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# **Running Aground: The Hidden Environmental and Regulatory Implications of Homeland Security**

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# Running Aground: The Hidden Environmental and Regulatory Implications of Homeland Security

Mariano-Florentino Cuéllar\*

Substantial commitments to environmental protection and safety regulation epitomize the modern American state. While no reasonable observer can blindly ignore lingering regulatory challenges, the United States has achieved an enviable environmental record compared to countries of comparable size and population.<sup>1</sup> Americans have witnessed such advances in environmental protection and related safety goals in no small measure because of public institutions forged during the last several generations.<sup>2</sup> The U.S. Coast Guard is a case in point. For years, its 43,000 employees have endeavored to safeguard living marine resources, prevent over-fishing, stop toxic spills degrading the environment, and ensure the safety of Americans who work or travel on oceangoing vessels.<sup>3</sup> Coast Guard officials work with the Environmental Protection Agency to limit catastrophic oil spills, and to carry out responsibilities parallel to those of the Occupational Safety and Health Administration (OSHA) for protecting the hundreds of thousands of Americans who work on watercraft. Together, the work of these employees helps paint a reassuring picture, where an agency engineered to meet its distinctive challenges protects thousands of miles of coastline, tens of thousands of watercraft, and millions of Americans.<sup>4</sup>

But that picture is beginning to blur. The Coast Guard has become the largest bureau within a new Department of Homeland Security (DHS). Under pressure from budget reallocations, new missions, and bureaucratic reorganization, the bureau faces constraints on its regulatory functions – a development foreseen by a bipartisan group of legislators who unsuccessfully sought to protect the Coast Guard’s environmental and safety functions by keeping it out of DHS.<sup>5</sup> Indeed, as it was being moved into the vast new homeland security

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<sup>1</sup> See Yale Environmental Performance Index (2006), Full 2006 EPI Report, available at <http://www.yale.edu/epi/> (recognizing notable American achievements in protecting ecosystem vitality, providing clean water, and reducing particulate air pollution, while indicating potential for U.S. improvement in wilderness protection, regional ozone levels, overfishing, and addressing global warming).

<sup>2</sup> See generally *id.* The study attempts to compare countries in the extent to which they reduce environmental stresses on human health and protect ecosystem vitality. The U.S. ranks 28 out of 133 countries studied. The performance of the U.S. appeared to suffer because of its provision of agricultural subsidies (counted as problematic because of its effect on ecosystem vitality), and its high energy usage. Despite this, no country of comparable population exceeded the performance of the U.S. in this study.

<sup>3</sup> See *infra* Part I.

<sup>4</sup> See e.g., Renae Merle, *For the Coast Guard Fleet, A \$15 Billion Upgrade; Agency’s Profile, and Its Duties, Have Grown Since September 11*, WASH. POST, June 25, 2002, at A1 (discussing the Coast Guard’s multiple missions of “rescuing boaters, stopping suspected drug traffickers and helping in environmental cleanups,” and how “[i]ts reach even includes enforcing sanctions in the Persian Gulf and watching for migrants fleeing Haiti”); Spencer S. Hsu, *Katrina Report Spreads Blame*, WASH. POST, Feb. 12, 2006, at A1, (describing how the Coast Guard “alone rescued nearly half of the 75,000 people” stranded in New Orleans in the wake of Hurricane Katrina).

<sup>5</sup> See *Sen. Cantwell Questions Decision to Ignore Coast Guard needs in President’s \$52 Billion Emergency Aid Bill*, U.S. FED. NEWS, Sept. 9, 2005, avail. at 2005 WLNR 15196787.

bureaucracy, the Coast Guard was already reporting a one third drop in the absolute number of hours its boats, cutters, and planes were devoting to protecting living marine resources (compared to pre-September 11 reporting periods),<sup>6</sup> a 43% drop in hours devoted to marine safety enforcement, and a 64% drop in hours spent on environmental protection. Between 2001 and 2005, Coast Guard outlays for environmental protection plummeted from over \$250 million a year to less than \$150 million a year.<sup>7</sup>

These developments bring into focus a new picture. In it, the Coast Guard is increasingly at risk of running aground somewhere on the frontier between regulatory policy and homeland security. The changes rippling through the Coast Guard even raise the larger question of how pollution control, wildlife protection, accident reduction, and other American regulatory priorities are being affected by the burgeoning focus on homeland security. In fact, DHS' own figures indicate that the proportion of resources dedicated to non-homeland security missions within the department has already fallen from 40% in 2003 to 10% in 2006. Because the Department's overall budget remained nearly flat during this period (excluding emergency supplemental appropriations), these percentage declines translated into sizeable cuts in non-homeland security spending by DHS bureaus.<sup>8</sup>

This new picture of DHS and its bureaus is worth scrutinizing because the nation's interests depend on a mix of policies that straddle the divide between homeland security and domestic regulatory affairs. While managing the risk of terrorism in a post-September 11 world is unquestionably important, any reasonable effort to assess such policies should examine their broader impact on marine safety, toxic spills, natural disaster recovery and the full range of federal regulatory functions. Yet regulatory policy garners relatively limited attention in public debates about American priorities in the post-September 11 world. Instead, the half-decade following the attacks will be remembered in large measure for debates about Guantanamo, torture, enemy combatants, warrantless surveillance, and the Geneva Conventions. While these debates are unquestionably important, they have overshadowed certain less visible implications of recent policy changes. The present Administration has forced regulatory agencies to shoulder new homeland security responsibilities without adequate resources, changed statutory priorities, and emphasized the value of secrecy. In the process, the present Administration has risked undermining important regulatory goals for the American people. These developments are most readily apparent at the U.S. Coast Guard, which was moved to the DHS about a year and a half after the September 11 attacks. While the bureau's work on defense readiness has skyrocketed, the statutory, bureaucratic, and budgetary changes affecting the Coast Guard are reflected in cuts to the agency's work protecting against oil and chemical spills, safeguarding living marine resources, and promoting marine safety.

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<sup>6</sup> Office of U.S. Senator Patty Murray, *New Coast Guard Report Shows Decline in Traditional Missions*, May 1, 2003 (enforcement of "international fisheries laws and treaties declined 33 percent" compared with the previous reporting period, reflecting pre-September 11 levels).

<sup>7</sup> *See id.* (resource hours devoted to marine environmental protection missions, compared to pre-September 11 levels "decreased 64%"). Drops in Coast Guard environmental outlays are discussed *infra* in Part III.

<sup>8</sup> *See infra* Figure 2 (indicating the falling proportion of DHS outlays devoted to non-homeland security missions); Dara Kay Cohen, Mariano-Florentino Cuéllar, and Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 733 (2006) (showing the relative lack of change in non-emergency DHS budget authority).

