



DHS and Immigration: Taking Stock and Correcting Course

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Executive Summary

The dawn of new leadership in the White House and throughout the executive branch offers a singular opportunity to examine the policies and performance of an immigration system that is, by turns, the most generous in the world but also widely viewed as dysfunctional and unresponsive to the interests of society, the economy, and immigrants themselves.

Nearly six years ago, the structural underpinnings of the federal immigration bureaucracy were dismantled and reformed to meet the heightened security imperatives of the post-9/11 world. Now situated in a vast Department of Homeland Security (DHS) responsible for everything from port and aviation security to federal disaster response, the government's immigration functions have profoundly evolved — in some ways for the good, in some ways requiring improvement.

This report steps back to take stock and offer a clear-eyed assessment of the performance of the three immigration agencies within DHS — US Customs and Border Protection (CBP), US Immigration and Customs Enforcement (ICE), and US Citizenship and Immigration Services (USCIS) — and overall DHS immigration policy direction and coordination.

With an uncertain timetable for legislative solutions on immigration, an issue that is politically complex and sensitive even in the best of times, the report focuses entirely on demands and choices the new administration must confront and changes the executive branch could accomplish.

Regardless of whether Congress and the White House ultimately enact new immigration legislation, the DHS immigration agencies require policy and operational changes to improve their effectiveness and ability to implement existing laws. Strengthening the agencies now offers the opportunity to further improve national security, increase efficiency and fairness, and prepare them to implement new mandates that could add significantly to their already large workloads.

The philosophy that imbues this report and its recommendations can be simply stated:

- Immigration is in the national interest, and an effective legal immigration system is central to America's historical values, economic competitiveness, and immigrant integration.
- Smart, high-impact, mission-appropriate law enforcement to deter illegal immigration and to punish the "bad-faith" employers whose business model is built upon illegal immigration is equally necessary.

The report is informed by roundtable discussions with senior DHS officials, congressional staff, stakeholders, state and local law enforcement officials, advocates and policy experts; it also draws on extensive Migration Policy Institute research and analysis.

It offers 36 recommendations for improvements that the executive branch can accomplish as they do not require legislation. Among the recommendations, presented here by agency:

- CBP should conduct a full-scale review of border technology, including the role and effectiveness of physical and “virtual” fencing, and other barriers. Pending the outcome of the review, new fencing projects and contracts should not be pursued.
- CBP should systematically analyze the biometric and border apprehension data it collects in order to understand crossing trends, smuggling patterns, and other criminal behavior. The report calls for all the DHS immigration agencies to improve the quality and transparency of their performance data and metrics.
- Consistent with its homeland security mission, ICE should focus its operations on the criminal enterprises that underlie large-scale illegal migration. Its investigations should be prioritized to target worksites that terrorists may attempt to infiltrate and employers who intentionally hire unauthorized workers in order to depress wages, undermine working conditions, and gain an unfair competitive advantage.
- ICE should establish and implement guidelines that prioritize its investigative targets, as well as whom it arrests, places in removal proceedings, and detains. Such guidelines should set criteria for conducting worksite enforcement actions and should direct all of ICE’s enforcement programs to achieve its statutory mission.
- ICE’s principal worksite enforcement goals should be fostering the use of a viable mandatory employment verification system, ensuring compliance with that system, and punishing employers whose business models depend on the employment and exploitation of unauthorized workers.
- ICE should routinely refer for *criminal* prosecution those who commit egregious or repeated violations of immigration law, or who commit unrelated criminal offenses. ICE should not overuse criminal charges in routine immigration-status violation circumstances.
- As part of its Criminal Alien Program and 287(g) agreements with state and local police and sheriff’s offices, ICE should pursue plans to provide federal, state, and local law enforcement with expanded access to its databases during the booking process; expand screening of all noncitizens serving criminal sentences; and place noncitizen criminals into removal proceedings before they complete their sentences (obtaining travel documents for those ordered removed).
- Supervised release programs run by ICE should be expanded for discretionary detainees who do not threaten national security or public safety, and who would not represent a flight risk while under supervision. ICE’s enhanced electronic monitoring program should be extended to carefully screened mandatory detainees who do not represent a national-security, public-safety, or flight risk if the agency determines the program meets necessary legal standards of civil detention.
- The Social Security Administration’s (SSA) “no-match” program, whose purpose is to credit earnings to those who paid into the system, should not be used by DHS as an immigration enforcement tool.
- Mandatory employer verification must be at the center of legislation to combat illegal immigration. Until such legislation is enacted, the administration should support reauthorization of the E-Verify employment verification system and expand its use as a voluntary program, allowing for its steady improvement in moving to scale as a mandatory program. Attention should now be focused on continued improvement in the accuracy rates of the DHS and SSA databases, development of a secure system of identification, and improved rates of employer compliance with program rules.

Also, the administration should analyze whether or not E-Verify ultimately offers the best platform for mandatory verification.

- Funding for USCIS should be “right-sized” and adjudication procedures should be streamlined so that the agency can break the recurring cycle of backlogs that impedes its ability to function as a true immigration services agency. The agency’s funding model must be redesigned so that user fees support legitimate application processing costs, with additional revenue sources to provide for critical infrastructure investments.
- To encourage legal immigration for all who are eligible for benefits under current laws, USCIS should adjudicate in the United States, not at consulates abroad, “extreme hardship” waivers for persons approved for family-based visas.
- Visa and immigration processes have been substantially strengthened since 9/11. DHS should undertake a rigorous review of all post-9/11 security procedures with the goal of identifying gaps that must still be addressed and streamlining processes to eliminate redundancies.
- DHS should strengthen its immigration policy coordination role by appointing a Senior Assistant to the Secretary and Deputy Secretary whose sole duty is to oversee all aspects of DHS immigration policy implementation and coordination. The individual should be empowered to act with the authority, as appropriate, of the Secretary and Deputy to ensure clear policy direction and coherence in DHS’s immigration functions.
- DHS should take the lead in developing a comprehensive immigration enforcement vision and strategic plan that involves all key stakeholders within the administration and beyond.

I. Introduction

As the Obama administration assumes office, new leadership is beginning to take responsibility for still-young immigration agencies born of a post-September 11 organizational and policy paradigm, the Department of Homeland Security (DHS). Incoming leaders are the first generation to have been out of government during the September 11 terrorist attacks, and they will serve at a time when immigration — though it fell from the agenda during the presidential campaign — is a pivotal issue in the life and future of the nation.

There is widespread agreement that the nation's immigration laws and system are badly broken. However, the legislative measures that would be required to fix them are sweeping and controversial. So the timetable for enacting reforms is uncertain.

This report recognizes the need for legislation that takes a comprehensive approach to immigration reform of the kind proposed by the Independent Task Force on Immigration and America's Future.¹ Nonetheless, at the outset, the new administration will be required to implement current laws and manage agencies and programs that have frequently been the targets of fierce criticism, often from constituencies and stakeholders closely aligned with the incoming leadership.

In assuming its immigration duties, the Obama administration faces a host of organizational demands and choices. This report examines a set of key issues that provide opportunities for new leaders to improve the effectiveness and implementation of current laws, and strengthen the agencies that will implement new mandates when they come. Such steps should also build confidence in the government's ability to take on new mandates, an important ingredient in enacting immigration reforms, particularly in an era when the public has become increasingly skeptical about the federal government's ability to deliver on its immigration responsibilities.

The report draws in part on four roundtable discussions that focused on each of the principal DHS immigration agencies and on DHS immigration policymaking. Roundtable participants included key DHS officials, stakeholders, advocates, congressional staff, local law enforcement officials, and policy experts (see Appendix III for the full list of participants). The report and its recommendations also reflect MPI research and analysis carried out in conjunction with the roundtables.

¹ The Independent Task Force on Immigration and America's Future was convened by the Migration Policy Institute and led by former US Senator Spencer Abraham (R-MI) and former Congressman Lee Hamilton (D-IN). The Task Force undertook a careful analysis of the economic, social, and demographic factors driving today's large-scale immigration. Concluding that immigration is essential to US national interests and will become even more so in the years ahead, the Task Force recommended that the United States fundamentally rethink its policies and overhaul an outdated system to better reflect current realities. See Doris Meissner, Deborah W. Meyers, Demetrios G. Papademetriou, and Michael Fix, *Immigration and America's Future: A New Chapter* (Washington, DC: Migration Policy Institute, 2006).

Finally, the report is informed by the following propositions:

- Both the oldest and newest story of the American experience, immigration is essential to advancing vital American interests in the 21st century.
- To harness the advantages of immigration, it is necessary to “close the back door,” so the front door can stay open.² Thus, immigration enforcement is an indispensable ingredient in a healthy immigration policy and system.
- Smart enforcement should strive to prevent illegal immigration and facilitate legal immigration and immigrant integration. Such policies and practices call for control with compassion and are difficult calibrations to achieve, but they must drive the thinking and performance of leaders and immigration officials, and they are what this report attempts to outline.
- The immigration debate in recent years has been viewed almost entirely through the prism of illegal immigration and the presence in the United States of 11 million to 12 million people without legal status. However the issue of illegal immigration is resolved by Congress and the administration, DHS’s immigration agencies have wide-ranging missions — encompassing both legal and illegal immigration — that should be more effectively mobilized to implement current laws and to provide leadership that educates lawmakers and the public about their programs and the kinds of new laws needed to make an effective immigration system.
- The men and women of the DHS immigration agencies perform difficult, complex, and sometimes dangerous work that involves often-contradictory laws and procedures. This report is not a criticism of their efforts or commitment. Instead, the report is a call — almost six years into the life of a vitally important young department with new hands at the tiller — to take stock and make course corrections.
- Substantial levels of new resources have flowed into the immigration system since 9/11. The course corrections proposed in this report are grounded in evidence and experience of how those resources are being used and are built on values of fairness, humane treatment, and accountability for public treasure and trust.

In November 2002, President Bush signed into law the Homeland Security Act of 2002 (HSA),³ which created DHS and led to the largest government restructuring since World War II. Created in response to the terrorist attacks of September 11, 2001, DHS was tasked with an urgent mission that extends well beyond the individual, traditional missions of the 22 federal entities that it assumed.⁴

² Select Commission on Immigration and Refugee Policy (known as the Hesburgh Commission for its Chairman, Father Theodore Hesburgh), Final Report to Congress and the White House in 1981: “The emphasis in the Commission’s recommendations, which are themselves complex, can be summed up quite simply: We recommend closing the back door to undocumented/illegal migration, opening the front door a little more to accommodate legal migration in the interests of this country, defining our immigration goals clearly and providing a structure to implement them effectively, and setting forth procedures which will lead to fair and efficient adjudication and administration of US immigration laws” (page 3).

³ Public Law No. 107-296, 116 Stat. 2135 (November 25, 2002).

⁴ DHS assumed, among other entities, the US Immigration and Naturalization Service, the US Customs Service, the US Coast Guard, and the US Federal Protective Service.

As set forth by law, DHS's mission is to:

- “prevent terrorist attacks within the United States”;
- “reduce the vulnerability of the United States to terrorism”;
- “minimize the damage, and assist in the recovery, from terrorist attacks” in the United States;
- carry out all of the functions of the entities that it assumed, including “acting as a focal point regarding natural and manmade crises and emergency planning”;
- ensure that the non-security functions of the entities it inherited are not diminished;
- ensure that the nation’s homeland security activities do not threaten or undermine its economic security;
- coordinate efforts to sever connections between “drug trafficking and terrorism” and otherwise contribute to drug interdiction efforts.⁵

In March 2003, DHS assumed the responsibilities of the former US Immigration and Naturalization Service (INS) and the US Customs Service (USCS), among other agencies. The immigration and border enforcement functions of these agencies eventually were restructured into three separate agencies within DHS, each charged with particular immigration functions:

- US Customs and Border Protection (CBP) executes border enforcement at and between legal ports of entry.
- US Immigration and Customs Enforcement (ICE) is responsible for interior enforcement functions, including investigations and the detention and removal of unauthorized aliens.
- US Citizenship and Immigration Services (USCIS) administers legal immigration benefits — both nonimmigrant and immigrant — and adjudicates applications for admission to the United States as well as changes in legal status.⁶

INS had for decades struggled to effectively carry out its mandates and was seen as a troubled, chronically underresourced, and backward agency during both Democratic and Republican administrations. For most of its history until 1941, INS was part of the Department of Labor, reflecting the relationship between immigration and workforce issues; it became part of the Department of Justice in response to World War II-era security concerns that the foreign born represented special vulnerabilities to the nation’s well-being.

It is perhaps not surprising, then, that the next fundamental organizational change for the nation’s immigration functions would flow from a new national security crisis, this time the September 11 attacks, which established the imperative to strengthen what is now called homeland security. Although it took 9/11 for Congress to restructure INS, there had long been debate and periodic proposals to reorganize the agency by separating its enforcement

⁵ HSA, §§101(b)(1)(A)-(G).

⁶ The Departments of State, Justice, Labor, and Health and Human Services all also have discrete immigration responsibilities, but DHS – through the work of its three principal immigration agencies – has the lead responsibility for implementing immigration policy.

and immigration-services missions. The goal was a structure that would lead to improved performance of the nation's immigration system.

This report examines each of the core new immigration agencies in light of DHS's overarching mission and the specific missions, roles, and responsibilities of its constituent agencies. The report also examines the sum of the parts, i.e., how overall immigration policy development and coordination take place and could be improved. The report is not a comprehensive inventory, but rather a distillation of key issues that highlight the distinct challenges each agency faces.

The report does not enter the contentious debate over the merits of creating DHS. It assumes that broad structural changes to DHS would be counterproductive, disruptive, and politically unrealistic. Instead, the report recommends shifts in policy and operational focus that do not require legislation and that will allow DHS to meet its mission more effectively, and — by improving the performance of the immigration system — take better account of the growing urgency that immigration and immigrant integration represent for the nation, both in the domestic and foreign policy/national security realms.

II. US Customs and Border Protection

Overview

The mission of US Customs and Border Protection (CBP) is to secure the borders of the United States, prevent terrorists and terrorist weapons from entering the country, and facilitate legal trade and travel. CBP combined the cargo and people inspections, and border and ports-of-entry responsibilities of the former US Customs Service (USCS); the ports-of-entry inspections and US Border Patrol functions from INS; and the agricultural imports and entry inspections of the US Department of Agriculture's Animal and Plant Health Inspection Service.

For more than 30 years, there had been debate regarding how best to organize and manage the nation's border-control functions and agencies. Numerous prior efforts to consolidate them within one cabinet agency under a single chain of command failed because of interagency rivalries and congressional stalemates over issues of jurisdiction and oversight. The debate ended abruptly with the events of 9/11.

CBP's core purpose is to establish an integrated approach to border security as an indispensable element of US national security. The imperative to protect the nation's borders involves a broad array of functions and geography that include nearly 7,500 miles of land borders with Mexico and Canada, 12,380 miles of US coastline, seaports, international airports, and visa-issuing activities at consulates abroad.⁷

The most fully developed articulation of an integrated approach to the immigration aspects of border protection has been DHS's Secure Border Initiative (SBI), which Homeland Security Secretary Michael Chertoff issued in November 2005. SBI is a multiyear plan to secure the nation's borders and reduce illegal immigration. It places within a single policy framework a set of programs and initiatives that constitute the core immigration enforcement responsibilities of both CBP and ICE.

The overall goals for the initiative include securing and patrolling US borders, expanding programs for detention and removal of deportable aliens, upgrading technology, and increasing worksite enforcement to target employment of unauthorized workers.⁸ The objectives within SBI that call for securing and patrolling the border by transforming border technology and infrastructure are called the SBI Network (*SBINet*). The initiative's most visible manifestation is the "virtual" fence being tested along the US-Mexico border; this fence seeks to expand the Border Patrol's ability to thwart illegal entries through a technological combination of motion-detection sensors, remotely operated camera surveillance, ground-based radar, and unmanned aerial vehicles.⁹

⁷ Central Intelligence Agency, "The World Factbook," <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html#Geo>.

