ORDER ON STRENGTHENING THE SENIOR EXECUTIVE SERVICE QUALIFICATIONS REVIEW BOARD SUBMISSION METHODS 3-4, <https://www.opm.gov/policy-data-oversight/senior-executive-service/selection-process/ses-qrb-guidance.pdf> (last visited Oct. 8, 2020).

⁵¹ OFFICE OF PERSONNEL MGMT., *supra* note 37, at 7.

⁵² 5 U.S.C. § 3131 (1978).

recognition of high achievement, reassignment of SES members to accomplish agency missions, enhanced separation packages for non-disciplinary SES removals, protection from political and capricious action, initial and continuing training for SES members, enhancing relationships between political appointees and career civil servants, and ensuring continued governmental operations during times of presidential change.⁵³ Moreover, the SES compensation is designed to “attract and retain highly competent senior executives”⁵⁴ so the cadre must be filled with at least 90% career civil servants.⁵⁵

A. *SES Success?*

Forty years later, the SES story is one of mixed results. Industry spectators and government consultants, among others, have highlighted shortcomings of the SES program.⁵⁶ The strongest critiques include highlighting the failure of SES to move between agencies, a lack of executive management focus over technical focus, a broken SES hiring process, and a failure to train executives properly.⁵⁷ To the extent the SES has been unsuccessful, Congress, the executive branch (including both administrative functions and presidential administrations), and the SES itself all share blame.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 5 U.S.C. § 3134 (1978) (requiring at least 90% career civil servants).

⁵⁶ See, e.g., CAREY, *supra* note 12, at 12-13; Nora Kelly Lee, *Can the Government Fix Its Corps of Managers?*, THE ATLANTIC, (Jan. 11, 2016,

<https://www.theatlantic.com/politics/archive/2016/01/senior-executive-service/423435/>;

Reid Davenport, *Avoiding the Senior Executive Service*, FEDERAL COMPUTER WEEK (May 30, 2014), <https://fcw.com/articles/2014/05/30/avoiding-the-senior-executive-service.aspx>;

Jeff Neal, *The Problem with the Senior Executive Service*, FEDERAL NEWS NETWORK (May 26, 2014, 9:34 AM), <https://federalnewsnetwork.com/management/2014/05/the-problem-with-the-senior-executive-service/>;

Robert F. Hale, *Sustaining the SES in Difficult Times*, GOVERNMENT EXECUTIVE (May 5, 2017), <https://www.govexec.com/management/2017/05/sustaining-ses-difficult-times/137621/>;

Reid Davenport, *Avoiding the Senior Executive Service*, FEDERAL COMPUTER WEEK (May 30, 2014), <https://fcw.com/articles/2014/05/30/avoiding-the-senior-executive-service.aspx>.

⁵⁷ See CAREY, *supra* note 12, at 4, 13-14, 18; Lee, *supra* note 56; Davenport, *supra* note 56; Neal, *supra* note 56; Hale, *supra* note 56.

The shortcomings begin with the recruitment process. As summarized in a 2009 report by the Partnership for Public Service and management consulting firm Booz, Allen, Hamilton, “[t]oday’s Senior Executive Service [] only vaguely reflects and demonstrates this [original] vision. Perhaps more alarming, though, is that the underlying expectations set forth in 1978 have survived and not enough has been done to strengthen, reinvigorate, and prepare the federal government’s senior career leadership corps.”⁵⁸ Similarly, despite statutorily calling for sufficient compensation to attract and retain highly competent senior executives, Congress has never provided it.⁵⁹ Executive compensation in the private sector, across both public and private companies, remains higher than career SES-compensation.⁶⁰ Not only is such compensation below private-sector peers, but SES compensation remains below some positions in government service.⁶¹ This problem is regularly compounded by “pay

⁵⁸ Partnership for Public Service & Booz Allen Hamilton, *Unrealized Vision: Reimagining the Senior Executive Service*, OURPUBLICSERVICE.ORG at i (Aug. 2009), <https://ourpublicservice.org/wp-content/uploads/2009/08/1da29db6beaa39509812e2ee6f10508e-1403033188.pdf> (last visited Apr. 22, 2020) at i.

⁵⁹ As early as 1980, the General Accounting Office warned that the federal government would struggle to attract high quality executives due to pay compression. “The success of SES may also be threatened by salary limitations . . . GAO recommends that the Congress allow annual pay adjustments, discontinue linking congressional and Executive Level II salaries, and allow bonus and rank provisions to take effect for SES members.” U.S. GEN. ACCT. OFF., FPCD-80-72, FEDERAL EXECUTIVE PAY COMPRESSION WORSENS 1 (1980). See also U.S. GEN. ACCT. OFF., T-GGD-87-1, FEDERAL EXECUTIVE PAY 3 (1986) (finding the problem exacerbated); CAREY, *supra* note 12, at 13-14 (finding compounded pay problems).

⁶⁰ “The minimum rate of basic pay for Senior Executive Service (SES) positions . . . will remain at \$126,148 in 2019. The applicable maximum rate of basic pay will continue to be \$189,600 . . .” U.S. OFFICE OF PERS. MGMT., MEMORANDUM FOR: HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, EXECUTIVE ORDER FOR 2019 PAY SCHEDULES, CPM 2018-23, (Dec. 28, 2018). In 2017, for privately held companies, “[a]fter the CEO, the most highly compensated senior executive position was the President, with a median total compensation package of \$262,000, followed by the senior operations executive (COO), with a median total compensation package of \$223,500.” Wayne Cooper, *CEO and Senior Executive Compensation in Private Companies 2018-19*, CHIEF EXEC. (Apr. 24, 2019), <https://chiefexecutive.net/ceo-and-senior-executive-compensation-in-private-companies-2018-19/>.

⁶¹ These often, though not exclusively, are medical professionals. See, e.g., Ralph R. Smith, *Top 10 Highest Paid Feds – 1 is Well Known*, FEDSMITH (July 21, 2020), <https://www.fedsmith.com/2020/07/21/top-10-highest-paid-feds-1-well-known/>;

compression.” GS employees with a lower level of responsibility making the same, or, in some cases, higher wages than SES employees.⁶²

The executive branch has not fully leveraged the elite cadre of executives, particularly by not promoting SES mobility or providing strong training. Despite calling for these high-level managers to share knowledge and expertise across government, there has never been such a policy.⁶³ As a result, less than 3% of SES members have worked in more than one agency.⁶⁴ Political appointees often view each agency as a fiefdom, and “senior executives have been viewed primarily as agency-specific assets, not federal or national assets.”⁶⁵ When rotations occur, they are often perceived not as fulfilling an important goal but as a punitive measure or for political interference.⁶⁶

This lack of support and direction by the executive branch is in sharp contrast to the direction it gives uniformed military leaders. For example, while military officers have roughly two *years* of leadership and management training over their careers, equivalent civilian executives have roughly two *months* of comparable training.⁶⁷

Steven Nelson, *Trump Says Infrastructure Bill Should Slash Salary of Highest-Paid Federal Worker*, N.Y. POST, Apr. 8, 2020 at 1-2 (referring to the Chief Executive Officer of the Tennessee Valley Authority (TVA), a quasi-federal entity. In response, a TVA spokesperson pointed out that “TVA’s CEO total compensation is approximately 25 percent of the compensation of CEOs of comparable utilities”)

⁶² This problem originated nearly immediately after the creation of the SES and continues to date. “Many Federal executives are reluctant to accept promotions because the increased responsibilities of the position are not recognized with higher pay.” U.S. GEN. ACCT. OFF., *supra* note 59 at ii; *see also* *SES Pay Compression Relief Sought*, FEDWEEK (May 23, 2001), <https://www.fedweek.com/fedweek/ses-pay-compression-relief-sought/>; Davenport, *supra* note 56.

⁶³ *See* CAREY, *supra* note 12 at 18. This is partly because the Office of Personnel Management (OPM) has delegated substantial portions of authority over career SES to agencies themselves. To address this, it has been argued that creating a centralized mechanism at OPM would substantially improve this situation. *Id.* (citing to Partnership for Public Service & Booz Allen Hamilton, *supra* note 58 at 3).

⁶⁴ Partnership for Public Service & Booz Allen Hamilton, *supra* note 58, at ii.

⁶⁵ *Id.* at 3.

⁶⁶ *Id.*

⁶⁷ *See* Bruce T. Barkley, Sr., *Developing Senior Executive Capabilities to Address National Priorities*, IBM CENTER FOR THE BUSINESS OF GOVERNMENT 7 (2013),

Similarly, their military counterparts have more mobility and exposure to technologies, organizational models, and other management approaches.⁶⁸ “SES executive training and career path development are largely left to individual agencies; thus, there is wide disparity in the way career development is handled. There is no government-wide coordination [for SES development]”⁶⁹

While Congress failed to provide proper funding, and the executive branch has failed to implement concrete plans, the SES program itself often promotes technical expertise⁷⁰ over executive leadership. Although conversion from supergrade to SES was not mandatory, over 98.5% of supergrades converted in 1979. Technical experts became “executives” with a stroke of the pen.⁷¹ These technical experts did not suddenly obtain executive or leadership vision, nor did they have any incentive to do so given their new “executive” status and lack of financial incentive. Unsurprisingly, a study decades later found SES candidates with technical expertise were *still* preferred over those with managerial and leadership training taught in certified SES Candidate Development Programs designed to identify, train, and promote SES candidates.⁷² A more recent study confirmed:

[A]gencies tend to focus on an applicant’s technical skills, rather than leadership and management skills . . . [which] might occur for several reasons: identifying technical skills is easier than identifying skills such as leadership capabilities; technical experts may serve agencies better in

<http://www.businessofgovernment.org/sites/default/files/Developing%20Senior%20Executive%20Capabilities%20to%20Address%20National%20Priorities.pdf>.