As the Coast Guard struggles to meet the nearly-impossible demands placed upon it, developments at the frontier between homeland security and regulatory policy raise larger issues meriting attention from discerning lawyers, scholars, and policymakers. First, whatever other missions the DHS performs, the new cabinet department is also a preeminent environmental regulator. Its performance should be judged accordingly. Second, national and homeland security policies have become inextricably intertwined with domestic regulatory policy. Third, the realities defining the impact of environmental, health, and safety policies do not depend only on the content of statutes. Instead, regulatory policies are indelibly affected by budget compromises, the scope of agency missions, and the priorities emphasized by executive branch political appointees. Lawmakers with an interest in effective regulatory policy must therefore depend on vigorous congressional oversight to ensure that legitimate environmental and safety priorities are not forgotten amidst concerns about homeland security.

## I. Homeland Security and Environmental Protection

Alone among major regulatory agencies, DHS houses nearly a quarter of a million employees, dozens of distinct bureaus recently transferred from other regulatory agencies, and a high-profile counter-terrorism mandate that now competes for attention with all the agency's other important missions. DHS is thus strikingly different from other regulatory agencies in its size, the vastness of its \$70 billion budget, and the difficult governance problems the agency poses. In contrast, the Department of Interior boasts 71,000 employees, a \$9.3 billion budget, and a relatively settled history. DHS also dwarfs the Environmental Protection Agency's \$8.3 billion budget and 18,000 employees.<sup>9</sup>

Despite these differences, DHS is similar to other agencies in the broad scope of its regulatory mission. Some of the new department's regulatory activities, such as issuing rules from the Transportation Security Agency governing access to commercial aviation, plainly implicate the new cabinet super-agency's core counter-terrorism mandate.<sup>10</sup> Other DHS regulatory missions involve an overlap between concern over terrorism and more traditional regulation. Examples include the interim final rules governing the security of chemical facilities -- where a successful attack could lead to millions of Americans being poisoned.<sup>11</sup> In still other cases, the Department performs regulatory functions that directly involve health, safety, or environmental goals. DHS investigators enforce laws against child- and prison-labor. The Department's inspectors are supposed to protect American plant and animal life by policing the borders against invasive species or diseased animals. Its clerks collect billions of dollars in customs duties. Its officials run a flood insurance program providing \$606 billion of coverage to 4.3 million policyholders. DHS units shoulder responsibility of mitigating the immediate consequences of natural disasters, and the longer-term environmental consequences of toxic

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<sup>9</sup> See, OMB, Budget of the United States Government (2008), BLS figures on numbers of employees from the U.S. Dep't of Labor, Career Guide to Industries (2006-2007).

<sup>10</sup> See, e.g., *Air Cargo Security Requirements*, 71 FED. REG. 30478 (May 26, 2006).

<sup>11</sup> See, e.g., *Proposed Chemical Facility Anti-Terrorism Standards*, 71 FED. REG. 78276 (DEC. 28, 2006). See also Public Citizen, *Homeland Unsecured: The Bush Administration's Hostility to Regulation and Ties to Industry Leave America Vulnerable* (Oct. 2004).

spills such as the ones that flooded the waters around New Orleans in the aftermath of Hurricane Katrina.<sup>12</sup>

The Coast Guard's multifaceted functions in responding to Katrina – from mitigating toxic oil spills to rescuing stranded Ninth War residents on rooftops – are a testament to its importance within DHS. The largest single component of the new cabinet department, the Coast Guard alone has over twice as many employees as the entire EPA.<sup>13</sup> These employees work on missions of comparable importance to many of those undertaken by the EPA, and in some cases, implement policies together with that agency. The bureau limits the risks from dangerous oil spills. Coast Guard employees bear the burden of protecting marine environments and other bodies of water from environmental degradation. The bureau's rules limit the extent to which toxic chemicals leak into the water from ship engines. Its employees regulate the cruise ship industry, with its floating cities each capable of producing hundreds of thousands of gallons of waste in a single day. The Coast Guard protects against over-fishing and against the elimination of marine endangered species. And Coast Guard officials oversee an elaborate regulatory framework designed to ensure the safety of (among others) vast cruise ships in Miami, fishing vessels off the coasts of Alaska and North Carolina, small pleasure craft in San Diego. Statutes have long entrusted these functions to the Coast Guard, and these continue among the bureau's responsibilities even after the recent transfer to DHS.<sup>14</sup> Indeed, in previous decades, safety and environmental responsibilities consistently accounted for more than half of the total amount of Coast Guard operational activity in terms of resource hours.<sup>15</sup>

But while the story of the Coast Guard and its sister bureaus shows the continuing relevance of longstanding environmental protection and safety responsibilities (often referred to as “legacy” mandates), it is also a story marked by remarkable recent changes in the bureaus' operating environments. The September 11 attacks focused attention on counter-terrorism and away from other national priorities. While government managers, Administration officials, and legislators reacted to shifting public perceptions, new counter-terrorism responsibilities began to add to agencies' burdens.<sup>16</sup> Even before it was moved into DHS, for example, the Coast Guard assumed several new missions, including that of escorting ships to port.<sup>17</sup> Even more pronounced changes followed, culminating in the creation of DHS. As bureaus such as the Coast Guard, immigration authorities, and FEMA were moved into DHS, they were placed in a

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<sup>12</sup> See, e.g., FEMA, National Flood Insurance Program: Program Description (2002); U.S. Government Manual (2006). See also Cohen et al., *supra* note 8.

<sup>13</sup> See Thomas Frank, *Panel Pares Homeland Agency*, NEWSDAY, July 12, 2002 (“The Coast Guard, with 43,000 employees, is the largest of 22 agencies that Bush wants in the new department.”).

<sup>14</sup> See Homeland Security Act of 2002, Pub. L. No. 107-296, § 888 116 Stat. 2135 (discussing Coast Guard non-homeland security functions). Despite these provisions, Section 101(b)(1)(E) ultimately underscores the power of the Secretary's power over the bureaus and allows the dilution of non-homeland security missions. See also Cohen et al., *supra* note 8, at 723.

<sup>15</sup> See Office of Inspector General, Department of Homeland Security, *Annual Review of Mission Performance: United States Coast Guard (FY 2005)*, Office of Audits, OIG-06-05 3 (July 17, 2006)(the average proportion of resource hours the Coast Guard spent on non-homeland security missions in the eight fiscal year quarters preceding September 11, 2001 was 62%).

<sup>16</sup> See, e.g., Merle, *supra* note 4 (The Coast Guard “now must also escort vessels into port, enforce safety zones around Navy ships, board commercial ships in search of chemical and biological weapons, and secure the nation's ports.”).