⁸ DHS, "Secure Border Initiative" (fact sheet, November 2, 2005), http://www.dhs.gov/xnews/releases/press_release_0794.shtm

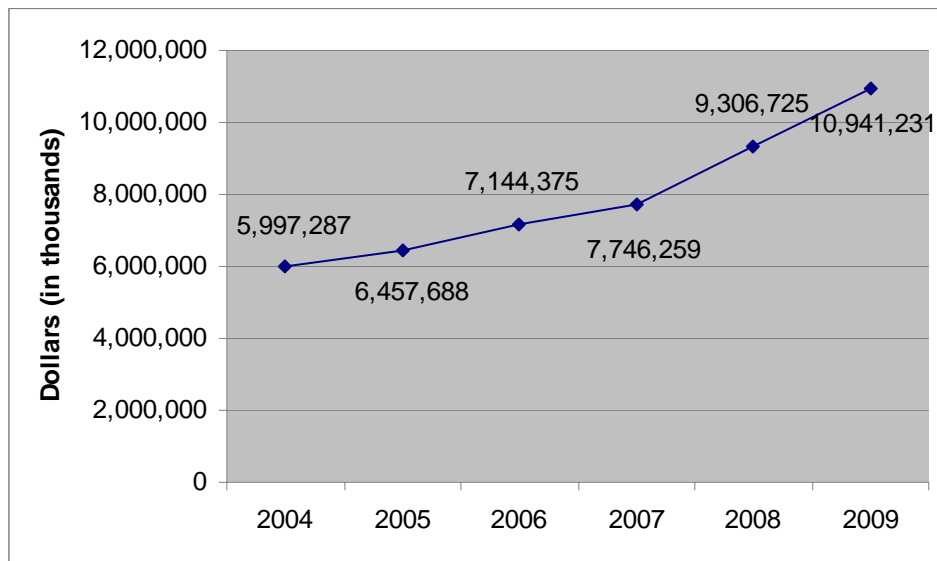
⁹ CBP, "SBINet: Securing US Borders" (fact sheet, September 2006), <http://www.dhs.gov/xlibrary/assets/sbinetfactsheet.pdf>.

Key Issues and Recommendations

A. Growth and Resources

CBP has the largest share of resources of the three principal immigration agencies in DHS. The CBP budget grew from \$6 billion to \$10.1 billion from fiscal year (FY) 2004 to FY 2009, an increase of 82 percent (see Figure 1). The growth has been primarily directed at SBI and SBI*net* with its goals of doubling the size of the Border Patrol and providing sizeable infusions of technology and infrastructure, including both physical and “virtual” fencing, to strengthen border enforcement.

Figure 1. Customs and Border Protection Budget Growth, FY 2004 to 2009



Source: Department of Homeland Security, *Budget in Brief Reports*, FY 2004-2009.

CBP resources were further enhanced through emergency supplemental funding for Operation Jump Start, which provided 6,000 National Guard personnel for Southwest border enforcement to assist the Border Patrol with certain non-law-enforcement duties. Jump Start was the Bush administration’s response to the declaration of a border emergency by the governor of Arizona; governors in New Mexico, California, and Texas soon followed. The National Guard helped with logistical and administrative support and set up infrastructure and surveillance systems. The deployment began in May 2006 and continued for two years, providing a significant supplement to existing staffing as CBP accelerated its hiring and training of additional Border Patrol agents.

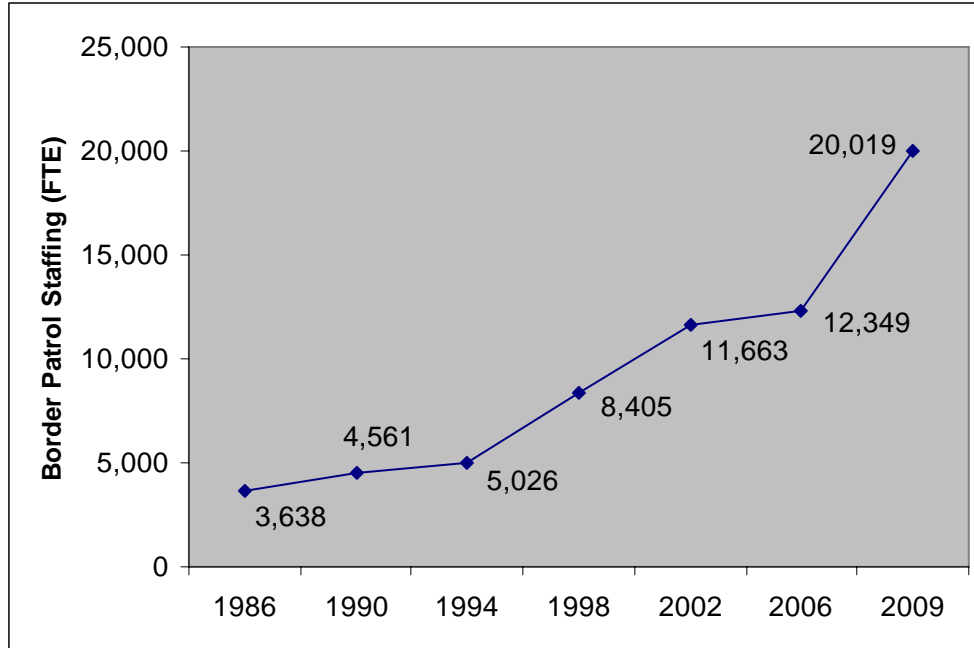
The FY 2009 budget represents a more modest level of growth from prior years. Still, the one-year increase of \$1.63 billion, or 17.6 percent, continues to be substantial.¹⁰ It includes \$442.4 million for the Border Patrol and \$775 million for continued expansion of SBI*net*’s technology and infrastructure, which now account for approximately \$1.2 billion of CBP’s total budget.

¹⁰ DHS, *Budget in Brief Reports*, FY 2004-2009, <http://www.dhs.gov/xabout/budget/>.

Staffing

Between FY 2005 and FY 2009, the CBP workforce grew 35 percent from 40,616 to 54,868. Much of this growth is in Border Patrol agents and support positions. The Border Patrol now numbers more than 18,000 agents, a doubling since January 2001 that delivered on the Bush administration's promise. The FY 2009 budget adds another 2,000 agents, continuing a trend of sustained and significant land-border enforcement staffing increases that date back to FY 1995 (see Figure 2).

Figure 2. Border Patrol Staffing, FY 1986, 1990, 1994, 1998, 2002, 2006, and projected FY 2009



Notes: Full-time equivalent employees (FTEs) for 1991 to 2002 include a proportional amount of FTEs assigned to construction, data, and communications activities that supported Border Patrol efforts. FTEs for 1986 to 1990 do not include these additional staff. Data after 2002 reflect the transition to DHS and the establishment of CBP as the agency responsible for the Border Patrol. *Sources:* Migration Policy Institute, *Immigration and America's Future*, 55; and information provided to MPI by CBP, "Resource Overview," December 1, 2008.

SBI_{net}

The SBI_{net} program is intended to provide the technology and infrastructure needed for the Border Patrol to monitor the borders between ports of entry. SBI_{net} replaces two previous efforts: the Integrated Surveillance Intelligence System (ISIS) and the America's Shield Initiative (ASI).¹¹

¹¹ In 1998, INS established the ISIS program which was intended to provide continuous monitoring of the borders in all weather conditions. In June 2003, CBP began developing ASI to integrate surveillance technology, communications, and visualization tools while maintaining and modernizing ISIS. ISIS cost \$429 million to build between 1998 and 2004. Due to contracting errors and lack of government oversight of the contract, it was considered ineffective and was incompletely installed. In 2005, ISIS was formally subsumed under ASI, which was an integrated, national web of border security with centralized command. ASI was created to strengthen US ability to detect, intercept, and secure the borders against unauthorized immigrants, potential terrorists, weapons of mass destruction, illegal drugs, and other contraband. ASI was

SBI*net* envisions a seamless interconnectivity among law enforcement personnel, surveillance and other advanced detection technologies, and physical barriers. SBI*net* is intended to

- detect an entry when it occurs;
- identify what the entry is;
- classify its level of threat (who the entrant is, what the entrant is doing, how many, etc.);
- respond effectively and efficiently to the entry, bringing the situation to an appropriate law enforcement resolution.¹²

The contract

In September 2006, Boeing won a \$30 billion contract to provide a concept of operations for border security for the 7,458 miles of border between the United States and its neighbor countries, Mexico and Canada. Since then, CBP has paid \$933 million to Boeing for the design and testing of its concept of a virtual fence that includes cameras, radars, sensors, and communications equipment strung on towers.¹³

Initial testing during the summer of 2007 demonstrated technical deficiencies, some so problematic that DHS delayed acceptance of the prototype. Only after Boeing corrected some of the deficiencies did CBP conditionally accept it in December 2007. Boeing completed the final demonstration and the government agreed to acceptance of a 28-mile prototype in February 2008, but permanent installation in Arizona was delayed in summer 2008 due to the failure to obtain required permits. Construction was set to resume in January 2009.

The design and performance of the contract has borne out concerns that were expressed by the DHS Office of the Inspector General, US Government Accountability Office (GAO), and others that warned that CBP and DHS undertook the project without proper planning, guidance, and oversight. DHS requested that the contractor create the concept rather than doing so itself. The DHS approach was partially the result of rushing to develop and award the contract to alleviate post-9/11 pressures from Congress and others.¹⁴ These failures have resulted in wasted resources, delays, and poor coordination.

The Fence

In addition to the virtual fence, the Secure Border Initiative includes physical barriers, i.e., fencing, to deter illegal pedestrian and vehicle crossings.¹⁵

also seen as ineffective and wasteful. To try and avoid similar problems with SBI*net*, DHS decided to have a single private contractor completely manage it.

¹² CBP, "SBI*net*: Securing US Borders" (fact sheet, September 2006), <http://www.dhs.gov/xlibrary/assets/sbinetfactsheet.pdf>.

¹³ Alice Lipowicz, "DHS needs to re-evaluate SBI*net* plan," *Washington Technology*, September 11, 2008, <http://washingtontechnology.com/articles/2008/09/11/dhs-needs-to-reevaluate-sbinet-plan.aspx>.

¹⁴ DHS, Office of the Inspector General, "Major Management Challenges Facing the Department of Homeland Security" (Washington, DC: Department of Homeland Security Office of the Inspector General, 2008), http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_08-11_Jan08.pdf.

¹⁵ Statement for the record of Michael Chertoff, US Secretary of Homeland Security, before the House Committee on Homeland Security, *Secretary Chertoff Cites Border Security Progress*, 110th Cong., 2d sess., July 17, 2008, http://cbp.gov/xp/cgov/newsroom/congressional_test/chertoff_testimony.xml.

The issue of the fence, physical and virtual, has sparked widespread controversy, especially in border communities, among environmental organizations, and in the US-Mexico relationship. To a great extent, that is because Congress took it up as a stand-alone answer to border security and legislated in haste. In an effort to show some action on immigration after a sweeping immigration enforcement bill did not get through Congress in 2006, Congress passed the Secure Fence Act, which mandated that 670 miles of reinforced fencing be completed on the Southwest border by the end of calendar 2008.

DHS was unable to meet Congress's timetable despite redefining the mandate to include vehicle barriers and despite suspending environmental regulations and laws in an effort to speed up construction. With an estimated 54 percent of the fence targeted for construction on private property, its completion was slowed by litigation, other controversies, and community objections to the idea and location. Of the planned 670 miles, 350 miles of fencing had been completed by October 31, 2008, including 135 miles of "legacy" (pre-2005) fencing and 215 miles constructed under the SBI initiative.¹⁶ As of December 2008, DHS reported that a total of 526 miles of fencing had been completed.¹⁷ DHS had earlier reported that it hoped to complete 90 to 95 percent of the planned fencing by January 2009.¹⁸

Recommendation:

CBP should conduct a full-scale review of its border technology program, including the role and effectiveness of fencing and other physical barriers. The review should evaluate SBI*net* and provide a multiyear vision and plan for the uses and deployment of technology of all kinds in both southern and northern border enforcement. Pending the outcome of the review, new fencing projects and contracts should not be pursued.

Technology and Border Patrol staffing are both essential elements of effective border enforcement. The Border Patrol has grown dramatically in recent years and is poised to reach the goal of 20,000 agents set for it by the last administration and by others since the 1990s when its growth trajectory began in earnest. By all measures, it has become markedly more difficult to cross the border illegally.¹⁹

At the same time, successive, ambitious technology initiatives have been oversold, rushed because of political pressures, mishandled by contractors, or poorly managed. As a result, hundreds of millions of dollars have been wasted.

¹⁶ US Government Accountability Office, *Secure Border Initiative Fence Construction Costs*, GAO-09-244R (Washington, DC: Government Accountability Office, January 29, 2009), 3-4, <http://www.gao.gov/new.items/d09244r.pdf>.

¹⁷ CBP, "Border Fence Project Surpasses 500-Mile Mark" (press release, December 19, 2008), http://www.cbp.gov/xp/cgov/newsroom/news_releases/december_2008/12192008.xml.

¹⁸ Andrew Quinn, "US to miss deadline on Mexico border fence," *Reuters*, October 23, 2008.

¹⁹ As one metric of this increased difficulty, the average fee paid to smugglers (*coyotes*) increased from \$978 in 1995 to \$2,124 in 2006; see Olivia García, Jezmín Fuentes, Jonathan Andres Hicken, and Jessica Sisco, "Illegal Migration and US Immigration Policy: All Eyes on the Border," in *Four Generations of Norteños: New Research from the Cradle of Mexican Migration*, eds. Wayne A. Cornelius, David Fitzgerald, and Scott Borger (Boulder: Lynne Rienner and University of California, San Diego Center for Comparative Immigration Studies, 2007).

The challenge ahead is to stabilize this personnel growth and leverage personnel resources with technology and other resources that work and can serve as a cutting-edge, but durable, force-multiplier. Fencing is a legitimate element of an integrated deterrence plan. It is effective in populated and urban areas and has worked well to reduce chaotic and dangerous conditions along limited stretches of the border that were traditionally high-volume crossing areas. But it should be used sparingly, in combination with other techniques, and only after extensive community consultation with those who live in the area and are affected by it.

Fencing is also exceptionally expensive. In implementing the Secure Fence Act, the \$1.85 billion cost of the first half of the project represented an average cost per mile of almost double what program officials had estimated.²⁰ These expenses do not include the cost of settling disputes with aggrieved landowners or ongoing maintenance. Thus, as a stand-alone answer to border enforcement, fencing is unnecessarily costly, offensive to many in the affected communities and beyond, and ineffective.

CBP leadership must do a better job of overseeing border technology planning and implementation. Too much deference has been given to contractors in *SBI_{net}* and other border technology efforts. The Border Patrol has deep institutional experience and expertise that needs to be mobilized to guide technology and infrastructure development planning and programs.

B. Apprehensions and Deterrence

The Border Patrol has long relied on apprehensions data as its primary measure of effectiveness, suggesting that falling apprehension numbers prove increased effectiveness. However, apprehensions data are an inexact metric because they measure events, not individuals. Thus, apprehension numbers are always greater than the number of unique individuals attempting illegal entry, since some will have been arrested more than once.

For two years now, the number of apprehensions has decreased significantly, which the Bush administration heralded as a sign that the increased border enforcement resources were successful. Apprehensions in FY 2007 dropped 20 percent at the southern border compared to FY 2006. Decreases continued in FY 2008 at 17 percent overall, with certain sectors experiencing up to 27 percent fewer apprehensions.²¹

As apprehensions have fallen, immigration-related prosecutions have risen significantly due to a number of new policy initiatives. The new policies are as follows:

²⁰ Testimony of Richard Stana, "Secure Border Initiative: Observations on Deployment Challenges," GAO-08-114IT, September 10, 2008, 4, <http://homeland.house.gov/SiteDocuments/20080910101006-27579.pdf>. As of August 2008, DHS had completed 187 miles of the physical fence and 154 of vehicle barriers at an average cost of \$7.5 million per mile and \$2.8 million per mile, respectively. Program officials had estimated costs at \$4 million per mile for physical fencing and \$2 million per mile for barriers six months earlier. In January 2009, GAO reported average cost of SBI fencing as \$3.9 million per mile of pedestrian fencing, \$2.0 million per mile of secondary fencing, and \$1.0 million per mile of vehicle fencing; see US GAO, "Secure Border Initiative Fence Construction Costs," GAO-09-244R, January 29, 2009, 3-4, <http://www.gao.gov/new.items/d09244r.pdf>.

²¹ CBP, "CBP Border Patrol Announces Fiscal Year 2008 Achievements El Centro Sector" (news release, October 15, 2008), http://www.cbp.gov/xp/cgov/newsroom/news_releases/2008_fiscal/10152008_2.xml.