⁶⁸ *Id.*

⁶⁹ *Id.* at 8.

⁷⁰ “Technical expertise” is specialized knowledge relating to a position. They are often explicitly required to be addressed for positions. In the words of one industry website advising on drafting application material, “Think of [technical qualifications (TQs)] as the old knowledge, skills, and abilities (KSAs) statements we used to write prior to 2009, whenever applying for a federal job . . . [w]hen you review a job announcement, be sure to look at the TQs before deciding whether to apply. If you cannot provide specific examples of when you demonstrated each TQ in your work, you may want to consider picking a different announcement.” Nancy Segal, *Writing Technical Qualifications for Your SES Package*, FEDWEEK (Oct. 16, 2017), <https://ask.fedweek.com/writing-technical-qualifications-ses-package/>.

⁷¹ See CAREY, *supra* note 12, at 15.

⁷² *Id.* at 15.

the short term; and failure to consider leadership capability during the hiring process.⁷³

Thus, due to Congress, the Presidency, and the SES cadre, the SES program has yet to fully reach its potential.

B. *SES Success!*

Nonetheless, despite flaws, SES members contribute to the success of the United States government. Agency performance is very difficult to quantify but includes assessing efficiency, processes, systems/organizations, and capacities. Measuring individual performance in government across agencies can be similarly difficult to quantify for the same reasons. There are rarely widgets to produce or customers to lose to market competitors, and, therefore, performance can be difficult to measure.⁷⁴ And, on this particular subject, there appears to be a lack of empirical research. But the limited evidence available makes clear that career SES members add value to their institutions.

By regulation, performance appraisals of SES members are tied to agency performance, and career SES performance ratings are routinely high.⁷⁵ From 2010 to 2013, 85% of career SES achieved the two highest ratings (“Outstanding” and “Exceeds Fully Successful,” respectively).⁷⁶ In 2014 those numbers reached above 89%.⁷⁷ In 2015

⁷³ *Id.* (citing to Partnership for Public Service & Booz Allen Hamilton) .

⁷⁴ See, e.g., Paul Eder, *How Do You Measure the Effectiveness of Government?*, GOVERNMENT EXECUTIVE (July 15, 2015), <https://www.govexec.com/management/2015/07/how-do-americans-measure-effectiveness-government/117814/>; U.S. OFFICE OF PERS. MGMT., A HANDBOOK FOR MEASURING EMPLOYEE PERFORMANCE 12-13 (Mar. 2017). Similarly, it can be difficult to compare success between agencies. For example, “What does it mean to say that a new Clean Air Act regulation promulgated by the Environmental Protection Agency was more responsive . . . than a recent decision by the Federal Trade Commission to prohibit a proposed merger?” Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L.J. 1002, 1007 (2017).

⁷⁵ 5 C.F.R. § 430.301(b)(2) (2015).

⁷⁶ U.S. GEN. ACCOUNTING OFFICE, GAO-15-189, RESULTS ORIENTED MANAGEMENT 7 (Jan. 2015).

⁷⁷ U.S. OFFICE OF PERS. MGMT., REPORT ON SENIOR EXECUTIVE PAY AND PERFORMANCE APPRAISAL SYSTEMS: FISCAL YEAR 2015 Table 3

and 2016 the numbers reached above 90%.⁷⁸ Thus, the executives charged with leading and managing government institutions, whose performance rating is tied to performance of their respective agencies, are excelling.

While self-promotion or “rating inflation” is possible, additional evidence suggests career SES members are positively impacting their agencies. Vanderbilt University Professor David E. Lewis conducted one of the few external reviews of the SES management performance from the now-defunct Program Assessment Rating Tool (PART).⁷⁹ The PART was a program of the Office of Management and Budget (OMB) under President George W. Bush to rate federal programs and agencies on their performance. In assessing performance measures of agencies and programs, coupled

https://www.govexec.com/media/gbc/docs/pdfs_edit/110116kl1.pdf (last visited Apr. 22, 2020).

⁷⁸ U.S. OFFICE OF PERS. MGMT., REPORT ON SENIOR EXECUTIVE PAY AND PERFORMANCE APPRAISAL SYSTEMS: FISCAL YEAR 2016 Table 3 <https://federalnewsnetwork.com/wp-content/uploads/2018/02/FY-2016-Report-on-Senior-Executive-Pay-and-Performance-Appraisal-Systems.pdf> (last visited Apr. 22, 2020).

⁷⁹ DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE, (Princeton Univ. Press) (2008). Although a question of whether a defunct tool should be used to assess performance is worth considering, reservations are unwarranted. “Briefly, if the errors or mistakes in the PART grades are random—say one program is awarded too many points and another too few points—this inaccuracy will wash out when one looks at all the programs together. If the situation is worse—say the mistakes in giving grades are nonrandom—this is also not a problem so long as we can devise appropriate ways of accounting for these biases or establish that the problems in the grades are unrelated to the key subject of interest, namely, whether a bureau chief is an appointee or careerist. For example, suppose all social welfare programs like those in HUD or HHS were graded down unfairly. While this would not be an admirable grading scheme, this bias in grading would not influence our conclusions so long as all social welfare programs, both those administrated by careerists and appointees, get downgraded equally. The worst-case scenario for inference would be if the errors in grading were related to whether a program is administrated by a careerist or an appointee. Even in this case, however, the bias is likely to lead to higher grades for *appointees* . . . since the administration’s reputation is more closely tied to the performance of its appointment selections than to that of career bureaucrats. Taken as a whole, the management grades provide a unique opportunity to analyze the cases of variation in management quality, but we should use these grades carefully, noting the possibility that the grades are biased in favor of appointees.” *Id.* at 176-77 (emphasis in original).

with the allocation of career and political SES membership allocated by agency, Professor Lewis determined that agencies and programs with higher concentrations of career SES members scored better.⁸⁰ Thus, while there is limited evidence, what exists shows that career SES add tangible value to their agencies.

C. *The Impact of Political SES*

Strikingly, there is strong evidence suggesting that programs led by *political* SES consistently underperformed compared to those run by career SES.⁸¹ Professor Lewis's research finds that increasing political control via political appointees leads to decreasing efficiency of the agency.⁸² These findings come not just from federal employees, but also from the presidential administrations that make the political appointments.⁸³ Additional studies have repeatedly come to the same conclusion.⁸⁴

Why are political SES members lagging in performance behind their career SES member counterparts? One of the most likely reasons is the difference between vetting candidates for political SES appointments and for career SES appointments. Political SES

⁸⁰ *Id.* at 172-84. See also Sidney A. Shapiro, *Paul Verkuil and Pragmatic Adjustment in Government*, 32 CARDOZO L. REV. 2459, 2477-78 (2011) (restating Lewis's study and noting that, based on other studies, there were clear indications that political control attempts generally backfire).

⁸¹ Sidney A. Shapiro, *Paul Verkuil and Pragmatic Adjustment in Government*, 32 CARDOZO L. REV. 2459, 2477 (2011).

⁸² LEWIS, *supra* note 79 at 172-219 (demonstrating, in mathematical detail, the negative impact of political appointees on agency efficiency).

⁸³ *Id.* at 213.

⁸⁴ Alexander Bolton, *Creating Capacity: Presidential Control and the Senior Executive Service*, (Aug. 15, 2015) (unpublished Ph.D., Duke University), https://static1.squarespace.com/static/53557985e4b049723f6e96f3/t/55ce47b2e4b0d7b9ee094867/1439582130542/bolton_ws2.pdf (used with permission) (citing to Nick Gallo & David E. Lewis, *The Consequences of Presidential Patronage for Agency Performance*, 22(2) J. OF PUB. ADMIN., RES., AND THEORY 219-43 (2011); George A Krause & J. Kevin Corder, *Explaining Bureaucratic Optimism: Theory and Evidence from US Executive Agency Macroeconomic Forecasts*, 101(01) AM. POL. SCI. 129-42 (2007); Soo-Young Lee & Andrew B. Whitford, *Assessing the Effects of Organizational Resources on Public Agency Performance: Evidence from the US Federal Government*, 23(3) J. OF PUB. ADMIN., RES., AND THEORY 687-712 (2012)).

members may be incredibly accomplished leaders of industry or government with strong policy or technical expertise in the area they work; or they may be fresh collegiate graduates whose familial, political, or financial ties are strongly intermingled with that of the current administration or its recent campaign.⁸⁵ Conversely, career SES members have generally demonstrated some of the strongest aptitude of civil servant managers, passed the rigorous assessment previously described, and represent the best and most experienced leaders and managers of a 2 million-strong workforce.