<sup>17</sup> See *id.*

different organizational environment, with institutional priorities more focused on countering terrorism than performing legacy functions.<sup>18</sup> Despite language in the statute creating the new Department to the effect that legacy missions would retain importance,<sup>19</sup> the bureaus were placed in an institutional structure that appeared to intensify – and to reify – changes in priorities.<sup>20</sup> Political appointees overseeing the amalgam of 22 bureaus melded into the new Department would have been hard-pressed not to appreciate the extent to which their performance would be judged primarily on the basis of counter-terrorism.<sup>21</sup> And those officials were working in a statutory framework that centralized power within a new Secretary, whose position would permit him to shift bureau activities and resources in the course of administering the Department.<sup>22</sup>

These changes in structure are likely to continue taking their toll. Bureaus such as the Coast Guard previously existed in an institutional environment that had long supported substantial engagement with complex and significant non-homeland security missions. Earlier in history, lawmakers and executive branch officials have often seemed aware of the political stakes involved in organizational charts, political superiors, agency missions, and congressional overseers. Examples include Jimmy Carter’s creation of the Energy Department in the 1970s and Franklin Roosevelt’s establishment of a new Federal Security Agency in the late 1930s.<sup>23</sup> These episodes are a testament to the fact that the law’s impact depends not only on the meaning of statutory provisions, but on the context in which policy is implemented. Efforts to control regulatory policy in a system of separated powers are therefore likely to involve conflict over the intricate statutory, structural, and budgetary provisions that affect the bureaus’ day-to-day operations. Accordingly, to fully understand the current status of the nation’s commitment to clean oceans, endangered marine species, natural disaster preparedness, and even child labor enforcement we must take a closer look at how statutes interact with budgets and organizational priorities inside DHS.

## II. The Competition to Control Regulatory Policy

### A. The Stakes Involved in Making, Enforcing, and Controlling Regulatory Policy

To fully appreciate how different players endeavor to shape the work of public agencies such as the Coast Guard, it is important to recall how much of an impact regulations can have on the American people.<sup>24</sup> Regulations can protect fragile ecosystems and save lives, but they can

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<sup>18</sup> This was, after all, the ostensible reason for creating the new Department in the first place. *See, e.g.*, Cohen et al., *supra* note 8, at 690-691.

<sup>19</sup> *See* Homeland Security Act, *supra* note 14.

<sup>20</sup> *See, e.g.*, David E. Lewis, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997 (2003).

<sup>21</sup> They could therefore be expected to change not only how the bureaus within DHS were managed but what budget priorities were emphasized in requests to Congress. *See generally* Walter J. Oleszek, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS (2007) (discussing the role of presidential administrations in setting the baseline for discussions about the budget).

<sup>22</sup> *See* Homeland Security Act, *supra* note 14. For an example of concerns raised by a Republican legislator regarding the extent to which the new Secretary could change the focus of Coast Guard missions, see Frank, *supra* note 13.

<sup>23</sup> *See generally* Cohen et al., *supra* note 8, at 746-748.

<sup>24</sup> *See generally* James Q. Wilson, BUREAUCRACY (1990).

also affect the economic interests of businesses, industries, and regions. The more prominent the role of regulatory bureaucracies in managing the environment, shaping public priorities, affecting the costs of doing business, and calibrating risks, the greater the effort politicians and organized interests will make to control public agencies.<sup>25</sup>

One such agency is the Coast Guard, whose work demonstrates not only the complexities of overlapping environmental, safety and homeland security responsibilities, but also the stakes riding on regulatory decisions. An example: the cruise ship industry contributes over \$11 billion to the American economy and about 170,000 jobs.<sup>26</sup> The industry also generates vast quantities of waste. The extent to which the industry degrades its surrounding environment depends to a substantial degree on the content and enforcement of federal regulations. So does the extent to which the industry remains as lucrative as it has been.<sup>27</sup> Not surprisingly, the industry has explicitly decided to become increasingly involved in politics as a means of ensuring attention to its concerns.<sup>28</sup> Its representatives have made extensive political contributions, and devoted particular attention to reining in Coast Guard regulatory enforcement.<sup>29</sup> Political controversy has also enveloped a range of other facets of Coast Guard regulatory activity. In 1994, for instance, Representative Billy Tauzin of Louisiana sought to legislatively invalidate Coast Guard regulations that imposed higher liability standards on companies involved in spills of oil and toxic materials, claiming that the absence of regulatory relief would make it all but impossible for some shippers to operate.<sup>30</sup>

These examples help explain why politicians and organized interests seek to affect the performance of regulatory agencies such as the Coast Guard. But it is not always easy for them to do so. Civil society groups, trade associations, and members of the mass public often support the goals of regulatory programs. Armed with public support for regulation, legislators and agency officials may gain the political ammunition to resist cutbacks in environmental, health, and safety policies.<sup>31</sup> When Ronald Reagan became President, for instance, he explicitly announced his opposition to an elaborate regulatory state, and appointed a number of administrative officials who shared this view. Even with the Administration's relative popularity, Reagan appointees' high-profile deregulatory policies encountered considerable resistance. In some cases, litigants seeking stricter regulatory enforcement used the courts to stop agencies from watering down regulatory provisions. For example, the Reagan-era leadership of the National Highway Traffic Safety Administration sought to roll back passive restraint rules to improve automobile safety, but insurance companies and consumer groups convinced the courts that the agency was acting arbitrarily in doing so.<sup>32</sup> In other cases, high-profile officials who were particularly explicit about their efforts to curtail regulatory programs paid a political

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<sup>25</sup> See Lawrence S. Rothenberg, *REGULATION, ORGANIZATIONS, AND POLITICS* (1994).

<sup>26</sup> See Meredith Dahl, *The Federal Regulation of Waste From Cruise Ships in U.S. Waters*, 9 *Env'tl. Law* 609, 613 (2003).

<sup>27</sup> See *id.*

<sup>28</sup> See *Cruise Ships Sail Into Political Arena*, BRADENTON HERALD (Bradenton, FL.), Nov. 6, 2000, at 5.

<sup>29</sup> See Cohen et al., *supra* note 8, at 726 n.182. See also Dahl, *supra* note 26.

<sup>30</sup> See Alan Abrams, *Tauzin Slams Coast Guard Rules, Says Ship Reforms Endangered*, J. OF COMMERCE 8B, Sept. 29, 1994.

<sup>31</sup> See, e.g., Robert F. Durant, *Hazardous Waste, Regulatory Reform, and the Reagan Revolution: The Ironies of an Activist Approach to Deactivating Bureaucracy*, 53 *J. Pub. Admin. Res. & Theory* 29 (1992).