- ***Expedited removal.*** Expedited removal has been used at ports of entry since 1997 but was expanded to include enforcement between ports of entry in 2004. The expanded procedure applies to those apprehended within 100 miles of the Mexican or Canadian borders within their first 14 days in the United States. Expedited removal proceedings result in the unauthorized migrant being detained and removed as soon possible, usually without the opportunity of a hearing before an immigration judge.²²
- ***Operation Streamline.*** Operation Streamline began as a pilot program in December 2005 in Del Rio, Texas, and has now been expanded to other border areas in Texas and Arizona. The program calls for filing low-level criminal charges — such as for entering the United States without inspection — against everyone who is apprehended crossing the border illegally. Prior to Operation Streamline most of these aliens would have been able to opt for voluntary departure from the United States or face civil charges before an immigration judge.
- ***End of “catch and release.”*** On August 23, 2006, Secretary Chertoff announced the end of the “catch and release” policy at the US-Mexican border as part of SBI. Previously, most illegal crossers apprehended from countries other than Mexico were released into the United States on their own recognizance pending a removal hearing. Most of these unauthorized immigrants did not return for their hearings. In 2005, DHS detained only 34 percent of non-Mexican unauthorized immigrants. Since the end of “catch and release,” approximately 99 percent are being detained.

These policy changes have resulted in dramatic increases in the numbers of immigration-related criminal cases in US courts, draining federal resources and the resources of the jails in these border areas. Prosecutorial and court resources have not kept pace.

In FY 2008, immigration-related prosecutions totaled 79,400, nearly a five-fold increase since 2000.²³ Immigration prosecutions now constitute the largest number of federal prosecutions in the United States — exceeding prosecutions made by the FBI and Internal Revenue Service (IRS), for example.²⁴

Some argue that the decline in apprehensions demonstrates that such stepped-up enforcement is slowing illegal immigration.²⁵ There is ample evidence that strengthened border enforcement and other new policy initiatives have made it increasingly difficult and

²² CBP, “DHS Announced Expanded Border Control Plans” (press release, August 10, 2004), http://www.dhs.gov/xnews/releases/press_release_0479.shtm.

²³ MPI analysis based on data from Transactional Records Access Clearinghouse Reports, “Bush Administration’s Immigration Prosecutions Soar, Total of All Federal Filings Reach New High,” TRAC, (2009), <http://trac.syr.edu/tracreports/crim/201/>; Transactional Records Access Clearinghouse Reports, “Federal Criminal Prosecutions Filed by Selected Program Areas,” TRAC, 2007, http://trac.syr.edu/tracreports/crim/184/include/table_1.html.

²⁴ Ibid.

²⁵ DHS attributes the decreasing number of apprehensions to successes in strengthening border security. Secretary Chertoff expressed this view in congressional testimony on July 18, 2008, http://www.cbp.gov/xp/cgov/newsroom/congressional_test/chertoff_testimony.xml. However, the Center for Immigration Studies and others see apprehensions as an imperfect metric that can be attributed to other factors such as the economy, http://www.cis.org/trends_and_enforcement.

dangerous — even life-threatening in some cases — to cross the Southwest border illegally.²⁶ From a record number in FY 2005, the number of deaths at the US-Mexican border during FY 2007 decreased 12 percent to 400 compared to the 453 deaths in FY 2006. The FY 2008 numbers showed a continued decrease of 3 percent compared to FY 2007.²⁷ The Border Patrol has worked diligently to increase its safety and rescue work. Still, such deaths continue to loom as a tragic byproduct of border enforcement.

The Jobs Magnet

As discussed above, apprehensions imperfectly measure the success of border enforcement. Inflows of migrants are dependent not only on changing enforcement policies and strategies, but also on the availability of jobs and growth in the US economy, along with economic conditions in migrant-sending countries.²⁸ More recently, a proliferation of state laws and practices that target unauthorized immigrants may be contributing to conditions that discourage cross-border migration.

Given the severe economic slowdown that began in 2007, it is predictable that fewer migrants would attempt to come to the United States,²⁹ thereby leading to decreased border apprehensions. The construction industry provides a dramatic example of the jobs engine as a critical factor driving migration. The Census Bureau has estimated that nearly 250,000 Hispanics lost jobs in the construction sector during 2007 and that most of those job losses were among Mexican immigrants.³⁰ Another recent analysis determined that 21 percent of construction workers are Mexican nationals, predominantly unauthorized.³¹

The complexities of conventional apprehension analyses are illustrated in Figures 3 and 4. In Figure 3, it is difficult to ascertain any clear relationship between increased border manpower and apprehensions.

²⁶ CBP, “CBP Border Patrol Apprehensions Down Along Southern Border” (news release, July 7, 2007), http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2007_news_releases/072007/07072007.xml

²⁷ CBP, “Securing America’s Borders, CBP 2008 Fiscal Year in Review,” and CBP, “Securing America’s Borders, CBP 2007 Fiscal Year in Review,” <http://www.cbp.gov/xp/cgov/about/accomplish/>

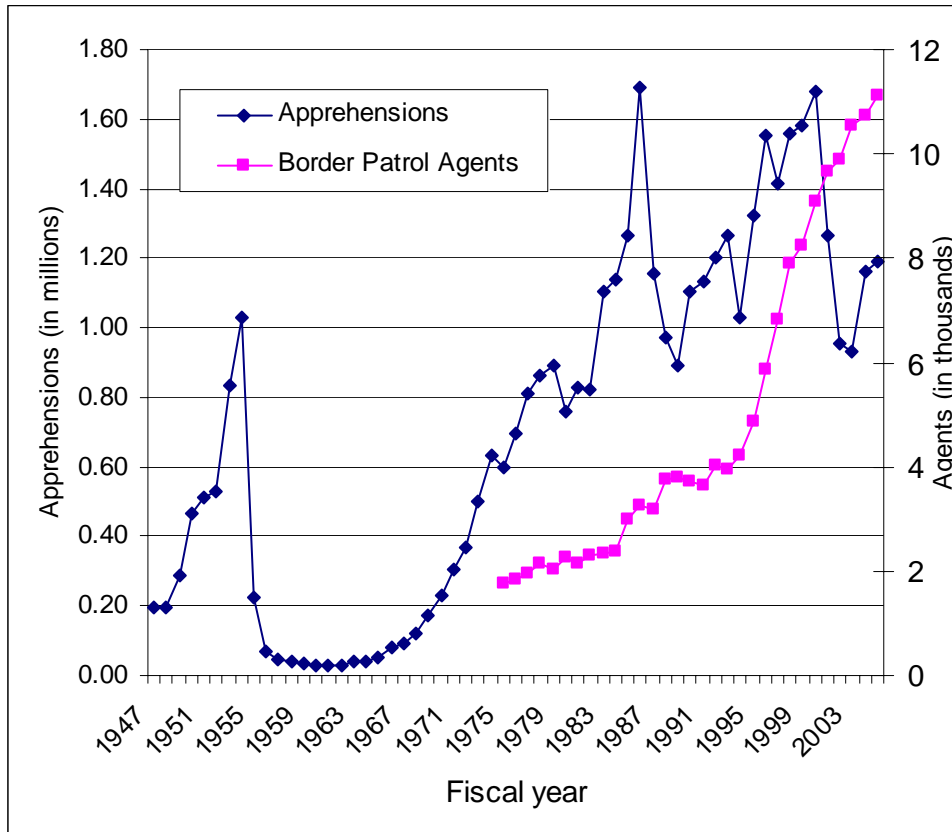
²⁸ Demetrios G. Papademetriou and Aaron Terrazas, *Immigrants and the Current Economic Crisis* (Washington, DC: Migration Policy Institute, 2009), http://www.migrationpolicy.org/pubs/lmi_recessionJan09.pdf

²⁹ Ibid.

³⁰ Rakesh Kochhar, *Latino Labor Report, 2008: Construction Reverses Job Growth for Latinos* (Washington, DC: Pew Hispanic Center, 2008), <http://pewhispanic.org/files/reports/88.pdf>,

³¹ US Census Bureau, American Community Survey 2007, <http://www.census.gov/acs/www/index.html>.

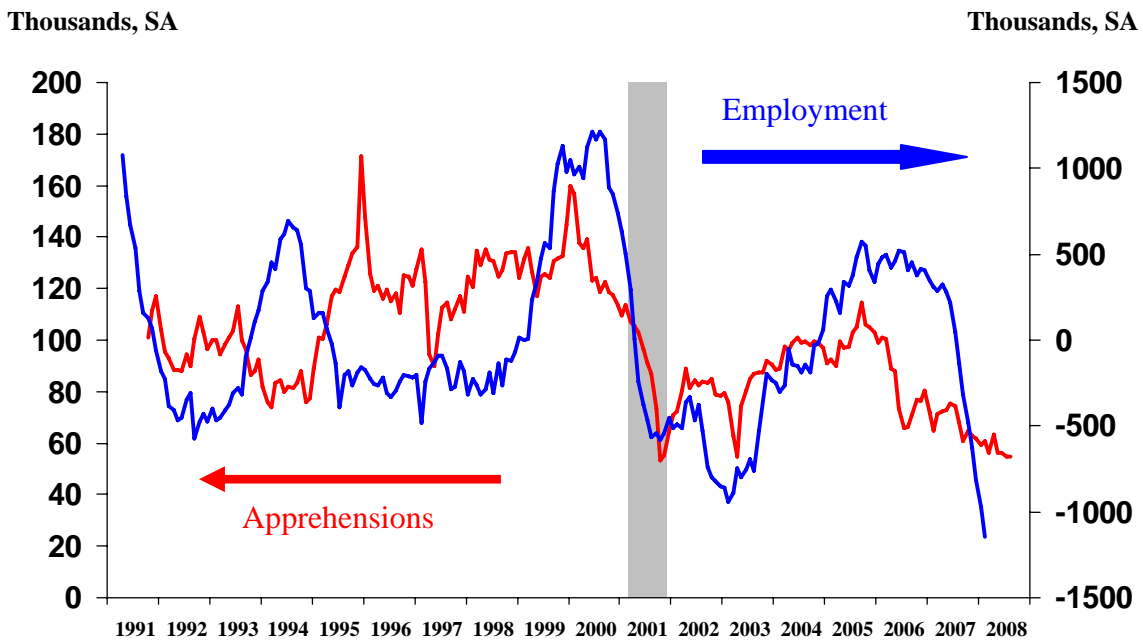
Figure 3. National Apprehensions Trends, 1945 to 2005



Source: Data from Transactional Records Access Clearing House, *Immigration Facts and Figures*, "TRAC Border Patrol Report on Staffing" and "TRAC Border Patrol Report on Apprehensions."

However Figure 4 shows how closely job fluctuations in the US economy seem to be mirrored in apprehensions. One economist has wryly observed that border apprehensions could serve as a leading indicator in assessing US economic growth.

Figure 4. Apprehensions a Function of Labor Demand, FY 1991 to 2008



Source: Bureau of Labor Statics and Department of Homeland Security data analyzed and provided to MPI by Pia Orrenius, Senior Economist, Federal Reserve Bank of Dallas.
Note: All data are monthly; data on employment represent deviations from long-run employment trends, plotted six months ahead.

These and other data raise the recurring question of the meaning and significance of apprehensions data as a metric on which to base assumptions regarding border enforcement effectiveness and resource decisions and allocations.

Recommendation:

Working with the DHS Office of Immigration Statistics, CBP must analyze the extensive biometric and other apprehensions data it collects to better understand trends in the numbers, which are based on a combination of arrests, attempts at unauthorized entry, shifts in crossing locations, recidivism, and other important characteristics of border crossing, including smuggling and other criminal behavior patterns.

The Border Patrol has for too long been satisfied with simplistic explanations of the meaning of apprehensions data. For more than a decade, it has collected biometric fingerprint information and related data from the people it apprehends. Use of that data would enable more sophisticated analysis that has valuable operational, intelligence, and policy uses.

For example, in interviews with would-be border crossers and returning unauthorized migrants, researchers have found that while most Mexicans in migrant-sending communities see crossing the border as difficult and dangerous, these attitudes have no statistically

significant effect on whether or not they planned to migrate illegally to the United States.³² More importantly, enhanced fencing and other border enforcement increases since 1994 have had no discernable effect overall on immigrants' ability to successfully cross the border: about 45 percent of migrants are apprehended at least once while attempting to cross, but about 97 percent are eventually able to enter the country on a given trip to the border. These numbers are unchanged since 1995. Overall, the average number of apprehensions per unauthorized immigrant has hovered between 0.3 and 1.3 since 1977.³³

CBP and DHS need to systematically evaluate the effectiveness of their enforcement strategies and develop their own understanding of what is happening in border enforcement. Apprehensions data should be regularly analyzed to inform both operational and policy thinking and decisions about border enforcement, factors that shape migration trends, and the effectiveness of different border strategies and technologies.

C. Ports of Entry

Consistent with the goal of integrated border enforcement that drove creation of DHS, CBP is responsible for border enforcement, both between and at ports of entry. CBP's mission to secure ports of entry (land, sea, and air) includes responsibility for both people and cargo entering and leaving the country. CBP describes its ports of entry mission as follows:

- identify people and goods approaching the port of entry;
- assess the risk level of the people and goods intending to cross through the ports of entry;
- inspect all people and goods according to their assessed level of risk;
- detect potential threats and inadmissible people and goods;
- enforce the law and take action against violators;
- record events at the ports of entry including crossings and findings;
- analyze outcomes at a micro and macro level to address emerging threats; and
- deter potential violators from crossing or shipping goods through the ports of entry.³⁴

The immigration functions at ports of entry require that CBP inspectors question, under oath, persons coming into the United States to determine their admissibility. Since 9/11,

³² Wayne A. Cornelius and Jessa M. Lewis, *Impacts of Border Enforcement on Mexican Migration: The View from Sending Communities* (Boulder: Lynne Rienner and UCSD Center for Comparative Immigration Studies, 2007); Wayne A. Cornelius and Idean Salehyan, "Does Border Enforcement Deter Unauthorized Immigration? The Case of Mexican Migration to the United States of America," *Regulation and Governance* 2007, no. 1: 139-153.

³³ Wayne A. Cornelius, "Reforming the Management of Migration Flows from Latin America to the United States" (Brookings Partnership for the Americas Commission Background Document BD-01, June 2008). As noted earlier, the average fee paid to smugglers increased during this time; see García et al., "Illegal Migration and US Immigration Policy."

³⁴ CBP, "Securing America's Borders at Ports of Entry" (Office of Field Operations Strategic Plan, FY 2007-2011), http://www.cbp.gov/linkhandler/cgov/border_security/port_activities/securing_ports/entry_points.ctt/entry_points.pdf.

CBP has implemented numerous improvements to strengthen security at ports of entry (see Appendix I). They include the Western Hemisphere Travel Initiative (WHTI), begun in January 2008, under which CBP inspectors no longer accept verbal declarations of citizenship and instead require all travelers to present specified documents to prove citizenship and identity.

The new requirements represented a dramatic change from past practices on the Mexican and Canadian land borders where millions of people — most of whom live and work in border areas — cross daily. The changes have also provoked concern and tensions in the US-Canadian relationship. The initial requirements called for all crossers to present passports, which many Canadian crossers do not possess. However, the United States has now agreed to issue a new document, known as a passport card, to meet the statutory requirements. CBP reports that the implemented changes have had a high rate of compliance, without increasing wait times at ports of entry or inconveniencing travelers.

The inspections mission is complex and has traditionally received proportionately less attention and resources than has the Border Patrol mission. These key elements of border security have experienced significantly different rates of growth, despite the fact that the 9/11 hijackers came to the United States through ports of entry, in most cases with legitimate visas. CBP receives annual appropriations of approximately \$3.6 billion for salaries and expenses related to border security inspections and trade facilitation at ports of entry; and another \$3.5 billion for border security and control between ports of entry. However, the port-of-entry funding includes the air, land, and sea environments and thus covers relatively little funding for border ports of entry.³⁵

Although resource enhancements for ports of entry have been more modest than those for the Border Patrol, major investments have been made in United States Visitor and Immigrant Status Indicator Technology (US-VISIT), a technology initiative that is not part of the CBP budget but that represents a long-needed and essential tool for inspectors in carrying out their key role in providing border security. Table 1 shows the enormous size of the inspections done at ports of entry, especially land ports of entry, and the need for greater focus on this inspections mission.