This does not mean that political appointees do not serve an important purpose. Naturally, presidential administrations, as elected officials, set forth the policies and priorities of the executive branch. Political appointees from these respective administrations influence and coordinate the administrative bodies with presidential ambitions. Certain factors such as longer tenure in the role, or prior experience in a program, correlate with better success.⁸⁶ But the added political control sought by increasing the number of appointees often backfires, leading to not just a diminishing but negative return.⁸⁷ In short, “there is a tradeoff with politicization—presidents get more control, but at the expense of performance.”⁸⁸

⁸⁵ See generally LEWIS, *supra* note 79 at 186-9; David M. Cohen, *Amateur Government: When Political Appointees Manage the Federal Bureaucracy*, (The Brookings Institution, CPM Working Paper 96-1, 1996), <https://www.brookings.edu/wp-content/uploads/2016/06/amateur.pdf>. Collaterally, it cannot go unmentioned that in many discussions of government performance, political SES involvement goes unmentioned: “Everyone talks about government ‘waste’ and ‘inefficiency,’ but everyone seems to think it is caused primarily by corruption, government intrusion in areas where it doesn’t belong, or the irredeemable nature of bureaucracies. No one ever considers that the bright, knowledgeable, and politically savvy fellow at the top of the organization is simply inexperienced and over his head. No one asks: ‘Has this nominee ever administered anything? Can he supervise people and manage a large organization?’” *Id.* at 15-16.

⁸⁶ See also Shapiro, *supra* note 80 at 2477. See also Dan Balz, *Political Reckoning: Crisis Exposes how America has Hollowed out its Government*, WASH. POST (May 16, 2020), <https://www.washingtonpost.com/graphics/2020/politics/government-hollowed-out-weaknesses/> (noting the problem of “short-termitis—focusing on matters of the moment and ignoring underlying structural weaknesses” among political appointees).

⁸⁷ See generally Lewis, *supra* note 79, at 172-219

⁸⁸ *Id.* at 205.

When does politicization most frequently occur?

[w]hen presidents believe that the policy views or priorities of specific agencies differ from their own. This is seen most visibly in data that show that presidents politicize most after party changes in the White House and that Republican presidents target agencies widely perceived as liberal and Democratic presidents target agencies widely regarded as being conservative. Conversely, the penetration of appointees diminishes when presidents believe agencies share their views about policy. Second, some agencies are more or less prone to politicization than others based upon their ability to incorporate appointees without consequences for performance. Finally, the number of appointees increases when presidents and the majority in Congress see the world through the same partisan or ideological lens.⁸⁹

This traditionally has occurred at the same general frequency within both Republican and Democratic administrations.⁹⁰ The mere presence of political SES members does not necessarily negatively impact their respective agencies, but the mixed-quality candidates, short-term aims, and political interests means that they generally do compared to career executives.

Both political and career SES members work at the highest levels of government, impacting the performance of everyone around them: subordinates, peers, political leaders, agencies, and, ultimately, the American public. Career SES members, despite imperfections the SES program must address or move through, are highly capable civil servants who play a major role in the future of the United States. Political appointees set policy and run critical national programs. The

⁸⁹ *Id.* at 203; *see also* Berry & Gersen, *supra* note 74, at 1036 (“Agencies with more political appointees are more responsive to moves into or out of the President’s party when making spending allocations. Moreover, agencies with more Senate-confirmed appointees are more responsive to the membership in the majority party than the President’s party, while agencies with more non-Senate-confirmed appointees are more responsive to the President’s party than the majority party.”)

⁹⁰ LEWIS, *supra* note 79, at 205; Berry & Gersen, *supra* note 74 at 1036 (The study was conducted prior to the Obama and Trump administrations).

stakes could not be higher, especially for those working in national security and law enforcement.

IV. THE DEPARTMENT OF HOMELAND SECURITY

The creation of the Department of Homeland Security was an operational, political, and legislative response to the terrorist attacks on 9/11.⁹¹ In the wake of the attacks, the bi-partisan National Commission on Terrorist Attacks Upon the United States, also known as the 9/11 Commission, was established to review the circumstances under which the attacks occurred and make recommendations to improve protection of the homeland.⁹² The result of their work, the *9/11 Commission Report*, included a recommendation to create a framework for coordinating the security of the homeland against a multitude of natural and man-made threats.⁹³

A. *The Structure and Scope of DHS*

The Homeland Security Act of 2002 established DHS in the largest realignment of the federal government since World War II.⁹⁴ The Act pulled many agencies into DHS from other departments: U.S. Customs (“Customs”), U.S. Secret Service, the Federal Law Enforcement Training Center from the Department of Treasury, the recently formed Transportation Security Administration (including Federal Air Marshals), U.S. Coast Guard from the Department of Transportation, Immigration and Naturalization Service (INS), the National Infrastructure Protection Center from the Department of

⁹¹ See generally Message to the Congress Transmitting Proposed Legislation to Create the Department of Homeland Security, 2002 Pub. Papers 1006 (June 18, 2002) [hereinafter *Message to Congress*]
https://www.dhs.gov/sites/default/files/publications/book_0.pdf.

⁹² NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE U.S., *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* xv (2004).

⁹³ U.S. DEP’T OF HOMELAND SEC., *IMPLEMENTING 9/11 COMMISSION REPORT RECOMMENDATIONS, PROGRESS REPORT 3* (2011)
<https://www.dhs.gov/xlibrary/assets/implementing-9-11-commission-report-progress-2011.pdf> (2011).

⁹⁴ Homeland Security Act of 2002, 6 U.S.C. §§ 101-557 (2002).

Justice (DOJ), and many more.⁹⁵ Some agencies, like Customs and INS, were broken apart and reassembled. For example, border authority for Customs and INS were given to Customs and Border Patrol (CBP); global authority for Customs and the interior enforcement of INS were given to Immigration and Customs Enforcement (ICE); and immigration benefit services of INS, including naturalization, adjustment, work authorization, and refugee and asylum processing were assigned to United States Citizenship and Immigration Services (USCIS).⁹⁶ Others, like the Federal Emergency Management Agency (FEMA), grew substantially as a result of the Act.⁹⁷ By March 2003, twenty-two agencies and offices were formally merged into a single DHS.⁹⁸ Today, 240,000 employees around the world share a mission: “With honor and integrity, we will safeguard the American people, our homeland, and our values.”⁹⁹

B. *Operational and Structural Challenges of DHS*

The process of growing DHS into the third-largest cabinet-level department has not been without hiccups. There are countless reports reflecting internal and external obstacles to DHS.¹⁰⁰ The

⁹⁵ See generally Message to the Congress Transmitting Proposed Legislation to Create the Department of Homeland Security, 2002 Pub. Papers 1006 (June 18, 2002) [hereinafter *Message to Congress*].

⁹⁶ *Message to Congress*, *supra* note 91.

⁹⁷ See also Cynthia Brumfield, *What is the CISA? How the New Federal Agency Protects Critical Infrastructure from Cyber Threats*, CSO ONLINE (July 1, 2019), <https://www.csoonline.com/article/3405580/what-is-the-cisa-how-the-new-federal-agency-protects-critical-infrastructure-from-cyber-threats.html> (explaining other agencies began as offices and eventually emerged into stand-alone agencies, such as the Cybersecurity and Infrastructure Agency (CISA)).

⁹⁸ *History of FEMA*, FED. EMERGENCY MGMT. ADMIN., <https://www.fema.gov/about/history> (last visited Oct. 8, 2020) (describing the 22 organizations merging into one DHS. Given the size and scope of DHS, these agencies and sub-agencies have evolved, changed, and moved since 2003.); see generally *Dep’t Six-Point Agenda*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/department-six-point-agenda> (last visited Oct. 8, 2020) (outlining growth and agency adjustments from 2003 to 2005).

⁹⁹ *Mission*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/mission> (last visited Apr. 22, 2020).

¹⁰⁰ See, e.g., U.S. Gen. Accounting Office, GAO-19-544T, *Department of Homeland Security: Continued Leadership is Critical to Addressing and Range of Management Challenges* (2019); Rep. Bennie G. Thompson, *A Legislative Prescription for*

challenges of the agencies within DHS are often complicated, nuanced, and range in severity.¹⁰¹ Nonetheless, a short survey of some of the DHS-wide challenges is important to understand the significance of its unworkable leadership model.

One of the principal challenges has been coherently managing the myriad of missions and cultures into one DHS. As noted in congressional testimony by John Roth, the independent DHS Inspector General from 2014-16:

In the best of times, DHS is an unruly and difficult-to-manage organization . . . DHS has demonstrated an inability to mesh divergent components, with different histories, cultures, and missions, into a single agency with a unity of effort . . . Too often, the components operated as stand-alone entities or, worse, in competition with each other. Knitting together a unified DHS with all components pulling together to protect our homeland security is a top challenge of the department and requires

Confronting 21st-Century Risks to the Homeland, 47 HARV. J. ON LEGIS. 277, 281-93 (2010) (finding numerous problems internally and externally); Dara Kay Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673 (2006) (finding numerous structural and policy problems with DHS); Nate Bruggeman, *Congress needs bipartisan commission to fix Homeland Security*, THE HILL (Feb. 7, 2020 2:00 PM EST), <https://thehill.com/opinion/national-security/481450-congress-needs-bipartisan-commission-to-fix-homeland-security>.