<sup>32</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983).

price for appearing to overstep the bounds of their authority. Reagan Administration EPA Administrator Anne M. Burford, one such official, eventually resigned under pressure as a result.<sup>33</sup>

## B. Navigating With a Clear Direction: Regulatory Policy and Accountability

The high-profile public battles over regulation that characterized the Reagan Administration reinforce the idea that presidential administrations are supposed to be accountable to the public in part on the basis of what they choose to say and do about regulatory policy. In principle, the existence of accountability justifies a number of familiar features of the regulatory state, such as an extensive role of the White House Office of Information and Regulatory Affairs (OIRA),<sup>34</sup> and the presumption that agency legal interpretations are entitled to deference.<sup>35</sup> Justice Scalia cites accountability when excoriating courts that fail to defer sufficiently to agency legal interpretations.<sup>36</sup> Justice Rehnquist, too, echoed the accountability fugue in the passive restraints case, where the Supreme Court invalidated the Reagan Administration's move to dilute automobile safety regulations. Dissenting from the majority opinion, Rehnquist praised the alleged virtues of the executive branch's accountability for its regulatory decisions. In his view, the Reagan Administration was simply carrying out publicly-ratified choices when it sought deregulation at NHTSA and EPA.<sup>37</sup> Rehnquist did not persuade the majority in the passive restraints case with this argument. Nonetheless, judges, lawyers, and scholars have often found such assertions to be persuasive over the years, and have repeated the mantra of presidential accountability in a host of regulatory context. Given the importance of passive restraints on automobiles, reductions in air pollution, marine safety, and the potential costs of regulation, voters are supposed to respond to changes in regulatory policy when making political choices.

Or do they? Upon closer inspection, the basic story of how the public monitors executive branch regulatory policy brushes over a host of complexities. It is doubtful, for example, whether voters routinely appreciate the full complexity of regulatory decisions at NHTSA, EPA, FEMA, or the Coast Guard. Moreover, because of political opposition engendered by regulatory policy changes, presidential administrations may aspire to hide what they are doing. By moving less publicly, politicians interested in ratcheting down regulatory enforcement can minimize the risks inherent in directly taking on policies that the public and organized interests might want to protect if the changes were more readily apparent. In short, accountability of politicians – and particularly the executive branch – for regulatory policy changes has become a foundational assumption of modern American public law. Yet accountability can be costly to those who must shoulder public scrutiny for regulatory changes. Consequently, some politicians craving changes in regulatory policy should be expected to look for strategies that avoid such public scrutiny.

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<sup>33</sup> See Marissa Martino Golden, *Exit, Voice, Loyalty, and Neglect: Bureaucratic Responses to Presidential Control During the Reagan Administration*, 2 J. Pub. Admin. Res. & Theory 29 (1992).

<sup>34</sup> See generally Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. Chi. L. Rev. 821, 827-828 (2003).

<sup>35</sup> See *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>36</sup> See Antonin Scalia, *Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 518 (1989).

<sup>37</sup> See *State Farm*, 463 U.S. at 59 (Rehnquist, J., dissenting).

### C. Hidden Course Changes: Modifying Regulatory Policy Beneath the Surface

The preceding dynamics force politicians to navigate through a dilemma when seeking major cuts in regulatory activity while attempting to minimize public opposition: How might regulatory activity be discreetly diluted? One tactic is to simply avoid public confrontation while using appropriations riders in Congress. Lawmakers allied with Microsoft sought to use such a tactic to stifle antitrust enforcement by the Justice Department.<sup>38</sup> In some cases, even appropriations riders can draw so much attention that their sponsors fail to achieve their goals. But by using a technical change in appropriations, Microsoft's supporters leveraged the substantial power of appropriations subcommittees, and avoided taking an explicit position against the substance of the antitrust laws that Microsoft was accused of violating.

Policymakers can also use changes in agency structure or missions to affect governance. By changing an agency's mission, placing it in a new bureaucratic context where political appointees emphasize new priorities, or loading it with new responsibilities but restricting its resources, a *de facto* change in regulatory policy may become possible. In response to such changes, bureaus' organizational cultures may evolve. Political appointees with different goals can reorient a bureau's priorities. Bureaus shouldering new responsibilities can become a locus of fierce internal competition for limited resources, playing out amidst signals from political superiors regarding what priorities can fall by the wayside. Such possibilities led the Roosevelt Administration to seek removal of the Public Health Service from the Treasury Department in the late 1930s.<sup>39</sup> The bureau's health-related missions were among the Treasury's lowest priorities. When President Roosevelt encountered an increasingly hostile congressional coalition blocking his efforts to strengthen the Public Health Service, he sought a more subtle approach to enhance what the bureau was able to accomplish by placing it in a new entity that would be more supportive of its health-focused mission. Decades later, between the 1970s and the 1990s, legislators hostile to another Treasury agency – the Bureau of Alcohol, Tobacco, and Firearms (ATF) – used a different organizational tactic to shape bureaucratic activity. Because lawmakers succeeded in pressuring ATF to assume additional responsibilities for investigating federal gun cases without corresponding increases in resources, they effectively diluted firearms-related regulatory activity.<sup>40</sup>

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<sup>38</sup> See *Microsoft Allies Urge Congress to Cut Antitrust Unit's Budget*, L.A. TIMES, Oct. 10, 1999.

<sup>39</sup> See Mariano-Florentino Cuéllar, *'Securing' the Bureaucracy: The Federal Security Agency and the Political Design of Legal Mandates, 1939-1953* (2006). STANFORD PUBLIC LAW WORKING PAPER NO. 943084, available at SSRN: <http://ssrn.com/abstract=942447>.

<sup>40</sup> One of the major responsibilities of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (previously Alcohol, Tobacco, and Firearms or ATF) is to regulate the nation's federally licensed firearms dealers (FFLs) to limit the lucrative transfers of firearms from such dealers to individuals engaged in criminal activity or other prohibited purchasers. See Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, *Commerce in Firearms in the United States* (Feb. 2000). While the population of FFLs has grown from 152,232 in 1973 to 250,833 in 1994, *id.*, at A-21, the number of agents stayed nearly flat from 1973 to 1994 (1,622 to 1,884), and the number of inspectors declined from 826 to 800. *Id.*, at B-13. The rate of compliance inspections on FFLs fell from a high of 54.7% in 1969 to 4.8% in 1998. *Id.*, at A-21. The drop took place as the ATF assumed the responsibility of tracing firearms from crime scenes, *id.* at A-25, and while it was being increasingly pressured to assign its agents to assist with federal prosecutions targeting firearms use connected to state and local offenses. See Daniel C. Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 Ariz. L. Rev. 369 (2001).

Wary of even the scrutiny generated by these indirect tactics, politicians may discover unique opportunities to pursue budgetary and bureaucratic changes affecting regulatory policy in the midst of a national crisis, or in its immediate aftermath. If crises by definition focus attention on some national problems and away from others, they may provide political cover for subtly affect regulatory functions. As public attention shifts to focus on matters such as the energy crisis (in the 1970s) or counter-terrorism (in recent years), the political constraints that keep the status quo in place begin to loosen. Hence, legislative action becomes possible in response to the new political circumstances, when such action ordinarily would have been blocked by watchful lawmakers trying to protect existing arrangements. Bureaucratic resistance may become easier to overcome. The result can be a new organizational structure, changed budget priorities, and new responsibilities imposed on bureaus that together forge a new context for regulatory policymaking and enforcement. Which brings us back to the Department of Homeland Security, and the Coast Guard within it.