³⁵ CBP, Information for the Migration Policy Institute, “Resources Overview” (CBP, December 1, 2008).

Table 1. Land Inspections as Share of All Inspections, FY 1992 to 2008

Fiscal year	Total inspections-air, land, and sea	Total land inspections	Land inspections as a share of all inspections
1992	481,250,587	419,486,206	87.2%
1993	482,373,589	418,215,327	86.7%
1994	503,960,985	437,818,727	86.9%
1995	479,145,089	408,269,868	85.2%
1996	475,288,615	400,170,123	84.2%
1997	494,820,404	416,331,885	84.1%
1998	499,250,550	417,643,477	83.7%
1999	521,006,614	435,349,168	83.6%
2000	529,595,835	437,868,224	82.7%
2001	505,912,116	414,360,721	81.9%
2002	440,420,842	358,373,744	81.4%
2003	423,125,759	338,633,264	80.0%
2004	424,982,523	333,261,126	78.4%
2005	416,157,282	321,463,760	77.2%
2006	411,563,697	314,999,774	76.5%
2007	407,333,095	298,820,145	73.4%
2008	399,704,041	288,673,097	72.2%

Source: DHS Office of Immigration Statistics, "Total Inspections by Air, Land, and Sea: Fiscal Years 1992 to 2008," Data from PAS G-22.1 Fiscal Years 1992-2006; CBP OMR fiscal years 2007-2008.

US-VISIT

The United States Visitor and Immigrant Status Indicator Technology program was required by the Enhanced Border Security and Visa Entry Reform Act of May 2002. Its purpose is to strengthen national security by giving inspectors at ports of entry a reliable means of confirming the identity of noncitizens entering and exiting the United States. Many aspects of the program have been driven by legislative mandates, including standards for biometric identifiers and a requirement to use biometrics at entry and exit.

US-VISIT ranks among the most successful of the post-9/11 initiatives that the government has fielded to reduce national security vulnerabilities in the immigration process. The US-VISIT process begins overseas before individuals travel to the United States and tracks them through arrival in the country. Ultimately, it should also verify departure, through exit controls that are not yet operational. The heart of the process is an eligibility determination

that DHS and the State Department (DOS) make when issuing a visa that incorporates biometrics, allowing inspectors to verify it is the same person to whom the visa was issued.

Implementation of the new entry procedures began in January 2004. Eligibility determinations and tracking are done through biographical and biometric identifiers, which began as two-finger digital fingerprint scanning and photographs taken and stored in DHS databases. Fingerprints are checked against DHS and FBI databases to confirm identity and determine national security risk. DOS has now deployed ten-fingerprint capabilities at all US consulates overseas, and DHS had the capability at all US airports as of the end of 2008. US-VISIT biometric entry procedures are currently in place at 116 airports, 15 seaports, and in the secondary inspection areas of 154 land ports.

Exit Controls

While the new entry procedures have been successfully installed at airports, concerns regarding the efficiency and reach of US-VISIT at land borders continue. Most important, however, is the program's inability to meet the mandate of implementing an effective exit program to provide, among other things, the ability to monitor visa overstays, a major contributor to the size of the unauthorized population in the country.

US-VISIT has conducted a three-year exit pilot program at a number of airports, as a basis for its proposal for exit procedures at air ports. The pilot required visitors with a visa to check out at a kiosk or with a US-VISIT official at the departure gate. On April 24, 2008, DHS published a proposed rule for an exit procedure at all air and sea ports of exit from the United States. The proposal generated vigorous objections to placing the responsibility of carrying out exit procedures on the private sector and/or the Transportation Security Administration (TSA). The International Air Transport Association (IATA) has resisted the proposal, which would require airlines to collect biometric information, saying that the government is outsourcing its responsibility to an ill-equipped private sector. DHS has stated its intention to begin implementation in January 2009. However, even if an exit program is deployed in air and sea ports, biometric exit procedures at land ports of entry have still not been shown to be operationally feasible.

The US-VISIT program has continued to receive substantial support from Congress. Appropriations have averaged between \$328 million and \$362 million annually since FY 2003.³⁶ The FY 2009 budget reflected a \$90 million cut because CBP and DHS failed to launch two pilot programs prior to proceeding with the biometric airport exit plan that Congress had required.

US-VISIT was originally part of CBP. It is now a separate DHS program that reports to the Undersecretary for National Protection and Programs. The program's cost, priority, and wide-ranging impacts required that it have sufficient organizational stature to establish robust working relationships with other DHS agencies, as well as other cabinet departments, especially DOS, and foreign governments. It has successfully moved an ambitious agenda

³⁶ Beginning in 2004, funding for US-VISIT was appropriated on a no-year basis, meaning it can carry over to future years and doesn't have to be spent in the year appropriated. (US-VISIT Program Office, Department of Homeland Security.)

that Congress and the public demanded and has substantially strengthened the nation's immigration and security processes.

Recommendations:

Consistent with the goal of integrated border enforcement, the administration must develop a comprehensive border enforcement funding strategy that makes resource investments proportionately across all key border functions. The immediate need is to build ports-of-entry resources, including infrastructure, to align more effectively with the dramatic growth the Border Patrol has experienced and to continue support for US-VISIT.

Ports of entry have traditionally received far less attention and resources than the Border Patrol and its work between ports of entry. Yet, the ports-of-entry mission is arguably the most difficult and complex element of border security. Ports of entry are responsible for facilitation of legitimate trade and travel, which is vital for the economies and social wellbeing of the United States and most countries around the world, and for preventing the entry of a small but potentially deadly number of dangerous people and lethal goods. Table 1 above shows the enormous volumes of such flows of people alone. These challenges have only increased and will continue to grow as border security improves and border enforcement makes illegal crossing ever-more difficult.

US-VISIT has demonstrated the value of well-planned, properly funded technology solutions to a critical element of border security at ports of entry. The United States has made dramatic progress in improving border security since 9/11; the next steps must include fuller integration and better resource alignments between the CBP inspections and Border Patrol missions with the US-VISIT program.

In carrying out its border enforcement responsibilities, CBP must build into its training, supervision, and daily operations — especially at ports of entry — courtesy and procedures that demonstrate respect for those entering the country, noncitizen and citizen alike. Protocols incorporating these policies should be issued and enforced.

For countless millions, the treatment they experience entering the United States as a visitor may be the only contact they have with an official representative of the US government and people. There continue to be too many reports of problems that range from simple but needlessly brusque behavior, to improper treatment in secondary inspection, and violations of rights if custody ensues. CBP must set — and enforce — high standards of personal conduct and be accountable for practices that are consistent with the fact that the overwhelming majority of people who enter the country properly are law-abiding and are contributing positively to the life and work of the nation.

III. US Immigration and Customs Enforcement

Overview

US Immigration and Customs Enforcement inherited a wide swath of federal law enforcement responsibilities, including the investigative functions of the former INS and USCS; the INS's detention, removal, and intelligence responsibilities; and the entirety of the US Federal Protective Service.³⁷ ICE is responsible for the enforcement of more than 400 federal laws.³⁸

ICE mandates cover border, economic, transportation, and infrastructure security and the protection of federal buildings. With a FY 2009 budget that exceeds \$5.9 billion and supports nearly 19,000 full-time positions,³⁹ ICE is the largest investigative body in DHS.

Of the three immigration agencies created in DHS, ICE has probably faced the most difficult organizational challenges. They included the need to

- merge two distinct Customs and INS organizational cultures that had different areas of expertise, training needs, management structures, and missions;
- set meaningful law enforcement goals in light of ICE's broad mandate and multiple responsibilities;
- reallocate poorly aligned staffing and budget resources — a problem that absorbed disproportionate levels of management attention during the agency's early years.

In its first few years, ICE understandably focused on 9/11-driven imperatives, and its immigration mandates continue in many cases to be cast in national security terms.

Key Issues and Recommendations

A. ICE's Mission and Priorities

ICE's mission is “to detect and prevent terrorist and criminal acts by targeting the people, money, and materials that support terrorist and criminal networks.”⁴⁰ ICE has repeatedly defined its responsibilities in terms of national security and public safety. Former Homeland

³⁷ Blas Nuñez-Neto, *Border Security: Key Agencies and Their Missions* (Washington, DC: Congressional Research Service, CRS-4, updated May 13, 2008, Order Code RS21899).

³⁸ *Ibid.*

³⁹ Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Committee Print of the Committee on Appropriations, US House of Representatives, H.R. 2638, P.L. 110-329 (Washington, DC: Government Printing Office, October 2008), 634-638, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_house_committee_prints&docid=f:44807p5.pdf; and ICE, “Fiscal Year 2009” (fact sheet, February 1, 2008), <http://www.ice.gov/doclib/pi/news/factsheets/2009budgetfactsheet.pdf>.

⁴⁰ ICE, *ICE Fiscal Year 2007 Annual Report: Protecting National Security and Upholding Public Safety* (Washington, DC: Department of Homeland Security, 2007), 1, http://www.ice.gov/doclib/about/ice07ar_final.pdf.

Security Assistant Secretary Julie Myers, who led ICE, described its primary responsibilities to be

- investigating “domestic and international activities arising from the movement of people and goods that violate immigration and customs laws and threaten national security”;
- promoting “public safety by ensuring the departure from the United States of removable aliens”;
- reducing threats and ensuring “a safe environment in which federal agencies can conduct business.”⁴¹

According to its 2007 annual report, ICE targets “criminal networks and terrorist organizations that seek to exploit vulnerabilities” in the US immigration system, in financial networks, at US borders, and at federal facilities.⁴²

To meet its mission, ICE must negotiate complex jurisdictional and operational lines. Its effectiveness in areas like worksite enforcement, detention, and removal depends heavily on the performance and cooperation of CIS, CBP, and non-DHS stakeholders such as US Attorneys and the immigration court system. Thus, while this section of the report will offer recommendations on ICE’s policies and programs, it will inevitably touch on the work of its partner agencies.

Like its parent, DHS, ICE’s mission differs in scope and focus from the collective missions of the federal agencies it assumed. ICE is not primarily an agency created to stymie illegal immigration, but it is a *homeland security* agency, with all of its activities falling under a national security rubric.⁴³ Its mission speaks to the need to target the international criminal networks that make large-scale illegal migration possible. Human smuggling networks often abuse migrants in transit, abandon them in the desert, hold them hostage in safe houses while extorting monies from their families, and even sell them into involuntary servitude.⁴⁴ In addition, these networks represent a possible vehicle for terrorist infiltration.

As the Congressional Research Service (CRS) reported in 2006:

It is widely believed that there are factors which have created an environment in which terrorist and smuggling enterprises may combine their criminal efforts to pose a significant threat to national security. These factors include the increase in sophistication of criminal organizations, the ability of these organizations to exploit public corruption, and the lax immigration controls in transit countries. In addition, smuggling pipelines that are used by unauthorized aliens and criminals seeking to

⁴¹ Testimony of Julie L. Myers, Homeland Security Assistant Secretary, before the House Appropriations Committee, Subcommittee on Homeland Security, 110th Cong., 1st sess., March 27, 2007, <http://www.ice.gov/doclib/pi/news/testimonies/070327budget.pdf>.

⁴² ICE, *ICE Fiscal Year 2007 Annual Report*, iii.

⁴³ Myers testimony before House Appropriations Committee, Subcommittee on Homeland Security, March 27, 2007.

⁴⁴ Alison Siskin et al., *Immigration Enforcement Within the United States* (Washington, DC: Congressional Research Service, 2006) 26, <http://www.fas.org/spp/crs/misc/RL33351.pdf>. (“[A]lien smuggling can lead to collateral crimes including kidnapping, homicide, assault, rape, robbery, auto theft, high-speed flight, vehicle accident, identity theft, and the manufacturing and distribution of fraudulent documents.”)

enter the United States could also be used by terrorists to gain entrance into the United States (citation omitted).⁴⁵

Similarly, corporations whose recruitment practices target, and whose business models depend on, unauthorized workers have been found more likely to violate labor, workplace protection, and environmental laws. “Bad-faith” employers exploit immigrant laborers, depress wages, and undermine working conditions for all US workers.

Recommendations:

Consistent with its mission, ICE should direct its operations at the criminal enterprises that underlie large-scale illegal migration; that exploit migrants; and that could potentially facilitate terrorist infiltration.

While some have argued that ICE should not pick and choose its enforcement targets, in fact every successful law enforcement agency prioritizes and calculates how most effectively to use its resources. Like any other law enforcement agency, ICE cannot ensure total compliance with the laws it enforces. It must assess the meaningful differences in culpability and equities among millions of people, citizens and noncitizens alike, who have violated immigration or customs laws. Its failure to establish priorities would, in fact, prioritize haphazard and standard-less law enforcement.

ICE’s performance should be measured based on its success in targeting the “people, money, and materials that support terrorist and criminal networks.”⁴⁶ Its priority should be to dismantle organized criminal enterprises and to prosecute high-level criminals, rather than their victims or otherwise law-abiding, hard-working persons. ICE’s funding and staffing levels reflect the magnitude of its responsibilities. It enjoys the resources and enforcement tools to meet its mission and its priorities. Since its inception, it has grown steadily, with staffing increases from 15,000 employees in FY 2005 to nearly 19,000 in FY 2009, and budget increases from \$3.6 billion in FY 2005 to nearly \$6 billion in FY 2009.⁴⁷

ICE should develop and adhere to guidelines that prioritize its investigative targets, as well as whom it arrests, places in removal proceedings, and detains. ICE should exercise prosecutorial discretion in individual cases based on the severity of the offense, the noncitizen’s immigration status and history, and humanitarian and equitable considerations, including family ties in the United States.

As stated, ICE should target international criminal smuggling networks and employers who flagrantly violate the law. It should also prioritize the investigation, arrest, and removal of noncitizens who raise significant national security and public safety concerns, including those with serious criminal records, those ordered removed, and those who otherwise egregiously violate immigration law.

⁴⁵ Ibid., 28.

⁴⁶ ICE, *ICE Fiscal Year 2007 Annual Report*, 1.

⁴⁷ DHS, “DHS Budget-in-Brief,” various years, <http://www.dhs.gov/xabout/budget/>.

Because ICE cannot realistically remove all 11 million to 12 million unauthorized immigrants living in the United States or even every removable person it encounters, it must invariably establish priorities on who it investigates, arrests, places in removal proceedings, and detains.⁴⁸ Prosecutorial discretion refers to the authority of law enforcement officials (within their areas of responsibility) to investigate, arrest, charge, prosecute, detain, and otherwise exercise coercive power.

In developing a formal policy on prosecutorial discretion, ICE might usefully update and build upon prior INS/ICE instructions. In 2000, for example, INS issued a memorandum directing officers “to exercise discretion in a judicious manner at all stages of the enforcement process.”⁴⁹ The memorandum recognized that, given finite resources, law enforcement officers cannot investigate or prosecute all violations and must decide on the most effective way to enforce the law. It directed officers to assess the relative interests at stake in a particular case and stipulated that they could “decline to prosecute a legally sufficient immigration case if the federal immigration enforcement interest that would be served by prosecution is not substantial.”

The INS memorandum detailed several factors that should be considered in deciding to exercise discretion in individual cases, including: (1) immigration status; (2) length of US residence; (3) criminal history; (4) family ties, medical conditions, and other humanitarian issues; (5) immigration history; (6) likelihood of removal; (7) likelihood of eligibility for other immigration relief; (8) military service; (9) community attention; and (10) law enforcement resources.

In October 2005, the principal legal advisor to ICE provided guidance on the exercise of discretion in immigration legal proceedings.⁵⁰ The memorandum concluded that while “national security violators, human-rights abusers, spies, traffickers both in narcotics and people, sexual predators, and other criminals are removal priorities,” other cases “sometimes require” a balancing of “the cost of the action versus the value of the result.” It highlighted the immense workload in immigration courts and at the Board of Immigration Appeals and urged that discretion be exercised in cases that could be disposed of through more expedited processes or where an immigrant enjoyed “clear eligibility for an immigration benefit outside of immigration court.” It acknowledged that trial counsel could move the court to dismiss cases when continuation was “no longer in the government interest” and directed that post-hearing actions should be guided by the “interests of judicial economy and fairness.”

In October 2007, GAO analyzed the use of discretion by ICE agents over six phases of the apprehension and removal process — the initial encounter with the noncitizen, apprehension, charging, detention, removal proceedings, and actual removal. It concluded that ICE should develop comprehensive guidance on the exercise of discretion related to the

⁴⁸ GAO, *Immigration Enforcement: ICE Could Improve Controls to Help Guide Alien Removal Decision Making*, GAO-08-67 (Washington, DC: Government Accountability Office, 2007), 3, <http://www.gao.gov/new.items/d0867.pdf>.