¹⁰¹ See Daniel Gouré, *Homeland Security: Measuring Success*, LEXINGTON INSTITUTE (Apr. 1, 2003), <https://www.lexingtoninstitute.org/homeland-security-measuring-success/> (“How do we measure increases in security? Israel, representing the gold standard for security measures, is reported to foil 15 terrorist attacks or suicide bombings for every one that gets through. But is a failure rate of 6.5% acceptable? Perhaps, if each successful attack caused “only” a few casualties; probably not if casualties were in the hundreds; and definitely not if each event resulted in tens of thousands of dead and injured.”). More specifically for DHS, a single error by a TSA agent can have devastating impact despite high success otherwise; CISA can provide guidelines to industry but cannot dictate compliance; CBP can stop some drug shipments but miss others; ICE’s HSI can disrupt human trafficking networks but not save victims early enough; ICE’s ERO can detain and remove individuals who garner sympathy in public opinion; FEMA can provide assistance but not help all impacted people or successfully detect fraud.

strong and committed leadership and oversight. This goal is thwarted by the pervasive senior leadership vacancies.¹⁰²

The span of DHS includes counterterrorism, antiterrorism, cybersecurity, infrastructure protection, aviation security, border security, immigration (enforcement and benefits), customs, and emergency response.¹⁰³ As noted, many of the agencies have histories established well before joining DHS, including some dating back centuries to America's founding.¹⁰⁴ These employees were asked to join forces with people from other agencies, leave behind their creeds, and take up a new mantle.¹⁰⁵

While these new colleagues have worked through internal tensions, substantial external pressures have been placed on the nascent Department. The mission of DHS is to protect the homeland. It is an awesome task falling somewhere between the DOJ and Department of Defense (DOD).¹⁰⁶ But it lacks the literal or figurative firepower of DOD (charged with defense of the nation against primarily state actors) or the support and respect of the DOJ (charged with law enforcement). While DOD has the U.S. Air Force, Army,

¹⁰² Joe Davidson, *Terrorism, Immigration Efforts Hampered by Homeland Security Vacancies*, WASH. POST, Mar. 6, 2019, <https://www.washingtonpost.com/politics/2019/05/06/terrorism-immigration-efforts-hampered-by-homeland-security-vacancies/>.

¹⁰³ *Topics*, U.S. Dep't of Homeland Sec., <https://www.dhs.gov/topics>.

¹⁰⁴ U.S. Customs and Border Protection, *1789: First Congress Provides for Customs Administration*, WWW.CBP.GOV, <https://www.cbp.gov/about/history/1789-first-congress-provides-customs-administration> (last visited Apr. 22, 2020).

¹⁰⁵ As recently as 2018, field leaders from ICE's HSI sent a letter to the Secretary of Homeland Security and Congress requesting to be split from the agency (though remain in DHS). Nicole Goodkind, *19 ICE Agents Call to Abolish Agency in Letter to Homeland Security Head Kirstjen Nielsen*, NEWSWEEK (June 29, 2018), <https://www.newsweek.com/abolish-ice-agents-homeland-security-1001602>.

¹⁰⁶ The mission of the DOJ is "[t]o enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans." U.S. Dept. of Justice, *About*, WWW.DOJ.GOV, <https://www.justice.gov/about>. "The Department of Defense provides the military forces needed to deter war and ensure our nation's security." U.S. Dept. of Defense, *Our Story*, WWW.DEFENSE.GOV, <https://www.defense.gov/our-story/>.

Marines, Navy, Space Force, and over twenty Defense Agencies (e.g., the Defense Counterintelligence and Security Agency and the Defense Intelligence Agency), DHS has the Coast Guard.¹⁰⁷ While DOJ has the FBI, Drug Enforcement Agency, U.S. Marshals Service, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives, DHS has ICE (including Homeland Security Investigations),¹⁰⁸ CBP, and the Secret Service.¹⁰⁹ When DHS “wins” happen and America is protected, the matters often go unreported, underreported, or attributed to better-known agencies. When “losses” occur, the results range from severe embarrassment to loss of life. Its peer departments enjoy legacies of honor, tradition, and, maybe, most importantly, political support and distance from excessive political control, all of which are in short supply for DHS.¹¹⁰

¹⁰⁷ The Coast Guard may also be allocated during a time of war to DOD by presidential or congressional decision. 14 U.S.C. § 103 (2018). Otherwise, it has authority to operate, among other duties, as a law enforcement agency exempt from *posse comitatus*. See 18 U.S.C. § 1385 (1994) (prohibiting the U.S. Army or Air Force from *posse comitatus*); 14 U.S.C. § 2 (1947) (granting law enforcement authorities); 19 U.S.C. §§ 1589(a), 1709 (1955) (granting customs authorities).

¹⁰⁸ See *Homeland Security Investigations Overview*, ICE.GOV, <https://www.ice.gov/hsi> (HSI is often confused as being a separate agency. It is an ICE component specializing in criminal investigations that include, among others, human trafficking, child exploitation, weapons proliferation, narcotic smuggling, and antiquities).

¹⁰⁹ But the Secret Service may be returning to the Department of Treasury. See Zolan Kanno-Youngs and Alan Rappoport, *Report Says Secret Service Return to Treasury Could Harm Homeland Security*, N.Y. TIMES, Jan. 17, 2020, <https://www.nytimes.com/2020/01/17/us/politics/secret-service-treasury-homeland-security.html>.

¹¹⁰ In a staggering blow to national security at the expense of politics, the longest government shutdown in U.S. history occurred due to a disagreement over border wall funding: just one of a myriad of issues for DHS. A joint letter was signed by every former DHS Secretary to date urging politicians to understand the gravity of risking national security for political gamesmanship. “Historically, Congress has consistently voted to fund the workforce of national security agencies, such as the Department of Defense, during government shutdowns. Congress does so because putting national security at risk is an option we simply cannot afford. DHS should be no different. With today’s threats, there is no longer a distinction between the ‘away game’ and the ‘home game’ which is why DHS and DOD work hand in hand to defend our country. There is no political litmus test to join the Department.” *Letter from Tom Ridge, Michael Chertoff, Janet Napolitano, Jeh Johnson, and John Kelly, Former Secretaries of DHS, to President Donald Trump and Members of Congress*,

Given these challenges, poor morale has festered since inception in 2003 and has remained below the government average.¹¹¹ Recent years show improvement, but serious challenges exist for nearly every agency in DHS.¹¹² These morale issues are not an exercise in existential happiness, but have tangible impacts on agency performance, absenteeism, and the number of equal employment opportunity complaints.¹¹³

Senior leadership could play a role in fixing these challenges, but, in recent years, senior leadership is often nonexistent.¹¹⁴ As of March 2020, a mere 35% of top leadership positions in DHS were filled with permanent leadership.¹¹⁵ While DHS ranks lowest in morale for large cabinet agencies, it ranks highest in lack of permanent senior leadership.¹¹⁶ And, in at least one instance, a “temporary” senior DHS official was found to be in violation of the Federal Vacancies Reform Act.¹¹⁷ The challenges facing DHS require leadership, but leaders cannot lead if they are not in place.

C. *Politicization and DHS*

In this massive department tasked with protecting the homeland, high performance is both needed and expected. The stakes,

TWITTER (Jan. 23, 2019),

https://twitter.com/quinn_owen/status/1088237484180455424/photo/1.

¹¹¹ See U.S. GEN. ACCOUNTING OFFICE, GAO-12-509T, DEPARTMENT OF HOMELAND SECURITY: PRELIMINARY OBSERVATIONS ON DHS’S EFFORTS TO IMPROVE EMPLOYEE MORALE (2012); U.S. GEN. ACCOUNTING OFFICE, GAO-20-349T, DEPARTMENT OF HOMELAND SECURITY: EMPLOYEE MORALE SURVEY SCORES HIGHLIGHT PROGRESS AND CONTINUED CHALLENGES (2020).

¹¹² See U.S. GEN. ACCOUNTING OFFICE, GAO-12-509T, DEPARTMENT OF HOMELAND SECURITY: PRELIMINARY OBSERVATIONS ON DHS’S EFFORTS TO IMPROVE EMPLOYEE MORALE (2012).

¹¹³ *Id.* at 1.

¹¹⁴ See Davidson, *supra* note 102.

¹¹⁵ Shannon Pettypiece, *DHS Faces Coronavirus with Scores of Vacancies and a Leadership Vacuum*, NBC NEWS (Mar. 18, 2020), <https://www.nbcnews.com/politics/white-house/dhs-faces-coronavirus-scores-vacancies-leadership-vacuum-n1160946>.

¹¹⁶ See *id.*

¹¹⁷ *L.M.-M. v. Cuccinelli*, F. Supp. 3d 1 (D.D.C. 2020) (finding that the executive branch violated the Federal Vacancies Reform Act of 1998 in appointing Kenneth Cuccinelli II as the acting Director of USCIS).

as previously noted, are often literally life-or-death matters, and when they are not, they remain matters of public health and safety. Both economically and for human life, the costs of failure are devastatingly high.