### III. The Impact of Homeland Security on Regulatory Policy: The Case of the Coast Guard and DHS

Notwithstanding its enormous size and vast responsibilities, the Coast Guard became something of a pawn after the September 11 attacks. Although the Administration was initially reluctant to create a Department of Homeland Security, it eventually decided to proceed with such a venture in a manner that was all but guaranteed to pressure the Coast Guard to reduce its regulatory functions. Overcoming resistance to the idea of including the Coast Guard from Congress and reluctance from the President's own Homeland Security Advisor, the Administration placed the entire bureau in DHS.<sup>41</sup> The Administration did not separate out the agency's regulatory policy or enforcement functions from its interdiction capabilities. Neither did it create within the new DHS a special office to ensure attention to environmental and safety functions within the Coast Guard or its sister bureaus, as it did to oversee narcotics enforcement and privacy issues. At the same time, new budgets only partially offset the burdens of the Coast Guard's growing security-related burdens, and in some cases, policymakers explicitly pursued cuts in budgets for regulatory enforcement that would have been more politically costly in normal circumstances. Regulatory performance has begun to shift in response. Consider each of these developments in turn.

For high-level officials in the new Department, the task of overseeing the Coast Guard would proceed against the backdrop of the White House's narrow approach to defining homeland security. The present Administration construed homeland security primarily in terms of counter-terrorism, thereby making it more difficult to protect legacy mandates merely by using homeland security rhetoric to describe longstanding missions.<sup>42</sup> And the possibility that organizational changes would diminish Coast Guard environmental and safety activities was not lost on members of Congress. "I am concerned," noted one lawmaker who echoed the reactions of others in both chambers "about taking resources from traditional Coast Guard missions and diverting them to homeland defense."<sup>43</sup> In fact, the House committee overseeing the creation of the new department voted to keep the Coast Guard out of DHS. Across party lines, legislators

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<sup>41</sup> See Cohen et al., *supra* note 8, at 728.

<sup>42</sup> See *id.*, at 681 n. 24.

<sup>43</sup> See Office of Senator Kerry, *Senator Kerry on the Coast Guard Commandment*, March 19, 2002.

cited concerns that folding the multifaceted bureau into the new super-department would erode its safety and environmental functions.<sup>44</sup> Government auditors echoed the legislators' concern about legacy mandates, concluding that the Coast Guard would face pressure to cut from existing resources absent dramatically higher financial resources.<sup>45</sup> In response, legislators added provisions to the Homeland Security Act in an attempt to limit the extent to which legacy functions might be eviscerated in the new Department,<sup>46</sup> even though the overall statute still permits the Department's leadership to refocus the agency's activities on defense and homeland security.

Within days of the September 11 attacks, the Coast Guard had been forced to assume new functions that placed further strain on the agency's already-scarce resources. These responsibilities grew as the Coast Guard moved to DHS. Predictably enough, these changes made resource hours focused on homeland-security related activity at the Coast Guard (including domains such as defense readiness, port security, and interdiction) skyrocket 1200% by 2005 (compared to the pre-September 11 resource allocation).<sup>47</sup> Meanwhile, even before the move to DHS was completed, resource hours spent on legacy environmental and safety missions began to plummet, with hours spent on living marine resource protection falling by a third, hours spent on marine safety falling by 43%, and hours spent on marine environmental protection falling by 64% in the reporting period following the September 11 attacks.<sup>48</sup> These shifts dramatically illustrated the constraints under which the Coast Guard was laboring. They also underscore the extent to which Coast Guard legacy functions depended on substantial additional resources. The Coast Guard would likely continue being forced to cut back on environmental and safety regulation, moreover by a succession of choices made by the Administration with respect to the Coast Guard. These included, among others, adding responsibilities to an existing bureau rather than creating a new one, placing the entire bureau within DHS, and demanding such a high degree of security-related activity at the agency. After all, budgets interact with agency structure, management choices, and statutory priorities to affect government functions. Moreover, even before the September 11 attacks, the Coast Guard already faced substantial budgetary pressures to accomplish its full range of missions.<sup>49</sup>

Ironically, the Administration did not approach the challenge of creating DHS by requesting the vast resources necessary for bureaus to cover their full range of missions. Instead, the White House curiously insisted on revenue neutrality.<sup>50</sup> The Administration's position again drew criticism from the Government Accountability Office (GAO). In a study focused on the

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<sup>44</sup> See Amy Klamper, *Congress Set for Tug-of-War Over Coast Guard Jurisdiction*, 48 SEA POWER 6 (Mar. 1, 2005). Even in other countries that have reason to view coast guard bureaus as an important national defense resource, the bureau is ordinarily treated as a stand-alone agency or placed within ministries focused on marine and fisheries issues.

<sup>45</sup> See *Coast Guard: Comprehensive Blueprint Needed to Balance and Monitor Resource Use and Measure Performance for All Missions*, Statement of Jayetta Z. Hecker, Director, Physical Infrastructure, General Accounting Office, GAO—03-544T (Mar. 12, 2003).

<sup>46</sup> See Homeland Security Act, *supra* note 14.

<sup>47</sup> See Les Blumenthal, *Old Fleet Asked to Fill New Mission*, NEWS TRIB. (Tacoma, Wash.) July 19, 2005, at A1.

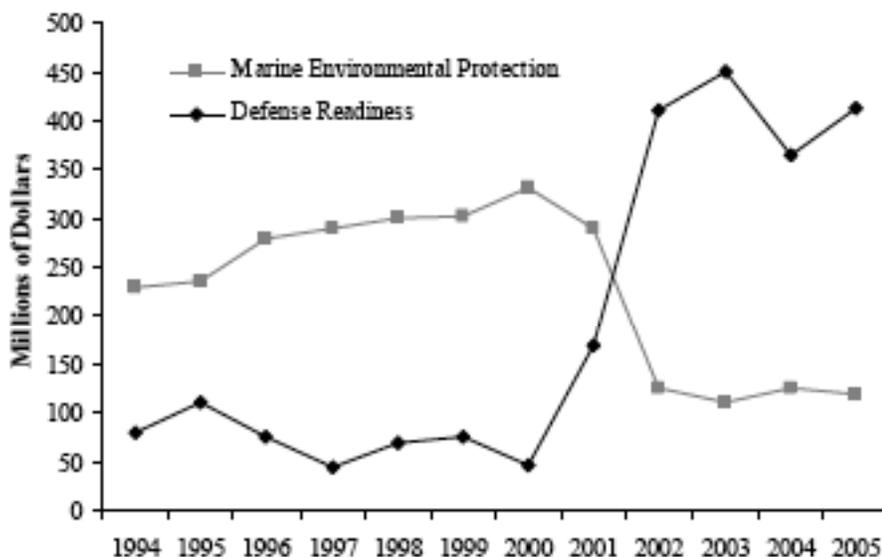
<sup>48</sup> See Office of Sen. Murray, *supra* note 6, at 1-2. These figures measure drops in the absolute number of resource hours (comparing the reporting period of April 2002-March 2003 with the previous reporting period) dedicated to the missions in question in terms of the use of the Coast Guard's cutters, boats, and planes.

<sup>49</sup> See Blumenthal, *supra* note 47.