⁴⁹ Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel,” HQOPP 50/4, November 17, 2000.

⁵⁰ Memorandum from William J. Howard, Principal Legal Advisor, Office of the Principal Legal Advisor, US Immigration and Customs Enforcement, to All OPLA Chief Counsels, October 24, 2005.

apprehension and removal process, including guidance “dealing with humanitarian issues and aliens who are not investigation targets.”⁵¹

It is essential that ICE articulate a formal policy on prosecutorial discretion. The kinds of criteria set forth in INS’s earlier guidance, particularly the exercise of discretion in favor of persons with strong family and equitable ties to the United States who do not threaten national security or public safety, should be reaffirmed. Such guidance would be consistent with ICE’s mission to protect the homeland and safeguard the public.

B. Immigration Enforcement through the Worksite: Employer Verification, Sanctions, and Raids

The Goal of Worksite Enforcement

ICE’s worksite enforcement goal should be to create the conditions for “good-faith” employers to meaningfully comply with the country’s immigration laws, and to deter criminality and the exploitation of immigrants by “bad-faith” employers. Most employers will comply with immigration laws, just as they customarily comply with tax, minimum wage, and workplace safety laws, on two conditions:

- First, employers must be able to verify the identity of prospective employees and their eligibility to work. This requires fraud-resistant identification and work-eligibility cards or some other system of identification covering all foreign- and native-born Americans, and a reliable, nonburdensome way for employers to assess work eligibility. By extension, employer verification also depends on accurate government databases and the ability to correct database errors expeditiously.
- Second, employers must understand the legal requirements and know that the law will be enforced. The former requires training and compliance-review mechanisms. The latter requires ICE’s strategic use of employer sanctions and worksite actions (raids).

Once customary compliance with the law is established, DHS will be able to direct its resources squarely at the criminal infrastructure that facilitates illegal hiring and employment, and at employers whose business model depends on the exploitation of unauthorized laborers to the detriment of all US workers.

Employer Verification

The Immigration Reform and Control Act of 1986 (IRCA) sought to foster permanent reductions in the US unauthorized population in three ways:

- It addressed the challenge of a swelling unauthorized population by offering two principal paths to legal status, which ultimately benefited nearly 3 million people.
- It authorized significant new funding for border enforcement.
- It sought to eliminate the employment magnet by making it unlawful “to hire, or to recruit or refer for a fee ... knowing the alien” is ineligible to work.⁵²

⁵¹ GAO, *Immigration Enforcement*, 34.

⁵² INA § 274A(a)(1)(A).

IRCA attempted to prevent unauthorized employment by creating a verification process and enforcing it with a sanctions regime.⁵³ Many observers have attributed the subsequent growth in illegal immigration to the alleged failure by INS and later ICE to enforce the verification and sanctions laws.⁵⁴ Of greater consequence, IRCA did not reform the system of legal immigration to make it responsive to subsequent shifts in “labor markets, demographics, and the pace of globalization.”⁵⁵ The US legal immigration regime remained, and remains today, disconnected from US labor needs. Nor did IRCA provide a path to legal status for the dependents of those granted amnesty. As a result, when IRCA’s beneficiaries obtained permanent resident status, they filed petitions for their spouses and children, leading to significant backlogs in the second-preference family-based immigrant visa category.⁵⁶ It is clear from this short history that appropriate legislative reform could significantly ease the pressure on, and improve the performance of, the verification system.

Of all the forms of immigration enforcement, employer verification has the potential to be the most effective and humane. If successful, a sound verification system obviates the need for more dangerous, restrictive, and expensive types of enforcement, like border enforcement and detention. From ICE’s standpoint, its primary advantage is to enlist employers as a force multiplier in the effort to reduce or eliminate illegal migration. ICE will never be able to police all of the nation’s 7.6 million business establishments on its own, nor remove all unauthorized workers.⁵⁷ There are simply too many worksites and unauthorized workers to make this a feasible goal. It must ultimately rely on voluntary compliance by good-faith employers and focus its enforcement efforts on the minority of employers who prefer to hire unauthorized workers. The availability of an employer verification system that allows good-faith employers to obey the law without significant cost or effort will be ICE’s most pressing challenge in this arena.

Most recently, the MPI-convened Independent Task Force on Immigration and America’s Future concluded that employer verification “must be at the center of reforms to combat illegal immigration” and that without an effective verification program “other reforms – including border enforcement – cannot succeed.”⁵⁸

⁵³ Ibid., (e)-(f).

⁵⁴ The putative reluctance of INS and later ICE to enforce the law has been variously credited to: (1) the paradigm shift required to enforce laws against employers who tend to be harder targets than employees; (2) the difficulty in proving that an employer *knowingly* hired an unauthorized worker; (3) IRCA’s anti-discrimination provisions that prevent employers from probing beyond documents that appear valid on their face; (4) the priority placed by Congress on enforcement at the US-Mexico border; (5) concern that unscrupulous employers use the threat of enforcement to discriminate, depress wages, and disrupt union-organizing activities; and (6) the government’s post-9/11 focus on national security. Beyond questions related to DHS reporting or productivity, these figures undermine the longstanding claim that the US unauthorized population expanded post-IRCA due to the willful failure of ICE and INS to enforce the law. Peter Brownell, “The Declining Enforcement of Employer Sanctions,” *Migration Information Source*, September 1, 2005, <http://www.migrationinformation.org/Feature/display.cfm?ID=332>.

⁵⁵ Meissner et al., *Immigration and America’s Future*, 20.

⁵⁶ Donald Kerwin and Charles Wheeler, *The Case for Legalization, Lessons from 1986, Recommendations for the Future* (Staten Island, NY: Center for Migration Studies, 2004), 16.

⁵⁷ Census Bureau, *Number of Firms, Number of Establishments, Employment, and Annual Payroll by Employment Size of the Enterprise for the United States and States, Totals-2006* (Washington, DC: US Census Bureau, 2006), <http://www2.census.gov/csd/susb/2006/usst06.xls>.

⁵⁸ Meissner et al., *Immigration and America’s Future*, 45.

The verification process initiated by IRCA requires employers to review employee documents from a list establishing identity or work eligibility, or both. Employers must attest that they have examined the appropriate documents and that they appear, on their face, to be genuine.⁵⁹ Employers who make a good-faith attempt to complete the I-9 verification form are deemed to have complied with the law.⁶⁰ Employers who request more or different documents than those required by law or who refuse to accept documents that appear to be genuine can face penalties for discrimination based on national origin or citizenship status.⁶¹

To fortify the I-9 process, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) directed DHS to create a voluntary electronic verification program that would allow employers to match information from an employee's I-9 form with DHS and Social Security Administration (SSA) databases.⁶² Congress subsequently reauthorized that program, known as Basic Pilot and renamed E-Verify in August 2007, and offered it to employers in all 50 states.⁶³ As of January 2009, more than 100,000 employers had enrolled in the E-Verify pilot. Program enrollment received a substantial boost after a number of states made the program mandatory for all state employers or for state employers and state contractors. In addition, a recent amendment to the Federal Acquisition Regulation requires certain federal contractors with contracts of \$100,000 or more to participate in the program, though a lawsuit has delayed implementation of this rule until February 20, 2009. In January, the Obama administration announced that it would delay the applicability of the new regulation to May 21, 2009, pending additional review of the E-Verify program.⁶⁴

The E-Verify program, administered by USCIS, is discussed more fully in the USCIS section of the report, including a significant discussion of database error rates. For present purposes, it suffices to point out that E-Verify is vulnerable to identity fraud or the use by unauthorized immigrants of identity data belonging to work-authorized individuals.⁶⁵ As the Independent Task Force put it, the E-Verify system “excels in detecting fake identity cards because they are not in the databases, but it fails to detect the fraudulent use of borrowed or stolen documents that are in the databases.”⁶⁶ As a result, the system has not solved the significant problem of “false positives” (persons who appear work-eligible but who are not), as has been illustrated by high-profile raids at businesses participating in the program. The success of the program, therefore, depends on establishing a reliable system of employee identification. The Task Force proposed the creation of a “secure, biometric, machine-readable Social Security card” that establishes both identity and eligibility to work,⁶⁷ though a number of alternative identification systems have also been proposed.

⁵⁹ INA § 274A(b)(1).

⁶⁰ INA § 274A(a)(3).

⁶¹ INA § 274B (a).

⁶² P.L. No. 104-208.

⁶³ P.L. No. 108-156.

⁶⁴ US Department of Defense et al., “Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification,” *Federal Register* 73, no. 221 (November 14, 2008).

⁶⁵ Statement for the record of Richard M. Stana, Director Homeland Security and Justice Issues, US Government Accountability Office, “Employment Verification, Challenges Exist in Implementing a Mandatory Electronic Employment Verification System,” GAO-08-895T, June 2008, 5, <http://www.gao.gov/new.items/d08895t.pdf>.

⁶⁶ Meissner et al., *Immigration and America's Future*, 49.

⁶⁷ Meissner et al., *Immigration and America's Future*, 52-53.

In the absence of a secure system to match workers with their identity data, E-Verify confronts the same systemic challenges as the I-9 verification system: employers must make judgment calls about workers' identity (though not about the legitimacy of their documents), leaving workers vulnerable to discrimination and exploitation, and threatening DHS's ability to obtain convictions for the *knowing* employment of unauthorized immigrants.⁶⁸ For this reason, DHS should support the development of a reliable identification system, and should continue to explore additional models of verification, particularly those that would remove some of the onus for verification from employers. One possibility, for example, would be a two-stage system in which all legal workers (immigrants and natives) would enroll in a secure database allowing them to self-verify prior to changing jobs. Workers would receive a single-use authorization code which they would present to employers in the place of (or in addition to) identity documents. A system like this could have important additional advantages, including cutting down on identity theft, preventing erroneous nonconfirmations, and protecting labor rights.

SSA's No-Match Program as an Immigration Enforcement Tool

Each year, SSA receives roughly 245 million wage reports, covering 153 million workers.⁶⁹ When an employee's name cannot be matched with a social security number, SSA posts the earnings to its Earnings Suspense File. In 1994, SSA initiated its "no-match" program in an attempt to credit the estimated \$586 billion (as of October 2006) in its Earnings Suspense File to those who had paid into the system.⁷⁰

Under the program, SSA sends letters to every employee with a mismatch and to employers who reported more than 10 nonmatches, representing more than 0.5 percent of the W-2 forms they submitted. The letters to employers list up to 500 names/numbers that cannot be matched. According to SSA's Office of the Inspector General, employer letters have not been a particularly successful tool in resolving discrepancies, partially due to the fact that the SSA criteria for sending letters prevents employers from learning about large numbers of no-match employees.

In tax year (TY) 2005, 74 percent of employers with mismatches did not receive no-match letters, and between TY 2001 and TY 2005 employer letters resulted in the correction of only 60,500 wage items.⁷¹ Many of the letters sent in FY 2005 did not report the employees'

⁶⁸ As stated, the law prohibits "knowing" hiring, recruitment, referral for a fee, or employment of an unauthorized immigrant; makes "good-faith" compliance with the verification procedures an affirmative defense; and sanctions employers who go beyond these procedures. INA § 274A(a)(1) and (2).

⁶⁹ Social Security Administration, "Overview of Social Security Employer No-Match Letters Process," <http://www.ssa.gov/legislation/nomatch2.htm>.

⁷⁰ SSA Office of the Inspector General, *Social Security Number Misuse for Work and the Impact on the Social Security Administration's Master Earnings File* (Washington, DC: Social Security Administration, 2008), p. i, <http://www.socialsecurity.gov/oig/ADOBEPDF/A-03-07-27152.pdf>; and Pia Orrenius, "'No Match,' No Sense," *Wall Street Journal*, August 13, 2007.

⁷¹ SSA Office of Inspector General, *Effectiveness of Educational Correspondence to Employers* (Washington, DC: Social Security Administration, December 2008), <http://www.ssa.gov/oig/ADOBEPDF/audittxt/A-03-07-17105.htm>.

names, making it impossible to correct the SSA records.⁷² In addition, the program relies on the same SSA database as the E-Verify program, and suffers from the same error rates.

In August 2007, DHS issued a final regulation that would require employers who receive no-match letters to follow certain steps — ultimately leading to termination of employment — to avoid being found to have “constructive knowledge” of employing unauthorized immigrants; “actual knowledge,” of course, can still be punished. On October 10, 2007, the US District Court for the Northern District of California enjoined implementation of the rule. On March 26, 2008, DHS issued a supplemental proposed rule that attempts to re-promulgate the earlier rule, with only minor changes. On October 28, 2008, DHS issued a supplemental final regulation which largely tracks the March 2008 proposed rule.

At this writing, the preliminary injunction remained in effect. Since the injunction was entered, SSA has opted against sending no-match letters to employers, although it continues to send letters to employees. Apart from the ongoing legal challenge, the pressing policy question remains whether to use the SSA no-match program as an immigration tool at all.

Policing Employer Verification

ICE’s worksite enforcement program consists of three complementary sets of tools that are meant to police the employer verification system:

- ICE can audit an employer’s I-9 forms and fine an employer (a process initiated by a Notice of Intent to Fine).
- It can conduct worksite enforcement actions (commonly known as raids) against employers who are suspected of violating the law.
- It can investigate and refer an employer for possible criminal prosecution, with or without going through the civil-sanction process or conducting a worksite enforcement action.

The main *purpose* of these tactics is to enforce adherence to the employer verification laws.⁷³ As stated, however, if this system cannot accurately identify prospective employees and verify their eligibility to work, worksite enforcement will *never* result in an acceptable level of compliance with the law. In addition, as GAO concluded in 2005, “[e]ven with a strengthened employment verification process, a credible worksite enforcement program is needed because no verification process is foolproof and not all employers may want to comply with the law.”⁷⁴

Once a reliable verification system is in place, ICE can use its worksite enforcement tools to promote voluntary compliance with its requirements by “good-faith” employers and to make noncompliance a prohibitive risk for “bad-faith” employers. An effective employer verification system would also put ICE in a better position, consistent with its mission, to

⁷² Ibid.

⁷³ The principal employer verification system that seeks to address the deficiencies of the I-9 system is administered by USCIS, not ICE.

⁷⁴ GAO, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, GAO-05-813 (Washington, DC: Government Accountability Office, 2005), 43.

target the criminal networks that facilitate large-scale illegal migration and the employers who intentionally hire and exploit unauthorized workers for competitive advantage.

Worksite Enforcement (Raids)

Over the last three years, ICE has carried out a succession of high-profile raids at a variety of locations against many targets.⁷⁵ ICE's investigations have appropriately concentrated on worksites that might be targeted for a terrorist attack, including military facilities, airports, seaports, nuclear plants, and chemical plants.⁷⁶ There is an obvious need to run identity and security checks on employees who are working at sites that are vulnerable to terrorist attack. However, since terrorists have proven more likely to recruit persons who do not have criminal records or who would not otherwise draw attention from law enforcement,⁷⁷ it is particularly important to run background checks of potential employees *without* immigration status problems.

ICE has also pursued employers whose business models rely on unauthorized workers,⁷⁸ as evidenced by raids at restaurants, chicken-processing plants, meat-packing plants, plant nurseries, and construction sites.

However, the raids have likely had only modest impact in their primary goal of disrupting the infrastructure that supports illegal immigration.⁷⁹ Rather than uprooting human smuggling syndicates, false document rings, and scofflaw employers, ICE has linked unauthorized *employees* to the criminal infrastructure that supports illegal migration, characterizing the mere *use* of false documents as identity theft or aggravated identity theft.

In 2009, ICE will devote less than 2 percent of its total budget — \$126 million of \$5.9 billion — to worksite enforcement, although some of its other funding for investigations may ultimately support or lead to worksite enforcement.⁸⁰ Overall, ICE worksite arrests have increased from 25 criminal and 485 administrative arrests in FY 2002, to 1,101 criminal and 5,173 administrative arrests in FY 2008.⁸¹ However, these numbers represent less than 2 percent of the 349,041 noncitizens removed by ICE, and only a fraction of 1 percent of the nation's unauthorized population.⁸² Moreover, criminal charges were filed in only 135 cases against business owners, managers, supervisors, or human resource employers in 2008.⁸³ Although prosecutions continue, the raids have mostly affected workers, not employers.