1. Inherited Politics

Statutorily, DHS and its agencies are highly politicized.¹¹⁸ There are multiple reasons for this politicization. First, DHS inherited a high number of political appointees at its creation from its predecessor agencies.¹¹⁹ Layered under these top-level political appointees were more political appointees of lesser ranking (*e.g.*, deputy-, under-, and assistant secretaries).¹²⁰ This is congruent with the broader observation that agencies with large numbers of political appointees trend higher with subsequent lower-level political appointees.¹²¹ In addition, the Homeland Security Act created many new political appointee positions, including a dozen assistant secretary positions with no specified functions.¹²²

While the Legislative branch provided a new entity to manage and organize each legacy agency merged into DHS, it held on tightly to the reins of Congressional oversight. From its inception to date, bipartisan legislators, career and appointed DHS leaders, think-tanks, and universities have all urged Congress to streamline reporting.¹²³

¹¹⁸ See LEWIS, *supra* note 79, at 215-16.

¹¹⁹ *Id.* at 216.

¹²⁰ See *id.* at 212.

¹²¹ *Id.* at 215.

¹²² See *id.* at 212. DHS's political misfortune began at its inception, with the Homeland Security Act explicitly creating such politically appointed positions. This was an anomaly. See *id.* at 214.

¹²³ The argument is so widely embraced that it pulls from across the political divide. See, *e.g.*, David Inserra, *DHS Swamped with Excessive Oversight Demands*, HERITAGE.ORG (Jan. 10, 2017), <https://www.heritage.org/homeland-security/commentary/dhs-swamped-excessive-oversight-demands> (“[T]here is widespread, bipartisan support for reforming the congressional oversight of DHS. The 9/11 commission recommended it; every secretary of homeland security (both Democratic and Republican) has pushed for it; dozens of homeland security experts, academics and think-tankers have penned supportive op-eds and run full-page advertisements in major national newspapers. Best of all, the chairmen of the homeland security committees have tried and are trying to make it happen. At this point, about the only people who don’t want to streamline congressional oversight of

But the perverse result is, while DHS reported to eighty-eight congressional committees at its inception, it now reports to ninety-two.¹²⁴ Comparatively, DOD—a much larger department—reports to thirty-six committees.¹²⁵ Members of Congress have refused to consolidate political control over DHS.¹²⁶ And the resulting problems are more than academic, being, in the words of the 9/11 Commission Report, a “[b]alkanized system of oversight [that] detracts from the department’s mission and has made Americans less safe.”¹²⁷ It thus remains an unfulfilled recommendation from the 9/11 Commission

DHS are the current members of Congress who would have to give up a slice of their power.”); Carrie Cordero & Elizabeth Goitein, *A Window to Rein in DHS*, JUSTSECURITY.ORG (July 28, 2020), <https://www.justsecurity.org/71718/a-window-to-rein-in-dhs/>.

¹²⁴ Thomas H. Kean & Lee H. Hamilton, *To secure homeland, clean up Congressional oversight: 9/11 Commission chairmen*, USA TODAY (Dec. 1, 2016), <https://www.usatoday.com/story/opinion/2016/12/01/congress-bureaucracy-committees-911-commission-chairmen-column/94624248/>. This has been reduced from its peak of 108. *Who Oversees Homeland Security? Um, Who Doesn’t?*, NAT’L PUBLIC RADIO (July 20, 2010), <https://www.npr.org/templates/story/story.php?storyId=128642876> [hereinafter Nat’l Public Radio].

¹²⁵ Chuck Brooks, *Time to Streamline Congressional Oversight of DHS*, FEDERAL TIMES (June 23, 2017), <https://www.federaltimes.com/management/2017/06/23/time-to-streamline-congressional-oversight-of-dhs-commentary/>.

¹²⁶ There is a variety of reasons why Congressional committees may want to keep control. The strongest argument might be that it provides a needed check on a still young, massive bureaucracy, one that is highly politicized and rankles portions of both major political parties. Or, perhaps certain congressional representatives possess some unique skill or knowledge that another member of congress might not. Nat’l Public Radio, *supra* note 123. But the more likely reasons are much more political. The most likely reason, suggested by the former DHS Secretary Michael Chertoff, was political compromise and money. *Id.* It has also been proposed that the committee assignments are viewed as “campaign credentials” and bring political capital. *Id.* Alternatively, as suggested by the Chairman and Vice-Chairman of the 9/11 Commission, likely reasons are congressional “bureaucratic inertia and turf battles . . . as they so often have in the past.” Thomas H. Kean & Lee H. Hamilton, *Homeland security threatened by oversight mess*, DAILY RECORD (Dec. 3, 2016), <https://www.dailyrecord.com/story/opinion/2016/12/03/homeland-security-threatened-oversight-mess/94806068/>.

¹²⁷ Jerry Markon, *Department of Homeland Security Has 120 Reasons to Want Streamlined Oversight*, WASH. POST (Sept. 25, 2014), <https://www.washingtonpost.com/news/federal-eye/wp/2014/09/25/out-sized-congressional-oversight-weighting-down-department-of-homeland-security/>.

Report to create “a single, principal point of oversight and review for homeland security.”¹²⁸

2. Perceived Politics

The broad, largely public-facing mission of DHS ensures it perpetually remains in the media and public imagination—and often, not favorably. Unfortunately, for both the public and the agency, much of the information has also been full of errors.¹²⁹ Given the constant attention, widely disparate agencies of DHS, and the political control of DHS, its very existence seems fated to agitate portions of both political parties.¹³⁰

¹²⁸ 9/11 Commission Report, *supra* note 92, at 421.

¹²⁹ For example, a customs officer with CBP who quickly garnered media attention as “ICE Bae” was extensively mislabeled after she gained notoriety. The officer, who was providing security during a visit from Vice President Michael Pence, was pictured in front of immigrant detainees. But there is no indication she ever worked in immigration, nor are CBP customs officers generally involved in immigration. Jami Ganz, ‘ICE Bae’ puts Latina customs officer at center of immigration debate, *LOS ANGELES TIMES* (July 17, 2019), <https://www.latimes.com/newsletters/ny-ice-bae-trend-divides-twitter-20190717-ldkwkqyg2fgnznyktnpr4g5see-story.html> (“Despite the ‘ICE Bae’ nickname, referencing the acronym for U.S. Immigration and Customs Enforcement, Cervantes actually works as a U.S. Customs and Border Protection officer,” a CBP official told the Daily News.”). Another incident occurred after another officer from CBP caused a local panic by parking a marked vehicle outside a school and crossed the street to have lunch. A local elected official used Twitter to alert the community to ICE officials, and a restaurant employee to quip that “ICE is another word for gestapo.” Kerry Burke and Ben Chapman, *Panic at NYC School When Immigration Agents Drive on Sidewalk — But They Just Wanted Lunch*, *DAILY NEWS* (Mar. 7, 2019), <https://www.nydailynews.com/new-york/education/ny-metro-immigration-agents-school-flap-20190307-story.html>. Misidentifying personnel and agencies is very common, particularly ICE ERO, ICE HSI, CBP, Border Patrol, and USCIS. Other matters of confusion and inconsistency include reporting on civil immigration detention and criminal detention; misreporting which agencies personnel work for; differences between the Federal Protective Service and the federal Witness Protection Program; differences between Air Marshals and U.S. Marshals; and mislabeling career civil servants as political appointees.

¹³⁰ See Marty Johnson, *Former Homeland Security Secretary Says DHS Not Meant to Be ‘President’s Personal Militia’*, *THE HILL* (July 22, 2020), <https://thehill.com/homenews/administration/508475-former-homeland-security-secretary-says-dhs-not-meant-to-be> (demonstrating democratic party concerns with use of DHS agents during Trump administration); Greg Sargent, *Trump’s*

In recent years, substantial portions of the Democratic Party have viewed DHS and its agencies with disdain. The voluminous critiques of DHS from many elected Democratic Party officials is readily available and ongoing.¹³¹ The missions of CBP (which manages Border Patrol) and ICE are often perceived as diametrically opposed to the Democratic Party platform. Many Democrats suspect racial discrimination and disparate treatment from FEMA and TSA.¹³² The

Authoritarian Crackdown Is So Bad that Even Some in the GOP Are Blasting It, WASH. POST (July 22, 2020),

<https://www.washingtonpost.com/opinions/2020/07/22/trumps-ugly-law-enforcement-crackdown-is-even-alienating-republicans/> (demonstrating similar disdain by republican party during Obama administration; *see also* Bruggeman, *supra* note 100 (“It is understandable that the civil servants at DHS become frustrated as the intense criticism follows, from the left or the right as the occasion demands, nearly every move they make.”)).

¹³¹ Easy examples are available. *See, e.g.*, Owen Daugherty, *Ocasio-Cortez, Progressives Press Pelosi To Not Increase DHS Funding in Any Spending Deal*, THE HILL (Jan. 31, 2019), <https://thehill.com/homenews/house/427886-progressive-freshman-dems-call-for-deal-to-avoid-shutdown-to-include-not>; Dartunorro Clark, *I Am Not a Liar: DHS Chief Nielsen Defends Immigration Policies in Heated Hearing*, NBC NEWS (Dec. 20, 2018), <https://www.nbcnews.com/politics/congress/i-am-not-liar-dhs-chief-nielsen-defends-immigration-policies-n950511>; Courtney Bubl , *Top Democrats Call for Emergency Review of DHS Appointments*, GOVERNMENT EXECUTIVE (Nov. 15, 2019), <https://www.govexec.com/management/2019/11/top-democrats-call-emergency-review-dhs-appointments/161339/>.