<sup>50</sup> See GAO, *Comprehensive Blueprint*, *supra* note 45; Merle, *supra* note 4.

needs of bureaus that would be placed within the Department, the GAO cautioned that only substantial budget increases could give the merger a chance to succeed.<sup>51</sup> Although the Coast Guard's budget did eventually increase after the merger, the effect of those increases on regulatory policy was blunted by several factors. In particular, the Coast Guard faced substantial expenses associated with its preparation to modernize an aging fleet. Pressure to perform additional security-related functions continued after the bureau moved to DHS. And in some cases, the new Department explicitly downgraded the importance of some regulatory missions such as environmental protection. As a result, as Figure 1 shows, initial budgetary changes early in the Administration slashing Coast Guard marine environmental protection funding were cemented in later years, with the change in mission and structure reinforcing the change in budget priorities.

**Figure 1: Changing Outlays in Two Coast Guard Program Areas**



Source: Data compiled from the Office of Management and Budget, *Appendix, Budget of the United States Government* (fiscal years 1996-2007).

None of this bodes well for the regulatory side of the Coast Guard's work. The preceding changes in the Coast Guard's organizational context, missions, and budgets have come at a time when the bureau's regulatory responsibilities for matters such as fisheries enforcement, ship safety, and environmental pollution remain substantial.<sup>52</sup> And in some cases, the Coast Guard's responsibilities in these domains are growing. The Coast Guard must now enforce a new regulatory requirement bringing the U.S. into compliance with treaty obligations under the International Convention for the Prevention of Pollution From Ships.<sup>53</sup> It must supervise a cruise industry that is growing dramatically.<sup>54</sup> Given these challenges, it may seem encouraging that the Coast Guard recently reported some slight increases in resource hours devoted to non-

<sup>51</sup> See U.S. GEN. ACCOUNTING OFC., GAO-03-260, HOMELAND SECURITY: MANAGEMENT CHALLENGES FACING FEDERAL LEADERSHIP, 44-45 (Dec. 2002).

<sup>52</sup> See Inspector General, *Annual Review of Mission Performance*, *supra* note 15.

<sup>53</sup> See Cohen et al., *supra* note 8, at 737 n. 220.

<sup>54</sup> See Dahl, *supra* note 26.

homeland security missions,<sup>55</sup> and that some agency officials have also recently claimed relative success in meeting selected non-homeland security performance goals in spite of the budgetary changes noted above.<sup>56</sup> But there is less than meets the eye to both of these developments. First, although the Coast Guard's database for keeping track of how it uses its boats, cutters, and aircraft includes categories for recording full range of non-homeland security activity, it has only provided information about resource hour increases in a limited number of program areas, such as fisheries enforcement. And the increases do not erase the impact of precipitous drops in activity registered earlier.<sup>57</sup> Second, the Coast Guard's performance measures for non-homeland security functions suffer from a number of problems. For instance, the Coast Guard currently measures its success in protecting living marine resources as a function of the "percent of fishermen in compliance with regulations."<sup>58</sup> Upon closer examination, it turns out the bureau's measure focuses only on the proportion of compliance observed in vessels *boarded* by the Coast Guard.<sup>59</sup> Plainly, the Coast Guard could observe more compliance on the meager number of vessels it boards while actual compliance is decreasing.<sup>60</sup> Similar problems afflict other regulatory performance measures.<sup>61</sup>

Meanwhile, the pace and focus of Coast Guard regulatory rulemaking activity – which combines with enforcement policy and resource allocation to shape overall regulatory activity – has also been shifting. While counts of regulatory rulemaking proceedings furnish an imperfect measure of life at the bureau, they do illustrate some apparent changes in agency activity and priorities. The average number of safety or environmental regulatory rules issued yearly by the Coast Guard dropped from about 3.8 in the last six years of the Clinton Administration, to about 2.6 during the first two years of the Bush Administration – before the Coast Guard was

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<sup>55</sup> See Inspector General, *Annual Review of Mission Performance*, *supra* note 15, at 3.

<sup>56</sup> See *id.* at 19-20.

<sup>57</sup> See *id.* Curiously, government auditors failed to provide any new data on the extent of drops in resource hours dedicated to marine environmental protection and marine safety. Auditors explained the decision not to analyze resource hour changes involving marine safety and marine environmental protection on the basis that the excluded functions were largely undertaken without the use of actual Coast Guard physical resources. This rationale may have been advanced by agency officials, who may have harbored concerns about what updated analyses of resource hours would show. But it is difficult to accept. The technical system the Coast Guard uses to keep track of resource hours, after all, includes a category for both marine environmental protection and marine safety. Moreover, it is difficult to assess how the Coast Guard would be able to accomplish marine safety and marine environmental protection missions, which depend crucially on inspections, without using its physical resources.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*, at 15.

<sup>60</sup> See U.S. GOV'T. ACCOUNTABILITY OFC., GAO-06-816, COAST GUARD: NON-HOMELAND SECURITY PERFORMANCE MEASURES ARE GENERALLY SOUND, BUT OPPORTUNITIES FOR IMPROVEMENT EXIST, 15 (Aug. 2006).

Because the Coast Guard targets vessels, the primary measure does not reflect the compliance rate for all fishermen in those areas patrolled by the Coast Guard, as could be inferred by the description, but rather is an observed compliance rate, that is, the compliance rate of only those fishing vessels boarded by Coast Guard personnel.

<sup>61</sup> See *id.*, at 18 (discussing problems with the measures for marine environmental protection). Although government auditors found performance measures for marine safety to be sound, these are based on a five-year average of the annual number of deaths and injuries of recreational boaters, mariners, and passengers. As such, changes in Coast Guard regulatory performance in this domain is likely to take longer to become observable from an analysis of the bureau's performance measures, even if underlying compliance rates are beginning to change substantially.

transferred to DHS – and then to approximately 2 per year during the four years the bureau has existed within DHS. Economically-significant safety or environmental rules<sup>62</sup> were emerging from the bureau at the rate of about one a year during the last six years of the Clinton Administration and the first two (pre-DHS) years of the Bush Administration. Rules in this category issued during that period included, for example, limits on the release of harmful species in water ballast dumped into the Great Lakes, and requirements that shipping companies install tank pressure monitoring devices reducing the danger of ruptured tanker vessels. In contrast, the Coast Guard has not issued a single economically-significant safety or environmental rule since its transfer to DHS.<sup>63</sup> This slowdown appears to reflect the fact that major, congressionally-required Coast Guard environmental and safety rules have yet to be completed. For example, the Coast Guard recently postponed issuing comprehensive oil spill mitigation regulations designed to limit the extent and consequences of Exxon Valdez-style oil spill. The rules were postponed, according to agency representatives, because of its “heavy workload guarding against terrorism in the post 9/11 era.”<sup>64</sup>