⁷⁵Centro Legal, Inc., "Comprehensive Documentation of Immigration Enforcement Operations," http://www.centro-legal.org/index.php?option=com_wrapper&Itemid=117.

⁷⁶DHS, "Worksite Enforcement," <http://www.ice.gov/pi/worksite/index.htm>.

⁷⁷Donald Kerwin and Margaret Stock, "National Security and Immigration Policy: Reclaiming Terms, Measuring Success, and Setting Priorities," *The Homeland Security Review* 1, no. 3 (Fall 2007), 131, 183-184.

⁷⁸DHS, "Leadership Journal, Myth vs. Fact: Worksite Enforcement," July 9, 2008, <http://www.dhs.gov/journal/leadership/2008/07/myth-vs-fact-worksite-enforcement.html>.

⁷⁹*Ibid.*

⁸⁰Department of Homeland Security Appropriations Act "Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Division D" (2009), H.R. 2638, P.L. 110-329, pp. 634-636.

⁸¹ICE, "ICE multifaceted strategy leads to record enforcement results: Removals, criminal arrests, and worksite investigations soared in fiscal year 2008" (news release, October 23, 2008), <http://www.ice.gov/pi/nr/0810/081023washington.htm>.

⁸²*Ibid.*

⁸³*Ibid.*

ICE's tough public rhetoric on enforcement, coupled with its highly publicized raids, has no doubt served to remind employers of the need to comply with the law. Its relatively modest successes against "bad-faith" employers argue for more targeted and tactical use of worksite enforcement.

Raids also have an oversized impact on local communities and immigrant families. In 2007, the Urban Institute concluded that for every two immigrants arrested in a raid, a US child lost a parent (to arrest) and that two-thirds of the affected children were US citizens.⁸⁴ The report detailed the hardship worked on newly fragmented families and the emergency response role assumed by charitable and social service agencies in the wake of the raids. For months afterwards, charities pay rent for remaining family members, help them relocate, buy diapers, provide food, move abandoned cars, negotiate child custody issues, cover prescription costs, and counsel persons whose loved ones have been deported.

In November 2007, ICE released humanitarian guidelines, or protocols, on the conduct of raids that provide for the release of sole caregivers (although not primary caregivers) arrested during raids; toll-free hotlines for the family members of arrested persons; notification to nongovernmental organizations (NGOs) once a raid is underway; coordination with federal, state, and local officials on humanitarian release decisions; and access to legal counsel.

Employer Sanctions

It is difficult to evaluate ICE's use of employer sanctions because it no longer reports on key enforcement metrics that INS tracked, such as I-9 audits, employer warnings, notices to fine, investigations completed, or investigative work-years devoted to this work.⁸⁵ However, judging by two shared metrics — administrative arrests and employers fined for civil immigration violations — ICE's worksite enforcement efforts have increased over its short history, but lag behind historically higher INS rates of enforcement.

ICE administrative arrests rose steadily from 445 to 5,173 between FY 2003 and 2008 (see Figure 5). However, INS arrested an average of 6,625 unauthorized immigrants per year based on its worksite investigation activities between FY 1988 and 1994; 13,911 on average between FY 1995 and 1998; and 1,255 on average between FY 1999 and 2002.⁸⁶

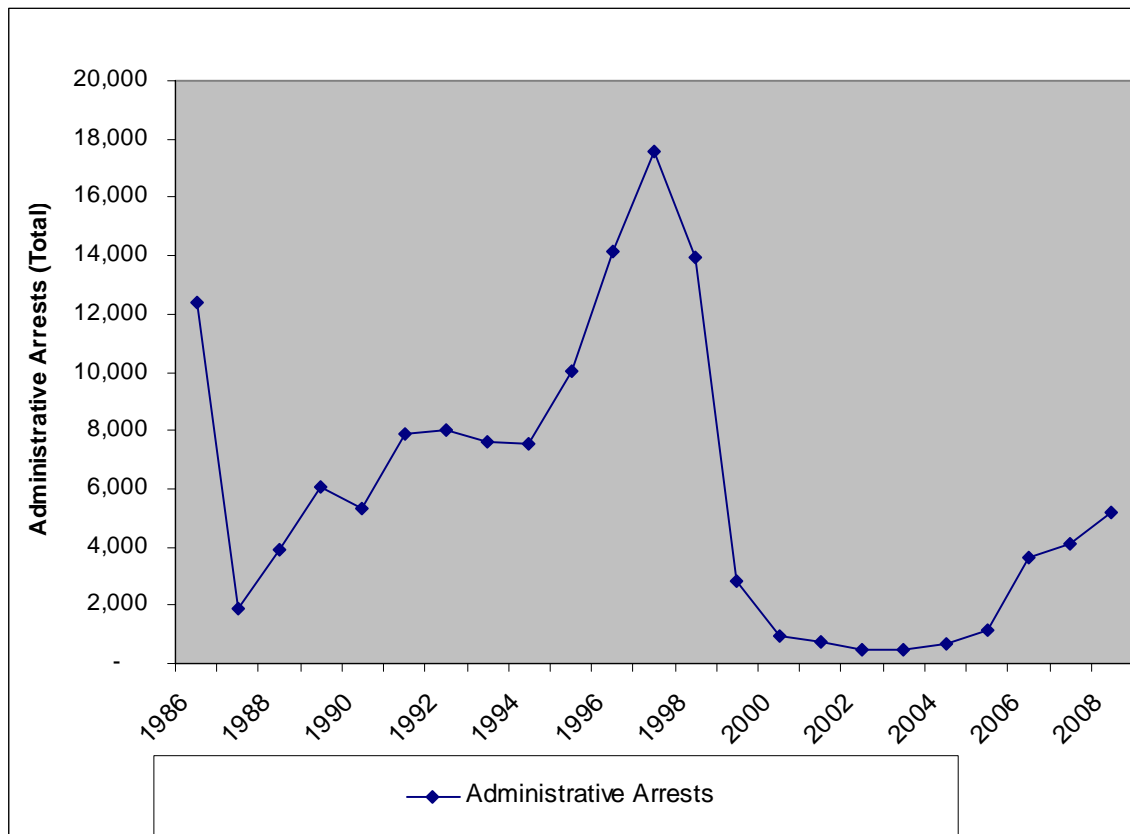
⁸⁴ Randy Capps, Rosa Maria Castaneda, Ajay Chaudry, and Robert Santos, "Paying the Price: The Impact of Immigration Raids on America's Children," A Report by The Urban Institute for the National Council of La Raza (Washington, DC: The National Council of La Raza, 2007), 15-20.

⁸⁵ Completed INS employer investigations spiked in 1989 (11,062) and 1990 (10,069), fell steadily to 5,149 in 1996, increased again in 1997 (7,537) and 1998 (7,788), and averaged 2,343 per year between 1999 and 2003. Employer warnings averaged 1,295 per year between 1988 and 1991, 696 per year between FY 1992 and 1998, and 287 per year between 1999 and 2003. Notices of intent to fine averaged 1,194 per year between 1988 and 1998, but only 182 per year between 1999 and 2003. DHS, "Employer Investigation Activities of the INS and ICE Immigration Investigations Program, Fiscal Years 1986-2008" (Paper on file with MPI prepared by Department of Homeland Security Office of Immigration Statistics, November 2008). Overall, investigative work years devoted to worksite enforcement activities fell from 240 in 1999 to 90 in 2003, while work years dedicated to all other investigative areas remained relatively constant over the same time span. GAO, "Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts," 33.

⁸⁶ DHS, "Employer Investigation Activities of the INS and ICE Immigration Investigations Program Fiscal Years 1986-2008." Department of Homeland Security Office of Immigration Statistics, November 2008. (On file with MPI).

In an agency devoted to uprooting the infrastructure that sustains illegal immigration and employment, one would expect to see an increase in document fraud investigations. However, as with many metrics related to its performance, ICE has not reported the “work years” that it has devoted to investigating fraud since 2003. Since document fraud facilitates unauthorized employment and undermines the verification process, this represents a surprising omission. Overall, time spent investigating facilitators of counterfeit or altered documents, organizations that broker large-scale illegal schemes and persons suspected of immigration benefit fraud decreased from 210.4 work years in FY 1992 to 136.8 work years in FY 2003.⁸⁷

Figure 5. INS/ICE Administrative Arrests, FY 1986 to 2008



Source: “Employer Investigation Activities of the INS and ICE Immigration Investigations Program, Fiscal Years 1986-2008,” data provided to the Migration Policy Institute by Michael Hoefler, US Department of Homeland Security, Office of Immigration Statistics, on November 25, 2008.

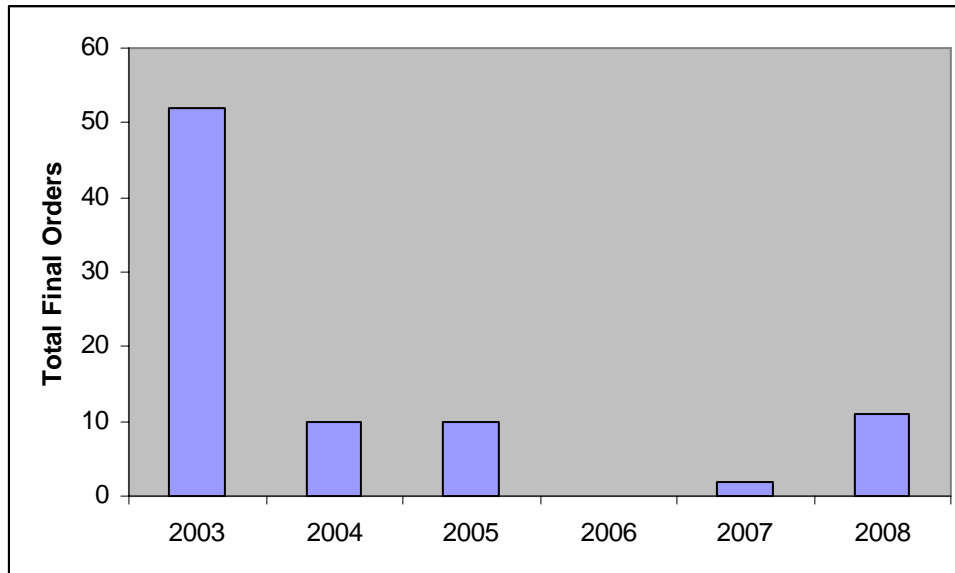
Similarly, as Figure 6 illustrates, ICE issued final orders for civil monetary penalties against just 85 employers between FY 2003 and FY 2008.⁸⁸ By way of comparison, INS issued

⁸⁷ CRS, “Immigration Enforcement Within the United States,” 35.

⁸⁸ CRS, “Immigration-Related Worksite Enforcement: Performance Measures,” 7-5700 R40002 (Washington, DC: Congressional Research Service, 2008), 5, http://assets.opencrs.com/rpts/R40002_20081202.pdf.

between 500 and 1,100 final orders *per year* between FY 1991 and FY 1998, 200 to 350 final orders *per year* from FY 1999 and FY 2001, and 91 final orders in FY 2002.⁸⁹

Figure 6. ICE Final Orders for Civil Monetary Penalties and Associated Administrative Fines Collected, FY 2003 to 2008



Source: Congressional Research Service, “Immigration-Related Worksite Enforcement: Performance Measures,” 7-5700 R40002.

ICE manually tracks information on criminal fines and forfeitures related to worksite enforcement investigations, including restitution payments to employees for labor law violations.⁹⁰ Between FY 2003 and the first nine months of FY 2008, the fines and forfeitures it imposed revealed “no discernible pattern,” with swings from *de minimis* levels (\$37,514 in FY 2003 and \$233,044 in FY 2006), to more substantial, albeit still modest, totals (\$15,822,100 in FY 2005 and \$31,426,443 in FY 2007).⁹¹ In late 2008, ICE announced a settlement of \$20.7 million with IFCO Systems North America, the nation’s largest pallet management services company, including \$2.6 million in back pay and penalties for overtime violations and \$18.1 million in civil forfeitures for immigration violations.⁹² Criminal prosecutions based on worksite enforcement increased steadily between 2001 and 2008, rising from 72 to 1,092.⁹³ DHS does not have comparative INS statistics on criminal fines, forfeitures, or prosecutions arising from worksite enforcement activities.⁹⁴

⁸⁹ Ibid.

⁹⁰ Ibid., 8.

⁹¹ Ibid.

⁹² ICE, “IFCO Systems enters into record \$20.7 million settlement of claims related to employment of illegal aliens” (news release, December 19, 2008), <http://www.ice.gov/pi/nr/0812/081219albany.htm>.

⁹³ DHS, “Employer Investigation Activities of the INS and ICE Immigration Investigations Program, Fiscal Years 1986-2008”.

⁹⁴ The alleged refusal of INS and later ICE to enforce the law has been variously attributed to: (1) the paradigm shift required to enforce laws against employers who tend to be harder targets than employees; (2) the difficulty in proving that an employer *knowingly* hired an unauthorized worker; (3) IRCA’s anti-discrimination provisions that prevent employers from probing beyond documents that appear valid on their face; (4) the priority placed by Congress on enforcement at the US-Mexico border; (5) concern that unscrupulous employers use the threat of enforcement to discriminate, depress wages, and disrupt union

National Security and Worksite Enforcement

ICE plays an important, mission-appropriate role in enforcing compliance with the law by “good-faith” employers and punishing employers who flagrantly violate immigration, labor, workplace protection, and other laws. However, ICE undermines its credibility and its legitimate role in protecting the homeland when it exaggerates vulnerabilities to terrorism, identifies risk where it does not exist, or mischaracterizes its work.

ICE has expansively applied a national security paradigm to unlikely security risks, including Mayan women from Guatemala who worked in a factory that made backpacks for the US military in New Bedford, Massachusetts. It has also framed all of its worksite enforcement activities in terms of “security,” either personal (identity theft), corporate, or national. It has argued that unauthorized workers would be subject to terrorist coercion due to their lack of status.⁹⁵

Such a scenario includes three striking improbabilities: (1) persons who work in secure facilities would not report terrorist plots, and (indeed) would facilitate them; (2) terrorists would know the immigration status of employees in certain facilities; (3) terrorists would enlist the assistance of strangers who might otherwise come to the attention of law enforcement. Instead, terrorists’ method of operation is to attempt to recruit “clean operatives” who do not have criminal records, immigration problems, or any characteristic that might draw attention from law enforcement.⁹⁶

Recommendations:

ICE’s principal worksite enforcement goal should be to foster a viable employer verification system, to ensure compliance with that system, and to punish employers whose business model depends on the employment and exploitation of unauthorized workers.

Employer verification represents the linchpin of a successful worksite enforcement regime and will be central to any comprehensive immigration enforcement plan —. If successful, an employer verification system can obviate the need for harsher, more burdensome enforcement measures. Employer verification requirements should be policed through sanctions and prosecutions against employers who flagrantly violate immigration, labor, and workplace protection laws. The goal of sanctions and other workplace actions should be to

organizing activities; and (6) the government’s post-9/11 focus on national security. Beyond questions related to DHS reporting or productivity, these figures undermine the longstanding claim that the US unauthorized population expanded post-IRCA due to the willful failure of ICE and INS to enforce the law. Peter Brownell, “The Declining Enforcement of Employer Sanctions,” *Migration Information Source*, September 1, 2005, <http://www.migrationinformation.org/Feature/display.cfm?ID=332>.

⁹⁵ Statement of Julie L. Myers, Homeland Security Assistant Secretary, before the House Appropriations Committee, Subcommittee on Homeland Security, p. 14. She stated: “Unauthorized workers employed at sensitive sites and critical infrastructure facilities – such as airports, seaports, nuclear plants, chemical plants, and defense facilities – pose serious homeland threats. Not only are the identities of these individuals in question, but these aliens are vulnerable to exploitation by terrorists and other criminals given their illegal status in this country.”

⁹⁶ Kerwin and Stock, “National Security and Immigration Policy.”

ensure that “good-faith” employers customarily comply with the law, and to raise the cost and risk of noncompliance, especially for employers who exploit unauthorized workers.

SSA’s “no-match” program serves the important purpose of attempting to credit earnings to those who paid into the system, but it should not be used as an immigration enforcement tool.