¹³² For example, Senator Gary Peters and then-Senator Kamala Harris issued a joint letter to DHS and FEMA asking questions related to equitable treatment for COVID-19 relief and noting “FEMA’s past response to disasters has frequently been plagued by racial and socioeconomic disparities” including disproportionate impacts on minorities in New Orleans, Texas, and Puerto Rico. *See Peters, Harris Lead Colleagues in Pressing FEMA to Address Racial Disparities in Coronavirus Disaster Response* (Apr. 24, 2020), <https://www.hsgac.senate.gov/media/minority-media/peters-harris-lead-colleagues-in-pressing-fema-to-address-racial-disparities-in-coronavirus-disaster-response>. It further alleged that “[s]ince Katrina, FEMA has sought to correct its failures in communication, coordination, and response and incorporate lessons from the past into its current response strategy. Unfortunately, it is clear that disparities still exist and continue to impede the agency’s response and recovery efforts, leaving our most vulnerable communities without the help they need time after time.” *Id.* Regarding TSA programs alleged as discriminatory, TSA has long been alleged to engage in discriminatory practices and racial profiling in airport and aviation security. *See generally Perspectives on TSA’s Policies to Prevent Unlawful Profiling: Hearing Before the Comm. On Homeland Security*, 116th Cong. Serial No. 116-24 (2019), <https://www.govinfo.gov/content/pkg/CHRG->

high-water mark of contempt may have been when Bernie Sanders, the near-Democratic Party nominee for the 2020 presidential election, ran on a platform that included wholesale elimination of ICE and CBP.¹³³

But it was less than a decade earlier that numerous Republican presidential candidates wanted to substantially reform or eliminate DHS.¹³⁴ One former-Congressman and contender for the 2012 Republican presidential nomination, Newt Gingrich, proposed sending 11,500 “Washington-area Department of Homeland Security bureaucrats to the Texas, New Mexico, and Arizona borders.”¹³⁵ Separately, another Republican Congressman, John Mica, called TSA a “little bastard child” filled with too many people and “highly paid bureaucrats.”¹³⁶ While some Democratic politicians dislike the

116hrg37870/html/CHRG-116hrg37870.htm; Brenda Medina, et al., *TSA Agents Say They’re Not Discriminating Against Black Women, But Their Body Scanners Might Be* (Apr. 17, 2019), <https://www.propublica.org/article/tsa-not-discriminating-against-black-women-but-their-body-scanners-might-be>; THE SIKH COALITION, *Ending TSA Profiling*, <https://www.sikhcoalition.org/our-work/preventing-hate-and-discrimination/ending-tsa-profiling/>. However, in at least one investigation by the DHS Office of Inspector General, TSA’s Federal Air Marshals were determined to not be employing racial profiling techniques. *DHS OIG Completes Review of Allegations of Discrimination at Orlando Airport*, OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF HOMELAND SECURITY (Aug. 2, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/pr/2019/oigpr-080219-dhs-oig-completes-review-allegations-discrimination-orlando-airport.pdf>.

¹³³ See Bernie Sanders, *A Welcoming and Safe America for All*, WWW.BERNIESANDERS.COM, <https://berniesanders.com/issues/welcoming-and-safe-america-all/>, (last visited Apr. 26, 2020) (describing a plan to redistribute DHS functions to other agencies).

¹³⁴ Mike Levine, *Napolitano Defends Department After Questions Over DHS At GOP Debate*, FOX NEWS (Sept. 8, 2011), <https://www.foxnews.com/politics/napolitano-defends-department-after-questions-over-dhs-at-gop-debate>.

¹³⁵ Kedar Pavgi, *Newt Gingrich’s Foreign Policy*, FOREIGN POLICY (Nov. 17, 2011), <https://foreignpolicy.com/2011/11/17/newt-gingrichs-foreign-policy/> (showing serious confusion over DHS agency roles and missions).

¹³⁶ Lisa Stark, *Rep. John Mica Calls TSA His ‘Little Bastard Child’*, ABC NEWS (Mar. 30, 2011), <https://abcnews.go.com/Politics/rep-john-mica-calls-tsa-bastard-child-transportation/story?id=13258609>. This congressman actually voted to authorize the TSA a decade earlier. In 2016, his position of TSA was that “[y]ou cannot recruit, you cannot train, you cannot retain, and you cannot administrate . . . This is a huge failing program.” Ron Nixon, *Congress’s List of Gripes With T.S.A. Is Long, Like an Airport Security Line*, N.Y. TIMES (May 12, 2016),

immigration enforcement missions of ICE and CBP, some Republicans dislike certain “benefits” awarded by USCIS.¹³⁷ And, although polling does not exist on many DHS components, portions of the Republican Party are suspicious of large, government bureaucracies working in intelligence or law enforcement entities such as the Office of Intelligence and Analysis, the Federal Law Enforcement Training Center (FLETC), or ICE’s Homeland Security Investigations (HSI).¹³⁸

3. Public Opinion

Surveys of the American public on DHS reveal conflicting feelings. Broadly, although 74% of Americans supported creating DHS in 2003, polling for the first decade was mediocre.¹³⁹ From 2003

<https://www.nytimes.com/2016/05/13/us/politics/congress-list-of-gripes-with-tsa-is-long-like-an-airport-security-line.html>.

¹³⁷ For example, the strenuous opposition to Deferred Action for Childhood Arrivals (DACA) granted by USCIS and initiated under the Obama Administration. See, e.g., Danielle Kurtzleben, *Republicans Are Happy Trump Ended DACA. They’re Less Sure About Deporting DREAMers*, NAT’L PUBLIC RADIO (Sept. 17, 2017), <https://www.npr.org/2017/09/17/551392700/republicans-are-happy-trump-ended-daca-they-re-less-sure-about-deporting-dreamer> (with prominent conservative media members Sean Hannity and Ann Coulter critiquing President Trump for considering codification of the DACA program); see Jeremy L. Neufeld, *What have Republicans said about Dreamers?*, NISKANEN CTR. (updated Sept. 7, 2020, 11:41 AM), <https://www.niskanencenter.org/republican-dreamer-quotes/>. Still, many Republican politicians disagree with executive orders granting this status and want a legislative approach. In some respects, this is similar to Democratic opposition to immigration enforcement actions taken by ICE and CBP, as both are driven by policy directives.

¹³⁸ See Dana Tims, *Is The Government 'Stockpiling' Hundreds of Millions of Rounds of Ammunition for Domestic Use?*, POLITIFACT, <https://www.politifact.com/factchecks/2014/jun/27/james-buchal/government-stockpiling-hundreds-millions-rounds-am/> (last visited Apr. 26, 2020) (showing congressional concern over DHS bulk ammunition purchase); See also Ralph Benko, *1.6 Billion Rounds Of Ammo For Homeland Security? It’s Time For A National Conversation*, FORBES, <https://www.forbes.com/sites/ralphbenko/2013/03/11/1-6-billion-rounds-of-ammo-for-homeland-security-its-time-for-a-national-conversation/#207230ca624b> (last visited Apr. 26, 2020) (demonstrating similar concerns by conservative leaning websites).

¹³⁹ Frank Newport, *Americans Approve of Proposed Department of Homeland Security* (June 10, 2002), <https://news.gallup.com/poll/6163/americans-approve-proposed-department-homeland-security.aspx>.

through 2013, DHS maintained a remarkably consistent 46% favorability rating.¹⁴⁰ In 2014, DHS favorability ticked up to 48%.¹⁴¹ Finally, after failing to rise above 50% favorability in its first decade, surveys in 2017 and 2019 showed DHS finally breaching this level.¹⁴²

Polling about specific agencies within DHS reveals more complex opinions.¹⁴³ Of the agencies within DHS that have been polled in recent years, an April 2019 poll reflected Secret Service has 69% favorability and FEMA has 52% favorability.¹⁴⁴ But in the same poll, ICE was the only federal agency in the federal government to receive a negative rating (54% negative versus 42% positive).¹⁴⁵ For comparison, the average favorability rating of federal agencies measured in 2019 was 65%.¹⁴⁶

Public opinion of DHS—a Department so involved in addressing threats to America—is very likely impacted by trust in

¹⁴⁰ See *Government*, GALLUP, <https://news.gallup.com/poll/27286/government.aspx>.

¹⁴¹ *Id.*

¹⁴² During this same time, DHS public outreach has had varying success. For example, the *See Something, Say Something* campaign appears to have been successfully messaged and used in thwarting terrorist attacks. See Christopher Maag, *'See Something, Say Something' Plays Critical Role in Thwarting Bombings*, USA TODAY (Sept. 20, 2016), <https://www.usatoday.com/story/news/nation-now/2016/09/20/see-something-say-something-plays-critical-role/90723920/>. Conversely, the oft-criticized color coded “Homeland Security Advisory Scale” completely flopped. See generally Jacob N. Shapiro & Dara K. Cohen, *Color Bind: Lessons from the Failed Homeland Security Advisory System*, 32(2) INT’L SECURITY 121, 121-54 (2007).

¹⁴³ One of the more curious relationships with the public and DHS emerged during the extended “DHS shutdown” of 2019 in which most DHS employees were not paid on time for more than a month. Food banks and donations poured in to personnel around the country. See Glenn Thrush, et al., *As Shutdown Drags on, Some Step Up to Help Unpaid Federal Workers*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/us/politics/government-shutdown-security-net-.html> (Describing generalized public support for government agencies during 2019 shutdown).