Nor do developments within the Coast Guard seem to be isolated incidents. As Figure 2 shows, DHS is devoting a dramatically shrinking share of its resources primarily to non-homeland security missions, including (among others) anti-child or prison-labor enforcement, flood insurance, animal and plant safety, as well as the Coast Guard’s marine safety, marine environmental protection, and living marine resources activities.<sup>65</sup> Drops in the share of spending on legacy missions have coincided, moreover, with flat non-emergency appropriations to the Department, and falling overall spending on some regulatory functions.<sup>66</sup> FEMA’s base budget was eroding before Katrina, for example, making it more difficult for the agency to mitigate disasters taking a massive environmental toll.<sup>67</sup> Meanwhile, the full range of environmental, regulatory, and revenue missions of the new bureaus of Customs and Border Protection and Immigration and Customs Enforcement seem to have fallen through the cracks, as neither successor agency has explicitly assumed responsibility over them or mentions them as priorities,<sup>68</sup> referrals for Customs duty violations have plummeted,<sup>69</sup> and inspectors formerly

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<sup>62</sup> OIRA treats rules as “economically significant” under Executive Order 12,866 when they “have an annual effect on the economy of \$100 million or more, or adversely affect the economy or a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities.” For an insightful analysis of the OIRA review process, see Croley, *supra* note 34, at 827-828.

<sup>63</sup> The preceding analysis was conducted using the Government Printing Office’s RegInfo database, available at <http://www.reginfo.gov/public/do/eoAdvancedSearchMain>.

<sup>64</sup> See Robert McClure, *Oil Spill Rescue Rule Keeps Seeking*, SEATTLE POST-INTELLIGENCER, Mar. 19, 2007.

<sup>65</sup> The changes in the proportion of resources devoted to non-homeland security missions may seem less important if overall DHS resources have been rising dramatically. Excluding supplemental appropriations, however, recurring programmatic funding at DHS has risen only mildly since 2003. See Cohen et al., *supra* note 8, at 732-733. As a result, the decreases in the proportion of resources devoted to non-homeland security missions at DHS are leaving the Department with a shrinking absolute amount of resources for such programs.

<sup>66</sup> See Cohen et al., *supra* note 8, at 733.

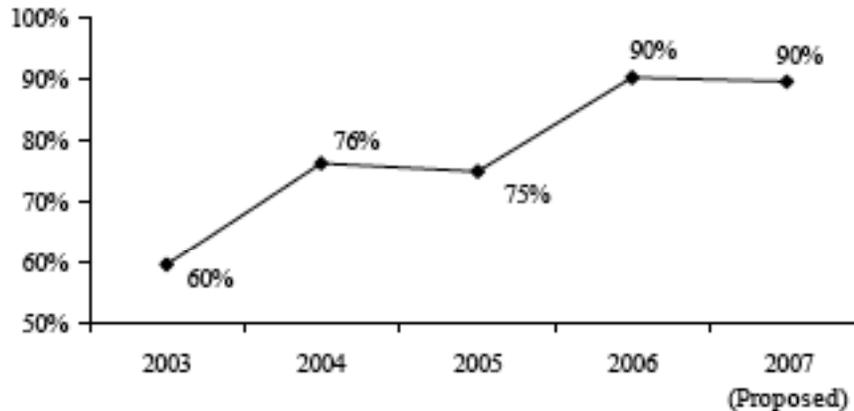
<sup>67</sup> See *id.*, at 738.

<sup>68</sup> See, e.g., *CBP: Securing America’s Borders*, available at <http://www.cbp.gov> (“U.S. Customs and Border Protection’s top priority is to keep terrorists and their weapons from entering the United States”).

<sup>69</sup> See Transactional Records Access Clearinghouse (TRAC), Federal Criminal Enforcement Database (program category, Customs-Duty Violations).

working for the Agriculture Department's Animal and Plant Health Inspection Service (APHIS) have little incentive to emphasize environmental missions.<sup>70</sup>

**Figure 2: Shifting DHS Priorities, Reflected in Changing Proportion of Annual Non-Emergency Outlays Spent on Homeland Security Missions**



Source: Calculations based on data from the Office of Management and Budget, *Budget of the United States Government* (fiscal years 2004-2007).

It may be tempting for some observers to chalk up the preceding changes to the new demands of security.<sup>71</sup> Yet upon closer inspection, the case for such security benefits turns out to be a good deal harder to make than one might imagine. First, even from a perspective concerned only about security as it is traditionally defined, centralization includes long-term costs as well as benefits. Federal drug enforcement, for example, has thrived in part because of competition between agencies.<sup>72</sup> Second, even if substantial benefits could have been derived from centralizing agencies in DHS, those benefits are diluted because of the fragmented legislative oversight authority that largely persists in Congress.<sup>73</sup> Third, any potential security benefits from reorganizing the Coast Guard and its sister bureaus also entailed pronounced transition costs, which is why Bush Administration officials initially sought to discourage the creation of a new Department,<sup>74</sup> and probably why some officials later sought to keep the initial proposal for a new department smaller by excluding the Coast Guard (they were overruled).<sup>75</sup> Fourth, resources

<sup>70</sup> In the Bush Administration's original proposal for DHS, all of APHIS would have moved to the Department. After substantial resistance materialized, however, the Administration chose to move only APHIS inspectors into the new agency. See Cornell News, *Cornell Official Testifies on Proposal for Department of Homeland Security*, July 17, 2002.

<sup>71</sup> No doubt many Americans would think it an eminently reasonable bargain to tolerate some dilution in regulatory policy in exchange for worthwhile improvements in national security. Nonetheless, for a contrary perspective (arguing that the failure to prevent the September 11 attacks was not necessarily a policy failure), see Richard Posner, *The 9/11 Report: A Dissent*, N.Y. TIMES, Aug. 29, 2004. Moreover, the regulatory policy changes described above would still raise concerns among lawyers and policymakers committed to sound environmental policies even if we could be certain that substantial security benefits would follow from them. Yet the actual and potential neglect of regulatory functions would be more troubling still if Americans were not deriving substantially greater national security benefits in exchange.

<sup>72</sup> See Cohen et al., *supra* note 8, at 710-711.

<sup>73</sup> See *id.* at 699-700 (discussing fragmented congressional oversight authority).

<sup>74</sup> See STEVEN BRILL, AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA 54 (2003).