The SSA “no-match” system relies on the same SSA database as the E-Verify program. In the short run, this means that using SSA no-match letters as a tool of immigration enforcement is subject to the same inaccuracies as E-Verify. In the long run, as E-Verify expands, the no-match program will become increasingly redundant as an enforcement tool.

Just as importantly, the no-match program serves (albeit imperfectly) an important, beneficent purpose: crediting wages to the correct employees for the purposes of social security benefits. Making the program an immigration enforcement tool undermines this goal and renders it less likely employees will correct their records. It also creates additional costs and inefficiencies for employers and employees.

ICE investigations should target:

- **worksites that terrorists may attempt to infiltrate; and**
- **employers who prefer to hire the unauthorized as a way to depress wages, undermine working conditions, and gain an unfair competitive advantage.**

ICE investigations should target employers who flagrantly violate immigration, labor, workplace protection and other laws. As early as 1998, an INS memorandum stipulated that because “the purpose of worksite enforcement is to deter the unlawful employment of aliens ... worksite enforcement investigations that involve alien smuggling, human rights abuses, and other criminal violations must take precedence.”⁹⁷ For this reason and to achieve maximum impact, ICE should focus its work on the criminal networks that facilitate unauthorized employment, not good-faith employers or employees who are simply trying to support themselves and their families.

The May 2008 raid of a meat-packing plant in Postville, Iowa provides a telling example of the right kind of corporate target, but the wrong method. Former employees have alleged labor and immigration violations by management, including child labor, procurement of false documents, illegal withholding of wages, improper use of deducted wages, verbal and physical abuse, use of hazardous equipment, payment of subminimum wages, and tax fraud.⁹⁸ Federal and state criminal charges have been brought against management for immigration, labor, and workplace safety violations.⁹⁹

⁹⁷ INS, “Immediate Action Directive for Worksite Enforcement Operations,” *Interpreter Releases* 75, no. 27 (July 17, 1998), 987-996.

⁹⁸ Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, Antonin Trinidad Candido, a minor, Roman Trinidad Candido and Maria del Refugio Masias, individually and on behalf of an unspecified number of Detained Immigrant Workers v. United States Immigration and Customs Enforcement Division of the Department of Homeland Security, et. al., No. 08 CV 1015 LRR (N.D. IA. May 15, 2008).

⁹⁹ Associated Press, “Managers Indicted in Immigration Case,” November 22, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/11/21/AR2008112103163_pf.html.

On the other hand, the raid had an immense, deleterious impact on the local immigrant community. Exacerbating matters, the local US Attorney for the Northern District of Iowa used the threat of aggravated identity theft, a crime with a minimum two-year sentence, to pressure more than 300 of the 389 workers arrested to plead guilty to lesser crimes, with most receiving five-month prison sentences. Significant issues have been raised over whether the workers received basic due process protections or even understood the charges against them.¹⁰⁰ In addition, the raid cost ICE alone (not counting other participating agencies) more than \$5 million.¹⁰¹

ICE should centralize its process for approving worksite enforcement actions (raids), and should develop and adhere to appropriate guidelines in deciding whether to conduct a raid. In particular, it should determine whether a raid will further an ICE worksite enforcement priority; whether other, equally effective means are available to achieve its goals; and whether the likely benefit of a raid will outweigh the harm to local communities and US families.

Whenever raids are conducted, arrested workers should be screened for information on human smuggling, violations of worker rights, and other criminal activity. Employees should be referred for criminal prosecution only in cases that involve more than commonplace immigration violations.

ICE should centralize its process for approving raids and develop and adhere to appropriate guidelines on *whether* to conduct a raid. Relevant considerations should include whether the raid will further an ICE worksite enforcement priority, whether other, equally effective means are available to achieve its goals, and whether its benefits will be outweighed by the damage to local communities and to US families. Strategic raids can have a salutary effect on employers, demonstrating that verification requirements will be enforced and increasing the risk and cost of noncompliance to “bad-faith” employers.

At the same time, the impact of raids typically extends beyond scofflaw employers to new immigrant families and to their communities. In those circumstances, raids should be used in a targeted fashion after an assessment of the alternatives (including civil and criminal sanctions) and their broader social impact.

ICE also should affirm, strengthen, and adhere to its protocols on *how* it conducts raids. Consistent with its mission, ICE should expand its protocols to provide that arrested workers be screened for information on human smuggling rings and on employer violations of immigration, labor, and workplace protection laws. If appropriate, arrested workers should be granted “U” and “T” nonimmigrant visas for their cooperation in the investigation and prosecution of criminal violations.

¹⁰⁰ William Petroski, “Taxpayers’ costs top \$5 million for May raid at Postville,” *Des Moines Register*.com October 14, 2008.

¹⁰¹ Eric Camayd-Freixas, PhD, “Interpreting after the Largest ICE Raid in US History: A Personal Account,” *New York Times*, June 13, 2008, <http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf>.

As discussed more fully below, immigrants should not be referred for criminal prosecution based solely on behavior related to their unlawful presence and illegal employment. Criminal prosecution should typically be reserved for those who make large-scale violations possible, including smugglers, persons who steal identification cards or produce counterfeit cards, and those who recruit and place unauthorized workers. In certain cases, criminal prosecution is appropriate for immigrants who repeatedly and egregiously violate immigration law.

ICE should improve its record-keeping on worksite enforcement activities, create consistent metrics to evaluate its success, and harmonize its reporting with that of the former INS.

ICE funding has substantially increased in its relatively brief existence. Yet its reporting on worksite enforcement has become less thorough, making it difficult to evaluate the impact and cost-effectiveness of its work. Judging by shared INS/ICE metrics, ICE's worksite initiatives have increased, but remain below historically high INS levels.

ICE should not attempt to impose a national security paradigm on all of its enforcement activities.

ICE has an indisputable role to play in homeland security. In addition, its enforcement efforts should concentrate both on sites that terrorists might target and on employers whose business model depends on unauthorized workers. However, it undermines ICE's effectiveness and credibility when it exaggerates vulnerabilities to terrorism, identifies risk where it does not exist, or attempts to situate all of its activities within a security paradigm. It also vilifies immigrants and creates a false sense of security to conflate unauthorized employment and terrorism.

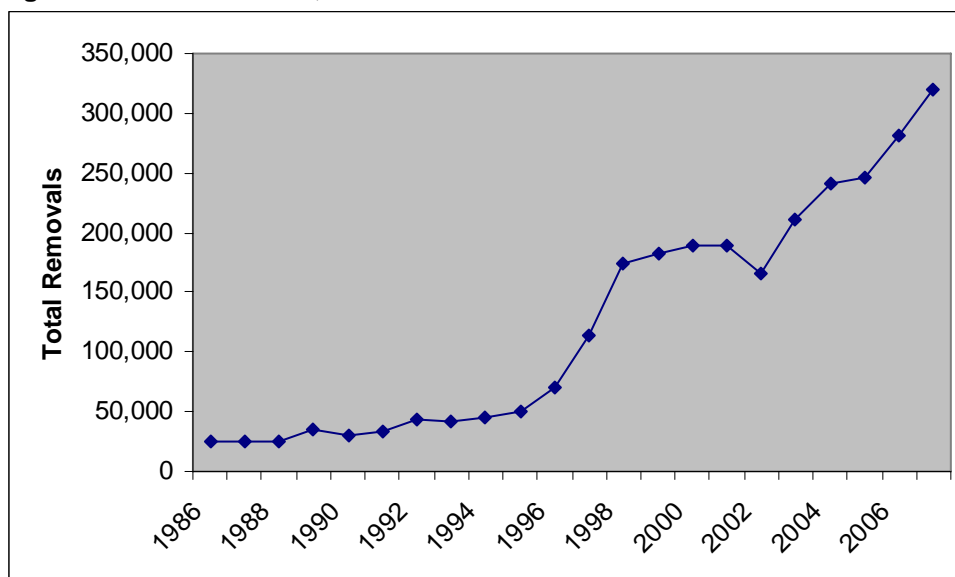
C. The Arrest, Removal, and Prosecution of Persons Who Have Committed Crimes or Who Represent a National Security Risk

ICE cannot arrest and remove all 11 million to 12 million unauthorized immigrants in the United States. In FY 2008, it removed 349,041 noncitizens,¹⁰² up from 50,924 in 1995, and 189,026 in 2001 (see Figure 7).¹⁰³ Despite these increases, total removals in FY 2008 still represented less than 3 percent of the estimated total number of unauthorized immigrants in the United States.

¹⁰² ICE, "ICE multifaceted strategy leads to record enforcement results: Removals, criminal arrests, and worksite investigations soared in fiscal year 2008" (news release, October 23, 2008), <http://www.ice.gov/pi/nr/0810/081023washington.htm>.

¹⁰³ DHS Office of Immigration Statistics, *2007 Yearbook of Immigration Statistics* (Washington, DC: Department of Homeland Security, 2008).

Figure 7. Total Removals, FY 1986 to 2007



Source: DHS, *DHS Yearbook of Immigration Statistics: 2007*, Table 36: Aliens Removed or Returned, Fiscal Years 1892 to 2007 (Washington, DC: Department of Homeland Security, 2007), <http://www.dhs.gov/ximgtn/statistics/publications/YrBk07En.shtm>.

Note: Removals are the compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal. An alien who is removed has administrative or criminal consequences placed on subsequent reentry owing to the removal.

Prosecution for Immigration Violations

Over the last 15 years, criminal prosecutions for immigration-related offenses have sharply increased. As reported by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, immigration-related referrals for criminal prosecution have grown from 8.6 percent of all federal criminal referrals in FY 1987, to 9.9 percent in FY 1997, to 27.2 percent in FY 2007.¹⁰⁴ By contrast, FBI referrals have sharply declined as a percentage of total federal referrals, from 36 percent in 1987, to 33.4 percent in 1997, and 16.4 percent in 2007.¹⁰⁵ Between 2000 and 2007, federal criminal prosecutions for immigration-related crimes increased 127 percent, rising from 16,724 to 38,008.¹⁰⁶ Between 2007 and 2008, these prosecutions more than doubled again to 79,400. The numbers include 11,454 immigration prosecutions in September 2008 alone.¹⁰⁷

Immigration-related criminal cases are heard in two types of courts, US Magistrate Courts (handling less serious offenses) and US District Courts. In August 2008, 64 percent of immigration convictions took place in Magistrate Courts, with the most frequent charge

¹⁰⁴ TRAC, "Shifting Enforcement Priorities," *Transactional Records Access Clearinghouse Reports* (Syracuse: Transactional Records Access Clearinghouse, 2008), <http://trac.syr.edu/tracreports/crim/186/>.

¹⁰⁵ Ibid.

¹⁰⁶ TRAC, "Federal Criminal Prosecutions Filed by Selected Program Areas," *Transactional Records Access Clearinghouse Reports* (Syracuse: Transactional Records Access Clearinghouse, 2007), http://trac.syr.edu/tracreports/crim/184/include/table_1.html.

¹⁰⁷ MPI analysis based on data from TRAC, "Bush Administration's Immigration Prosecutions Soar, Total of All Federal Filings Reach New High," *Transactional Records Access Clearinghouse Reports* (Syracuse: Transactional Records Access Clearinghouse, 2009), <http://trac.syr.edu/tracreports/crim/201/>.

being illegal entry (8 USC §1325).¹⁰⁸ By contrast, reentry of a deported alien (8 USC §1326) was overwhelmingly the most common immigration-related prosecution in US District Courts.¹⁰⁹ Most immigration-related prosecutions continue to occur in border districts, but with significant recent increases in nonborder communities like the Northern District of Iowa (due primarily to the Postville raid) and the Northern District of California.¹¹⁰ In short, criminal prosecution for immigration offenses has become a national trend.

US attorneys have not adopted consistent standards related to the severity of immigration violations that merit prosecution, and practices vary. Under Operation Streamline, DHS refers for criminal prosecution all illegal entry violations in certain Border Patrol sectors. Because illegal crossings have diminished in the targeted areas during periods of intensive prosecution, DHS maintains that the program has had a deterrent effect.¹¹¹ However, no evidence exists that this strategy has deterred illegal crossings across the entire US-Mexico border, and it may simply be that targeted “zero tolerance” strategies move or temporarily displace illegal migration streams to other locations. In addition, DHS has not addressed the intuitive suspicion that the prosecution of relatively minor immigration offenses diminishes the resources available to investigate and prosecute more serious crimes. According to ICE, all Operation Streamline prosecutions have been for illegal entry, no matter the actual immigration violation committed.

Removal of Noncitizens Serving Criminal Sentences

Since at least the passage of IRCA, it has been a priority, first by INS later by DHS, to initiate removal proceedings for noncitizens serving criminal sentences prior to their release from prison. IRCA required INS to initiate removal proceedings at all prisons as soon as possible after noncitizens’ conviction. In response, INS created the Institutional Removal Program (IRP) in 1988. IRP ultimately covered 30 federal prisons and a handful of state prisons, and INS’s Alien Criminal Apprehension Program (ACAP) covered prisons not participating in IRP.¹¹²

In June 2007, ICE collapsed IRP and ACAP into its Criminal Alien Program (CAP). According to ICE, CAP has prioritized screening at institutions with noncitizen inmates, some of whom do not have immigration records, who present the greatest risk to national security and public safety. ICE has deployed teams to screen inmates at Bureau of Prison (BOP) facilities. The Detention Enforcement and Processing Offenders (DEPORT) Center in Chicago remotely processes convicted criminals at additional prisons and jails. ICE currently screens prisoners at all federal and state prisons, and at 10 percent of the nation’s

¹⁰⁸ TRAC, “Immigration Convictions for August 2008,” *Transactional Records Access Clearinghouse Reports* (Syracuse: Transactional Records Access Clearinghouse, 2008), <http://trac.syr.edu/tracreports/bulletins/immigration/monthlyaug08/gui/>

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ DHS, “Remarks by Homeland Security Secretary Michael Chertoff and Attorney General Mukasey at a Briefing on Immigration Enforcement and Border Security Efforts” (news release, February 22, 2008), http://www.dhs.gov/xnews/releases/pr_1203722713615.shtm.

¹¹² US Immigration and Customs Enforcement, “Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Alien” (fact sheet, November 19, 2008), http://www.ice.gov/pi/news/factsheets/secure_communities.htm.

3,100 jails.¹¹³ Its goal is to screen all foreign-born inmates in every federal, state, and local prison and jail in the nation.

DHS ultimately plans to provide federal, state, and local law enforcement officials with access to its databases during the booking process. Since an estimated 630,000 foreign-born nationals are booked in prisons and jails on criminal charges annually,¹¹⁴ screening at this early stage will contribute strongly to ICE's goal of ensuring that noncitizens in criminal custody are placed in removal proceedings at the earliest possible point in the criminal justice process. At present, police officers check fingerprints against the FBI's database, but not DHS databases. Once the FBI and DHS systems become interoperable, DHS databases will be automatically checked for immigration history at the same time that FBI databases are checked for criminal history.

Less than one-third of the noncitizens removed by ICE in FY 2007 — 99,924 of 319,382 — were removed on criminal grounds or were otherwise identified as having criminal records.¹¹⁵ This percentage is even less impressive when one considers that 21.6 percent of the “criminal aliens” removed committed immigration-related crimes.¹¹⁶ The number of “criminal alien” removals is surprising given the far higher number of prisoners ICE places in removal proceedings under the CAP program and the significant percentage of mandatory detainees (most facing removal on criminal grounds) in its custody.

Referral for Removal and Prosecution of Criminals or Noncitizens who Present a National Security Risk

Given its mission, ICE should be vigilant in identifying and initiating removal proceedings against noncitizens who threaten security or public safety. It should also refer appropriate cases for criminal prosecution. Yet both the numbers and percentages of noncitizens ICE has placed in removal proceedings on criminal, national security, and terrorist grounds have decreased from historic INS levels.¹¹⁷

In a study of immigration court data from FY 1992 to 2006, TRAC found that INS charged an average of 61 noncitizens per year with national security and terrorism grounds of removal between 1992 and 2001. By contrast, INS's successor agency initiated removal proceedings against an average of 41 unauthorized immigrants per year on national security and terrorism-related grounds between 2003 and 2006.¹¹⁸ The overall number of noncitizens

¹¹³ DHS, Office of Immigration Statistics, “Immigration Enforcement Actions: 2007,” 4, www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf.

¹¹⁴ ICE, “Department of Homeland Security unveils comprehensive immigration enforcement strategy for the nation's interior” (news release, April 20, 2006). http://www.dhs.gov/xnews/releases/press_release_0890.shtm.