¹⁴⁴ See Gallup, <https://news.gallup.com/poll/27286/government.aspx>.

¹⁴⁵ Carroll Doherty et al., *Public Expresses Favorable Views of a Number of Federal Agencies*, PEW RSCH. CTR. 2 (Oct. 1, 2019), <https://www.people-press.org/2019/10/01/public-expresses-favorable-views-of-a-number-of-federal-agencies/>.

¹⁴⁶ *Id.* Americans were polled about 16 agencies, collecting holding 1,044 “favorability” points, resulting in an average of 65.25% average favorability.

government during times of threat. Americans generally have higher favorability of government during crisis.¹⁴⁷ But, Matt Grossmann, Director of the Institute for Public Policy and Social Research and Associate Professor of Political Science at Michigan State University offers additional observations with regard to Americans' reliance on government during threats, specifically during the COVID-19 pandemic, and the role of politics:

Trust in government is very polarized, with Americans less likely to trust presidents from a different political party . . . It's not just a partisan issue, though. As political scientist Amy E. Lerman [notes] . . . "We're really in a reputation crisis, which goes beyond what we think of as the usual low trust in government, and is really [a] downward spiral." Because so many Americans already hold the government in low esteem, they notice when it is unable to solve problems while also failing to notice when it does work, which reinforces their initial negative opinion.¹⁴⁸

While these surveys may or may not reflect informed opinions of agency performance, they do reflect the perception of DHS and its component agencies.¹⁴⁹

¹⁴⁷ Matt Grossman, *Americans Are Skeptical of The Government — Except When There's A Crisis*, FIVETHIRTYEIGHT (Apr. 15, 2020), <https://fivethirtyeight.com/features/americans-are-skeptical-of-the-government-except-when-theres-a-crisis/>. Cf. Richard Wilke et al., *Globally, Broad Support for Representative and Direct Democracy*, PEW RSCH. CTR. (Oct. 16, 2017), <https://www.pewresearch.org/global/2017/10/16/many-unhappy-with-current-political-system/> (finding economic security and political affiliation with ruling parties strongly related to peoples trust in government). However, the COVID-19 global pandemic has likely tested this traditional reliance and, consequently, the extent to which the public trusts the government in future crises.

¹⁴⁸ *Id.*

¹⁴⁹ Often, career employees believe their work is grossly misunderstood or mischaracterized such as arbitrary or random decisions by TSA employees or immigration enforcement policies made by ICE employees. See, e.g., Bridget Johnson, *Low DHS Morale: Is it Job Stress, Acting Leaders, or Lack of a 'Culture of Recognition'*, HOMELAND SEC. TODAY (Jan. 14, 2020), <https://www.hstoday.us/subject-matter-areas/federal-government/low-dhs-morale-is-it-job-stress-acting-leaders-or-lack-of-a-culture-of-recognition/> (DHS Chief Human Capital Officer Angela Bailey agreeing that "demonizing rhetoric" affected DHS employees). Other times, it seems more likely that public opinion is opposed to

V. SECURING THE HOMELAND THROUGH BETTER
MANAGEMENT

While the challenges DHS faces are substantial, many challenges can be addressed on two fronts: reducing political interference and enhancing career management.

A. *Reducing Political Interference*

It is hard to overstate the anchor of politics drowning the DHS body. With a largely public-facing mission, and certain DHS agencies offending factions of both the Democratic and Republican parties, DHS becomes a political football: tossed around by the Executive branch via large numbers of political appointees and by the Legislative branch via exorbitant congressional reporting. The result is a controversial agency tasked with protecting the homeland caught between two powerful political branches.

Two concrete steps will improve national security and reduce political interference. First, congressional leaders, think tanks, former appointees, and scholars have agreed for years that streamlining congressional reporting would be beneficial and enhance DHS's ability to improve the homeland.¹⁵⁰ This is not a new concept and should not be controversial. Second, there should be a reduction in political appointees in DHS.¹⁵¹ A straightforward way is to convert

the agency's mission or policies surrounding the mission, not a belief that the agency is not successful in its mission. See, e.g., Field Office Directors, *A Letter to the American Public*, www.ICE.GOV, <https://www.ice.gov/statements/enforcement-and-removal-operations-mythbuster> (last visited Apr. 26, 2020).

¹⁵⁰ See also LEWIS, *supra* note 79 at 215 (noting that “[g]iven the high costs of failure, relatively politicized agencies with responsibility for public safety such as FEMA, DHS, and the Department of Defense should be considered for reductions.”); Joan V. O’Hara, et al., *Turf Wars: How a Jurisdictional Quagmire in Congress Compromises Homeland Security*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 1 (2015) (discussing the problem in depth).

¹⁵¹ *Id.* at 215. See also *Morale at Homeland Security Department*, 116th Cong. (2020) (statement of Mr. Stier, Partnership for Public Service, House Homeland Security Comm.’s Oversight, Management and Accountability Panel). Concurrently, the number of political appointees broadly increased between 1960 and 1980 but has largely stalled since 1980 (DHS notwithstanding). *Id.* at 42-56, 203. This does not mean they cannot be removed.

some political positions to non-political positions. This action has the added benefit of simultaneously bolstering non-political SES ranks, which, in turn, has the added benefit of improving agency performance.¹⁵²

Another option to reduce political appointees involves having certain politically appointed positions become long-term and distinct from presidential transitions. There are numerous examples of this in government today. For example, while Inspector General positions are appointed, they are neither political in nature nor are they expected to resign at the end of a presidential administration.¹⁵³ They are perceived as independent and above the political fray. There are other positions both at and below the “Director” or “Administrator” level that involve similar longevity, including at many regulatory agencies, the FBI, and so-called “independent agencies,” including the Central Intelligence Agency (CIA) and National Aeronautics and Space Administration (NASA).¹⁵⁴

The likelihood of reduced political involvement in DHS seems unclear. As noted, the excessive congressional reporting has long been recognized as contributing to political control over DHS. But it is not clear what would break the logjam created by overbearing politicization and oversight, particularly in a heightened political environment.¹⁵⁵ Current senior leadership vacancies at DHS does

¹⁵² *Id.* at 212-16.

¹⁵³ *Morale at Homeland Security Department*, 116th Cong. (2020) (statement of Mr. Stier, Partnership for Public Service, House Homeland Security Comm.’s Oversight, Management and Accountability Panel). See also Courtney Bubl , *Would Converting Some DHS Political Positions to Career Ones Help Employee Morale?*, GOVERNMENT EXECUTIVE (Jan. 14, 2020), <https://www.govexec.com/management/2020/01/would-converting-some-dhs-political-positions-career-ones-help-employee-morale/162441/>.

¹⁵⁴ See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 789-91 (2013).

¹⁵⁵ One move that could have fundamentally changed DHS was early in 2020 when President Trump proposed moving the Secret Service back to the Department of Treasury. Kanno-Youngs and Rappeport, *supra* note 109. A bi-partisan bill to enact this change was introduced in the Senate, but spurred debate about the impact on DHS and ultimately stalled. Donald J. Mihalek, *Why the Secret Service moved to DHS After 9/11, and Now May Be Moved Back to Treasury*, ABC NEWS (May 29, 2020), <https://abcnews.go.com/ABCNews/department-homeland-security-risk-cret->

mean fewer political appointees, but this is a temporary effect.¹⁵⁶ A small reduction in political appointees has occurred from 160 in 2012 to 156 in 2016 to 150 in 2020.¹⁵⁷ Thus, progress has been limited.

B. *Enhancing Career Management*

The value of effective career managers, particularly in a still-young department tasked with an extraordinary mission, is similarly hard to overstate. A singular response is not enough to address the complex, multifaceted challenges of DHS. But vetted, capable, and proven members of SES can adapt and adjust. They add demonstrated value to their agencies and DHS. Like all career employees, they are sworn to “protect and defend the Constitution of the United States” and to “well and faithfully discharge the duties of the office.”¹⁵⁸ Broadly, they do not make policy or law – nor are they beholden to agendas, policies, or politics – and they are required to follow all lawful orders. SES employees enhance the priorities of whatever presidential

service-moves-back/story?id=70941421. If such legislation moved forward in the future, the potential to reshape DHS in other ways could be a closely analogous issue for congress.