<sup>75</sup> See *id.* at 397.

taken away from environmental and regulatory functions do not seem to have been focused on areas that experts most readily cite as urgent homeland security priorities.<sup>76</sup>

Finally, even if the security benefits of reshaping the Coast Guard's priorities and creating DHS were sufficient to offset the preceding problems, the present Administration has avoided explicitly taking responsibility for the regulatory policy changes it has set in motion. In part as a consequence, the Administration has failed to justify why it did not mitigate the environmental policy impact of its decision. If the Coast Guard's fleet of cutters and aircraft, for example, were so indispensable to the President's vision for a new department (even though the White House Homeland Security Adviser at the time, Tom Ridge, initially counseled against including it in reorganization efforts), it is still unclear why the White House still pressed to include within DHS all of the Coast Guard's marine environmental regulatory authority (recall that other agencies were split up, and in the case of Customs, for example, much of the revenue regulating authority remained at Treasury; and much of APHIS remains at Agriculture). And beyond the context of DHS, the present Administration has subtly pursued efforts to restrict public access to environmental information on security-related grounds,<sup>77</sup> to siphon budgetary resources away from environmental programs and to pour them into national security priorities.<sup>78</sup> In effect, even if one places new national security laws and policies in the most positive light, little public scrutiny has focused on thorny questions about where necessary trade-offs should be made to pay for new security policies, making it harder to judge the very goals of a homeland security establishment that has itself repeatedly proven to be deeply troubled.<sup>79</sup>

#### IV. Conclusion

No one should seriously contemplate a complete reversal of the statutory changes that created DHS. Such a move would prove politically treacherous. It would force Americans to incur more of the transition costs that have already depleted the nation's resources. And unquestionably, some changes in federal priorities should be expected following a major national security emergency. Nonetheless, a more defensible balance between critical regulatory missions and traditional security functions is likely to depend on the use of complementary

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<sup>76</sup> See *infra* note 72. See also STEPHEN FLYNN, *AMERICA THE VULNERABLE* (2005).

<sup>77</sup> See Sidney A. Shapiro & Rena Steinzor, *The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, 69 *Law & Contemp. Prob.* 99, 124 (2006) (describing changes in the public availability of offsite consequence analyses describing potential environmental consequences of chemical leaks, and changes in FOIA-related policies further restricting access to the availability of environmental information).

<sup>78</sup> See Steven Dennis, *Bush Boosts Request for War Funding, Proposes Domestic Cuts*, C.Q. TODAY, Mar. 10, 2007 (discussing a recent Bush request for national security funding that proposed to cut from "environmental programs"). For an analysis of how "[h]ealth rules, environmental regulations, energy initiatives, worker-safety standards and product-safety disclosure policies have been modified in ways that often please business and industry leaders," see Joel Brinkley, *The Bush Record -- First in a Series: Domestic Policy*, N.Y. TIMES, Aug. 14, 2004, at A1.

<sup>79</sup> See Cohen et al., *supra* note 8, at 753 n. 279. See also Richard A. Clarke et al., *THE FORGOTTEN HOMELAND: A CENTURY FOUNDATION TASK FORCE REPORT* (2006). A related question concerns the appropriate scope of the underlying concept of homeland security. The question was initially avoided by the Administration's narrow focus on counter-terrorism. It emerged again in the aftermath of the Katrina disaster, when some observers questioned why natural disasters were not firmly acknowledged to represent homeland security threats. For a discussion of the legal and political implications associated with different definitions of security, see Cuéllar, *Securing the Bureaucracy*, *supra* note 39.

techniques of institutional design and oversight. For example, several shorter-term changes could make a contribution to a principled balance. Congress should direct DHS to create an environmental protection and safety policy office staffed primarily with career officials within the agency, to focus attention on the environmental missions within the Department. Although such an office does not guarantee that the Department will honor its regulatory responsibilities, its existence can create an internal constituency for monitoring environmental performance and provide concerned legislative staff a unified point of contact within the agency. The agency already has civil liberties, privacy and a counter-narcotics offices to play such a role in their respective domains.<sup>80</sup> In addition, enhanced regulatory review mechanisms – whether based in the DHS Inspector General’s Office or elsewhere – should better monitor gaps in agency regulatory activity. Monitoring should encompass failures to issue rules under statutes that require them, or to adequately enforce the mandates that protect our marine resources, coastal areas, and clean water. Without these measures, we are more likely to witness continued erosion of protections against over-fishing, toxic spills, and marine safety problems.

The American public will have achieved a great deal if it manages to stem the erosion of the Coast Guard’s capacity to deliver environmental and safety protection while simultaneously supporting a sensible homeland security policy. But despite its importance, the fate of the Coast Guard is just a piece of the larger puzzle. By scrutinizing the intersection of homeland security and domestic regulation, three larger lessons emerge. First, whatever else one says about the largest government reorganization in 50 years, one legacy of it has been to create a vast new regulatory entity. In fact, DHS is in part a massive environmental agency, with sprawling responsibilities for protecting our natural resources that now compete with higher-profile terrorism-related missions.

Second, notwithstanding frequent assumptions to the contrary, “security” policy cannot be entirely separated from the rest of the government’s work. In fact, “security” and domestic regulation have become inextricably intertwined. Homeland security – even narrowly defined to encompass threats from terrorism or international conflict – depends crucially on decisions of agencies such as the Nuclear Regulatory Commission,<sup>81</sup> or in rulemaking proceedings governing the security of chemical facilities. A single attack against one such facility could risk the lives and health of thousands.<sup>82</sup> Moreover, just as American security may ultimately depend on regulatory policy, so too does the quality of Americans’ health and safety protections depend on security policy. The story of the Coast Guard is part of a larger picture, where domestic regulatory policy is increasingly affected by budgetary, statutory, and bureaucratic developments involving homeland security. Indeed, the nation’s experience with Hurricane Katrina offers a cautionary note to anyone determined to exclude natural disasters, serious health emergencies, and infrastructure failures from the scope of discussions about national security.<sup>83</sup>

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<sup>80</sup> See Department of Homeland Security, Organizational Charts (Jan. 29, 2007), available at [http://www.dhs.gov/xlibrary/assets/DHS\\_OrgChart.pdf](http://www.dhs.gov/xlibrary/assets/DHS_OrgChart.pdf).

<sup>81</sup> See Keay Davidson, *Nuclear Officials Say Plants Strong Enough: Decision Angers Watchdog Groups*, S.F. CHRON., Jan. 30, 2007, at B2.

<sup>82</sup> See Richard A. Clarke et al., *supra* note 79, at 85-87.

<sup>83</sup> Cf. Cuéllar, *supra* note 39. For an argument explaining the importance of expanding the scope of “national security” to encompass major natural disasters and infrastructure failures, see Stephen J. Flynn, *THE EDGE OF DISASTER: REBUILDING A RESILIENT NATION* (2007).

Third, vigorous congressional oversight is necessary to ensure that crucial regulatory policies enacted by Congress do not run aground. Legislative oversight can bestow greater significance to the brief references in the HSA requiring protection of legacy mandates. Lawmakers can achieve these goals by calling hearings and pressuring for DHS to act on concerns raised by partner agencies with related environmental policy mandates, such as EPA, Interior, and Agriculture. Without such attention from lawmakers and civil society groups, regulatory priorities may become hopelessly mired amidst the recent policy changes, administrative modifications, and new organizational structures focused on national security. As those changes have taken root during the last half-decade, Americans have begun to grasp how the national security state poses difficult trade-offs with long-term consequences. The consequences are beginning to affect our environmental and regulatory policy, just as they have civil liberties. Americans cannot respond intelligently to these consequences if they are blind to them.