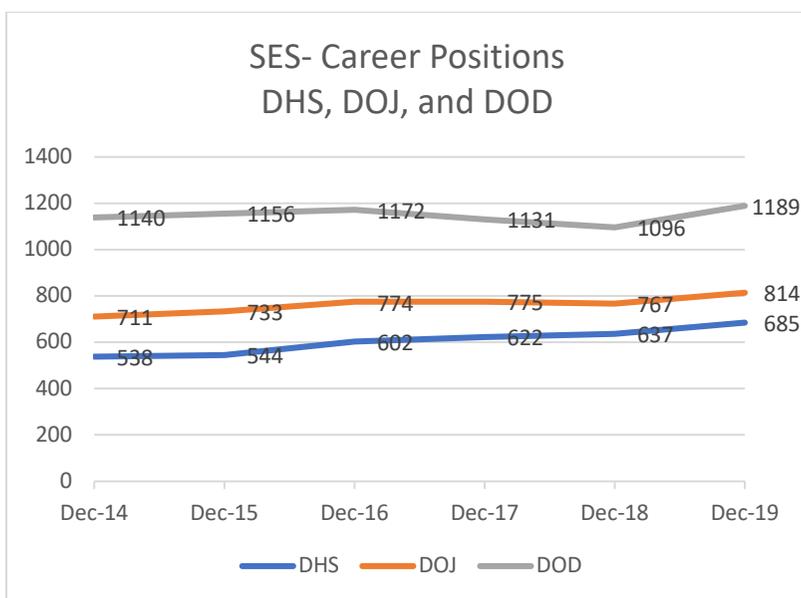
¹⁵⁶ LEWIS, *supra* note 79 at 127. These positions are generally filled by career SES members who then serve in “higher” roles in an acting capacity.

¹⁵⁷ *Compare* S. COMM. ON HOMELAND SEC. AND GOV’T AFFAIRS, 110TH CONG., 2D SESS., POLICY AND SUPPORTING POSITIONS 74-80 (Comm. Print 2016) *with* H. COMM. ON HOMELAND SEC. AND GOV’T AFFAIRS, 112TH CONG., POLICY AND SUPPORTING POSITIONS 71-77 (Comm. Print 2012) *and* H. COMM. ON HOMELAND SEC. AND GOV’T AFFAIRS, 116TH CONG., POLICY AND SUPPORTING POSITIONS 210 (Comm. Print 2020). This publication is produced every four years after a presidential election by either the Senate Committee on Homeland Security and Governmental Affairs or the House Committee on Oversight and Government Reform. It lists positions in the Legislative and Executive Branches of the federal government that may be exempt from noncompetitive appointment. Political appointee numbers can be found at Appendix No. 1, adding the following: PAS (Positions Subject to Presidential Appointment with Senate Confirmation); PA (Positions Subject to Presidential Appointment without Senate Confirmation); NA (Senior Executive Service General Positions Filled by Noncareer Appointment); and SC (Positions Filled by Schedule C Excepted Appointment). These positions are classified as “political appointees” for the purpose of this analysis, consistent with a report conducted by the General Accounting Office on the Plumbook and political appointees. U.S. GEN. ACCOUNTING OFFICE, GAO-19-249, FEDERAL ETHICS PROGRAMS, GOVERNMENT-WIDE POLITICAL APPOINTEE DATA AND SOME ETHICS OVERSIGHT PROCEDURES AT INTERIOR AND SBA COULD BE IMPROVED 9 (Mar. 2019).

¹⁵⁸ 5 U.S.C. § 3331 (1966).

administration is in charge.¹⁵⁹ A direct and impactful solution is to bolster their ranks.

Fortunately, career SES employees are becoming more frequent in DHS, both overall and as a percentage of the workforce. An examination of employment data from the Office of Personnel Management from December 2014 through December 2019 reflected growth in career SES membership in DHS of about 27.3% from 538 positions to 685 positions.¹⁶⁰



Similarly, career SES membership went from about 1:349 (career SES to non-SES employees) in December 2014 to 1:309 (career

¹⁵⁹ For example, immigration (both enforcement and benefits) is a sharply divisive issue. But career SES employees working in immigration (like all career employees) generally do not create law or policy. They are experts in the field, and, whether serving in conservative or liberal administrations, they implement and defend lawful immigration orders and policies to the best of their abilities.

¹⁶⁰ OFFICE OF PERSONNEL MANAGEMENT, DEMOGRAPHIC PROFILE OF THE FEDERAL WORKFORCE DATA, at Dec. 2019; Dec. 2018; Dec. 2017; Dec. 2016; Dec. 2015; Dec. 2014, (database updated June 2020). Comparatively, DOJ grew by about 14.5% and DOD grew by about 4.3%. DOD calculations do not include uniformed personnel, including flag officers (Generals and Admirals).

SES to non-SES employees) in December 2019.¹⁶¹ DHS has been under-resourced with career SES members and continues to be (particularly compared to peer agencies), but the data reflect an improvement.

Yet the solution cannot simply be increasing the number of career SES employees; the employees must be of an even higher caliber to address the significant challenges of the Department. Fortunately, in recent years, DHS has finally addressed this issue. From 2010 through 2016, DHS developed the Department of Homeland Security's Leader Development Framework and set a plan to implement compliance among all DHS employees.¹⁶² In so doing, it established a unified set of leadership principles and trainings for every level of every DHS agency: Team Member, Team Lead, Supervisor, Manager, and Executive.¹⁶³ The basis of the forty-four leadership competencies and five content categories creates, in the words of former Deputy Secretary Jane Lute, "a standardized framework and a shared set of expectations about competency development for leaders that is appropriate across the entire department."¹⁶⁴

The process has been far from perfect. The implementation took too long and challenges to future implementation remain. Like the agencies that lobbied for exemption from the SES system,¹⁶⁵ DHS agencies often opposed efforts to improve leadership under the auspices of mission-specific criteria despite repeated demonstrations of leadership failure.¹⁶⁶ Nonetheless, progress has been made, with

¹⁶¹ *Id.* Comparatively, DOJ went from 1:161 to 1:141 and DOD went from 1:633 to 1:641. DOD calculations do not include uniformed personnel, including flag officers (Generals and Admirals).

¹⁶² COMM. ON DEP'T OF HOMELAND SEC. WORKFORCE RESILIENCE BD. ON HEALTH SCIS. POL'Y, A READY AND RESILIENT WORKFORCE FOR THE DEPARTMENT OF HOMELAND SECURITY: PROTECTING AMERICA'S FRONT LINE 89-100 (2013) (ebook) <https://www.ncbi.nlm.nih.gov/books/NBK201684/> (last visited Apr. 26, 2020).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ H. R. COMM. ON POST OFFICE AND CIV. SERV., *supra* note 17 at 970-72.

¹⁶⁶ See Jeffrey M. Miller, *Rescuing Tomorrow Today: Fixing Training and Development for DHS Leaders* 7, 9, 48-49 (Sept. 2016) (Postgraduate unpublished thesis, Naval Postgraduate School), <https://calhoun.nps.edu/handle/10945/50595>.

both active participants¹⁶⁷ and general employees recognizing leadership improvement.¹⁶⁸ The result is that employees have been exposed to quality leadership training earlier and progressively throughout their careers, providing a stronger SES-cadre for the future. The DHS Leadership Development Framework has been an actionable and measurable step that should be continued, assessed, and modified (as appropriate) going forward.

CONCLUSION

After Charles Guiteau was arrested, he was eventually placed in a psychiatric hospital in Washington, D.C., where he remained throughout his trial until his execution by hanging on June 30, 1882.¹⁶⁹ More than a century later and exactly eight years after the attacks of 9/11, scores of DHS employees from each agency gathered on those same grounds. These employees had been selected largely on merit (though Guiteau might be pleased to know there were still plenty of political appointees),¹⁷⁰ including a professional protective force of Secret Service agents. They had gathered to celebrate breaking ground on the first unified DHS headquarters, built in the same space once occupied by a man who killed a president over political patronage.

The challenges faced by DHS are known but surmountable. Continuing the growth of career SES members and reducing political

¹⁶⁷ GORDON ABNER ET AL., PREPARING THE NEXT GENERATION OF FEDERAL LEADERS: AGENCY-BASED LEADERSHIP DEVELOPMENT PROGRAMS 27, 34, 44 (2019).

¹⁶⁸ OFFICE OF PERSONNEL MANAGEMENT, FEDERAL EMPLOYEE VIEWPOINT SURVEY, AGENCY MANAGEMENT REPORT, DEPARTMENT OF HOMELAND SECURITY 14, 27-28 (2020).

¹⁶⁹ Kathleen Koch, *Mental Hospital Now Endangered Landmark* (June 8, 2002 11:04 PM), <https://www.cnn.com/2002/HEALTH/06/08/stelizabeths.hospital/index.html>. Other presidential and would-be presidential assassins were also held there, including Richard Lawrence and John Hinckley, Jr. The trial itself was notable for several reasons, including being one of the first high-profile cases involving defense by insanity and the *McNaghten Rule*. *United States v. Guiteau*, 10 F. 161 (D.C. 1882); *United States v. Guiteau*, 12 D.C. (1 Mackey) 498 (D.C. 1882); Mark P. Friedlander, Jr., *The Cross-examination of Charles J. Guiteau*, 23 No. 3 LITG. 1, 43-46, 52-57 (1997).

¹⁷⁰ To date, the United States has thousands more political appointees across the federal government than the United Kingdom, Germany, and France. LEWIS, *supra* note 79, at 1, 3.

influence by reducing political appointees and streamlining congressional reporting will be significant steps. In the words of Congressman Mike D. Rogers, “[m]anagement vacancies, mismanagement and poor employee morale have plagued the Department of Homeland Security since it was created . . . Every day, DHS employees do an exceptional job carrying out their critical missions. No one should blame the men and women of DHS for problems Congress has allowed to fester.”¹⁷¹ The Department of Homeland Security has embraced its mission and acknowledged the need to improve its ranks. For it to succeed, it now needs the nation’s leaders to do the same.



¹⁷¹ Davidson, *supra* note 102.