¹¹⁵ DHS Office of Immigration Statistics, *Immigration Enforcement Actions: 2007* (Washington, DC: Department of Homeland Security, 2008), www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf.

¹¹⁶ *Ibid.*, 4. Unpublished statistics provided to MPI by ICE which vary slightly from published statistics, indicate that this disparity persisted in FY 2008, as ICE removed 361,000 noncitizens, 111,000 of them criminals.

¹¹⁷ TRAC, *Immigration Enforcement: The Rhetoric, The Reality*” (Syracuse: Transactional Records Access Clearinghouse, 2007) <http://trac.syr.edu/immigration/reports/178/>.

¹¹⁸ DHS has argued that it often opts to charge immigrants for routine immigration violations, rather than on more complex security and terrorist grounds because these cases can be easier to sustain and generate

charged in immigration court on criminal grounds peaked in 1997 at 52,750, and declined steadily to 32,142 in 2006.¹¹⁹

Conversely, the percentage and number of charges for routine immigration violations (principally entry without inspection) increased under ICE's stewardship, from 2000 (79.2 percent) to 2006 (86.7 percent).

TRAC also analyzed the cases referred for criminal prosecution on terrorist grounds in the two years following 9/11.¹²⁰ Most were not referred by INS or ICE. It found that prosecutors opted not to prosecute in 64 percent of the 6,472 terrorism or anti-terrorism referrals during this period, and charges were dismissed or the individuals were found not guilty in 9 percent of the referred cases. Of the 1,329 persons convicted over a five-year period, 14 (1 percent) received a sentence of 20 years or more, 67 (5 percent) received sentences of five or more years, 327 (24 percent) received sentences of one day to less than one year, and 704 (53 percent) received no prison time.

During the same period, federal investigative agencies referred 1,391 persons for prosecution as international terrorists, an expansive category that encompasses 80 crimes. Prosecutors filed charges against 335 of those referred, but declined to prosecute in 748 cases. Of the 213 persons convicted, 90 received no prison sentences, 91 received sentences of one day or less than one year, 18 receiving sentences of one to five years, eight were given sentences of five to 20 years, and six received sentences of 20 years to life.

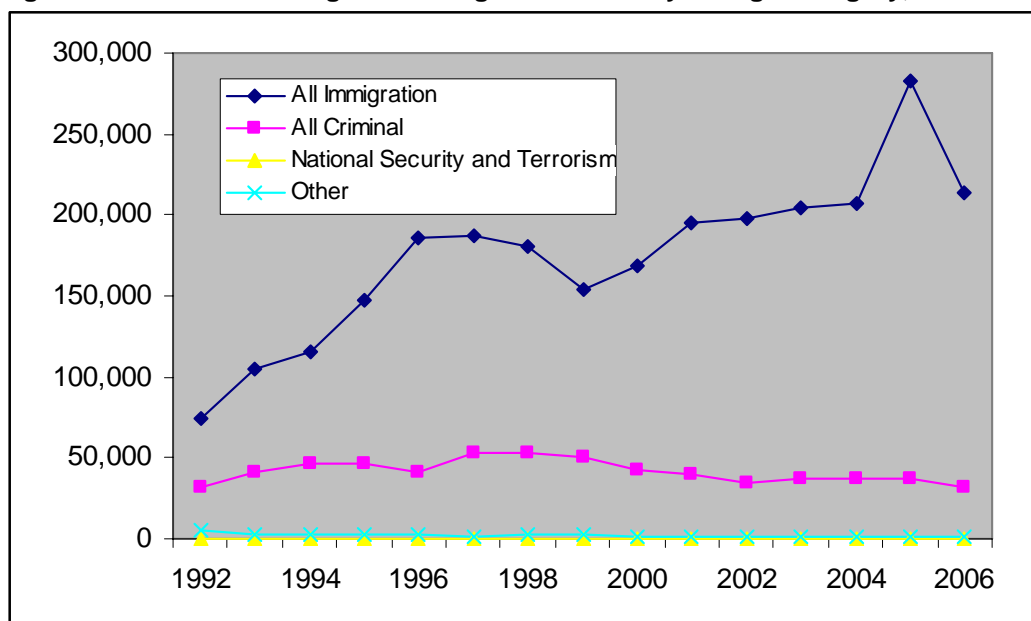
Of the 1,391 case referrals for international terrorism, 161 came from INS or DHS (both CBP and ICE), and another 70 from Customs/CBP. Of the INS/DHS referrals disposed of by the court system in the five years after 9/11, 45.4 percent were convicted, with most of those convicted receiving no prison time. Of the Customs/DHS referrals, 27.1 percent were convicted, with most receiving no prison time.

the same result, a removal order. However, this would presumably have been the practice both before and after the creation of ICE.

¹¹⁹ TRAC, *Individuals Charged in Immigration Court by Charge Category, FY 1992-2006* (Syracuse: Transactional Records Access Clearinghouse, 2007), <http://trac.syr.edu/immigration/reports/178/include/timeseries.html>.

¹²⁰ TRAC, *Criminal Terrorism Enforcement in the United States During the Five Years Since the 9/11/01 Attacks* (Syracuse: Transactional Records Access Clearinghouse, 2006), <http://trac.syr.edu/tracreports/terrorism/169/>.

Figure 8. Individuals Charged in Immigration Court by Charge Category, FY 1992 to 2006



Source: MPI figures based on TRAC data, “Individuals Charged in Immigration Court by Charge Category, FY 1992–2006,”

<http://trac.syr.edu/immigration/reports/178/include/timeseries.html>

Arrest and Removal of Unauthorized Immigrants Ordered Removed

The National Fugitive Operations Program (NFOP) has experienced more dramatic increases in funding and staffing than any other ICE program. Fugitive Operations Teams (FOTs) arrest noncitizens with outstanding deportation, exclusion, or removal orders. Estimates of the number of “fugitives” or “absconders” living in the United States have varied widely over the years, from 314,000 in January 2002, to 623,292 in August 2006, to 560,000 at the end of FY 2008.¹²¹

In January 2002, DOJ introduced the “Absconder Apprehension Initiative” with an initial focus on “priority” absconders (persons ordered removed) from countries with Al Qaeda terrorist presence or activity.¹²² In June 2002, Attorney General John Ashcroft announced the National Security Entry/Exit Registration System (NSEERS) program, which attempted to track and ensure the timely departure of nonimmigrants from select countries with a terrorist presence. In its detention and removal plan for 2003 to 2012, ICE averred that developing the capacity to remove “all removable aliens” was a critical pre-condition to national security.¹²³

¹²¹ DHS, Office of Inspector General, *Assessment of Department of Homeland Security’s Fugitive Operations Teams*, OIG-07-34, (Washington, DC: Department of Homeland Security, 2007), 3-4, http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-34_Mar07.pdf; ICE, “ICE Fugitive Operations Program,” http://www.ice.gov/pi/news/factsheets/NFOP_FS.htm.

¹²² Memorandum from Larry Thompson, Deputy Attorney General, to the INS Commissioner, the FBI Director, the US Marshals Service, and US Attorneys, January 25, 2002, <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/doj/abscondr012502mem.pdf>.

¹²³ DHS, Immigration and Customs Enforcement, *Endgame: Office of Detention and Removal Strategic Plan, 2002-2012: Detention and Removal Strategy for a Secure Homeland* (Washington, DC: Department

At the time of their establishment in 2003, Fugitive Operations Teams (FOTs) were expected to apprehend 125 fugitive aliens per year.¹²⁴ In 2004, DHS instructed that at least 75 percent of FOT arrests be of noncitizens with criminal records.¹²⁵ In 2006, DHS waived that guidance and established new targets for each FOT: 1,000 arrests per year.¹²⁶ By the end of FY 2008, ICE had created 95 FOTs, up from just eight teams in 2003.¹²⁷ Apprehensions by FOTs increased from 6,584 in FY 2003 to 34,155 in FY 2008.¹²⁸ Funding for the program grew from \$9 million in FY 2003 to just under \$219 million in FY 2008.¹²⁹

ICE has prioritized the apprehension of absconders who “pose a threat to national security and community safety.”¹³⁰ DHS has appropriately set the following fugitive apprehension priorities:

- noncitizens who are a threat to the nation;
- noncitizens who are a threat to the community;
- noncitizens with a violent criminal history;
- noncitizens with criminal convictions; and
- noncitizens with no criminal convictions.¹³¹

Until recently, FOTs relied on DHS’s 24-year-old Deportable Alien Control System (DACS) for information on noncitizens ordered removed. In 2006, the DHS OIG concluded that the DACS database was “not always accurate and up to date.”¹³² Exacerbating the problems with DACS, noncitizens ordered removed frequently move and are not likely to register changes of address with DHS. As a result, FOTs have consistently sought absconders at former or incorrect addresses, and have arrested the unauthorized immigrants they encounter at these residences. In August 2008, DHS retired DACS, merging its data into its Enforcement Case Tracking System (ENFORCE).

of Homeland Security, 2003), p. 2-2,

<http://media.houston.indymedia.org/uploads/2008/08/operationendgame.pdf>.

¹²⁴ DHS, Office of Inspector General, “Assessment of Department of Homeland Security’s Fugitive Operations Teams,” 8.

¹²⁵ Ibid.

¹²⁶ ICE, “Department of Homeland Security unveils comprehensive immigration enforcement strategy for the nation’s interior” (news release, April 20, 2006),

http://www.dhs.gov/xnews/releases/press_release_0890.shtm.

¹²⁷ ICE, “99 aliens arrested by Fugitive Operations Teams in the Dallas area” (news release, October 10, 2008), <http://www.ice.gov/pi/nr/0810/081010dallas.htm>.

¹²⁸ ICE, “ICE Fugitive Operations Program” (fact sheet, November 19, 2008).

¹²⁹ Margot Mendelson, Shayna Strom, and Michael Wishnie, *Collateral Damage: An Examination of ICE’s Fugitive Operation Program* (Washington, DC: Migration Policy Institute, 2009),

http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf.

¹³⁰ ICE, “ICE Fugitive Operations Program” fact sheet.

¹³¹ DHS, Office of Inspector General, *Assessment of Department of Homeland Security’s Fugitive Operations Teams*.

¹³² DHS, Office of Inspector General, *Detention and Removal of Illegal Aliens*,” OIG-06-33 (Washington, DC: Department of Homeland Security, 2006), 20, http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_06-33_Apr06.pdf.

Recommendations:

ICE should routinely refer for criminal prosecution only:

- **persons who commit egregious or repeated violations of immigration law; or**
- **those who commit unrelated criminal offenses.**

DHS and the relevant US Attorneys should suspend “zero-tolerance” prosecution programs in Border Patrol sectors and US Attorney jurisdictions pending a thorough review (by DHS and DOJ) of whether these programs:

- **deter illegal immigration across the entire border; and**
- **prevent the investigation and prosecution of more serious crimes in targeted sectors.**

While we do not discount the possible efficacy of targeted prosecution strategies, we recommend that DHS *routinely* refer for criminal prosecution only those persons who repeatedly and egregiously violate immigration law. The initiation of civil removal proceedings typically represents the most fitting, proportionate, and cost-effective approach to commonplace immigration violations. In addition, DHS and DOJ should initiate a review of whether “zero-tolerance” prosecution strategies preclude the investigation and prosecution of more serious crimes in targeted sectors and deter illegal immigration more broadly. During this review, zero-tolerance” initiatives, including Operation Streamline, should be suspended.

ICE should pursue its plans to:

- **provide federal, state, and local law enforcement officials with expanded access to its database during the booking process;**
- **expand screening of all noncitizens serving criminal sentences;**
- **place noncitizen criminals into removal proceedings prior to the completion of their sentences; and**
- **obtain travel documents for noncitizens ordered removed.**

ICE should also ensure that detained and imprisoned immigrants in removal proceedings have access to legal counsel.

In FY 2008, ICE initiated removal proceedings against 221,000 noncitizens in federal, state, and local jails — more than triple the number from FY 2006. ICE should pursue its plans to increase law enforcement access to its database, to expand its screening of noncitizens serving criminal sentences, to charge noncitizens prior to the completion of their criminal sentences, and to secure travel documents for prisoners who have been ordered removed.

Noncitizens who have a legal claim to remain in the United States — whether based on risk of torture, fear of persecution, or strong family ties in the United States — should be able to make that claim effectively. As a rule, immigrants cannot competently represent themselves in removal proceedings, which are complex and adversarial. However, most immigrants facing removal (particularly those in custody) cannot afford or otherwise secure legal counsel.

Legal representation furthers the nation's interest in fair and informed decisions being made under its laws, and constitutes an essential due-process protection.¹³³ It also represents a safeguard against indefinite detention. ICE should work with DOJ to ensure that federally funded "legal orientation" programs, coupled with *pro bono* and other legal service programs, are available to all detained and imprisoned noncitizens in removal proceedings.¹³⁴

ICE's NFOP should replace its 1,000-arrest quota requirement with a system that prioritizes the arrest of noncitizens ordered removed on criminal and national security grounds. ICE should improve and update the information on absconders (particularly addresses) in its databases, and not send FOTs to unverified addresses. It should develop a new, formal protocol for NFOP.

While NFOP was intended to focus on apprehending dangerous fugitives, a newly released MPI study has found that FOTs have primarily arrested the easiest targets, including many persons without a criminal history and nonfugitives, whose cases have not yet been heard by an immigration judge. Key findings included:

- Almost three-quarters (73 percent) of the individuals apprehended by FOTs from 2003 through February 2008 had *no* criminal conviction.
- In 2007, fugitive aliens with criminal convictions represented just 9 percent of total FOT arrests.
- In 2007, Congress appropriated \$183 million to NFOP. With those funds, NFOP arrested only 672 fugitive aliens with violent criminal history or whom ICE considered dangerous to the community.
- From 2003 to 2005, ordinary status violators represented an average of 22 percent of annual FOT arrests. In 2006, after the 1,000-arrests-per-team quota was implemented, ordinary status violators constituted 35 percent of total FOT arrests. In 2007, the figure rose to 40 percent. Arrests of ordinary status violators are sometimes referred to as "collateral arrests."

The MPI report makes the following six recommendations:

- NFOP should replace the 1,000-arrest annual quota per FOT team with a system that prioritizes arresting dangerous fugitives above all others. As of July 31, 2008, 80 percent of ICE fugitives did not have criminal histories.¹³⁵ Thus, ICE cannot expect FOTs to arrest a high percentage of criminals unless it narrows the program's focus.
- FOTs should approach only targeted houses and persons.
- NFOP should develop a new protocol that explicitly addresses constitutional and humanitarian concerns that arise during FOT operations. All FOT agents should be required to undergo comprehensive training in accordance with this new protocol (as

¹³³ Jaya Ramji-Nogales, Andrew Schoenholtz, and Phillip Schrag, "Refugee Roulette: Disparities in Asylum Adjudication," 60 *Stanford Law Review*, 295 (2007), papers.ssrn.com/sol3/papers.cfm?abstract_id=983946.

¹³⁴ Donald Kerwin, "Revisiting the Need for Appointed Counsel," *MPI Insight* (Washington, DC: Migration Policy Institute, April 2005), http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf.

¹³⁵ ICE, "New ICE program gives noncriminal fugitive aliens opportunity to avoid arrest and detention: Aliens and families to benefit from coordinated removals" (news release, July 31, 2008), <http://www.ice.gov/pi/nr/0807/080731washington.htm>.

well as periodic refresher training), in addition to their basic law enforcement training.

- NFOP should expand its priority system to designate individuals with *in absentia* orders who may not even know that they were ordered removed and have no criminal history as a new lower priority target.
- ICE should direct substantial NFOP resources to improving the database from which information about fugitive aliens is drawn. Specific standards for database accuracy should be set, achieved, and verified by government audit.
- NFOP should redeploy resources when FOTs are unable to identify or pursue dangerous fugitives.

D. The Role of States and Localities in Enforcing Federal Immigration Law

One of the most contentious issues in the US immigration debate has been the role local police forces and sheriffs' offices should play in enforcing federal immigration law. Because immigration remains the province of the federal government, states and localities do not have *carte blanche* authority in this area. At the same time, some level of state and local involvement in immigration enforcement is inevitable and desirable. The debate over whether states and localities have inherent authority to enforce immigration law will ultimately be less consequential than the development of a mission-appropriate, mutually beneficial division of labor.

ICE's FY 2009 budget includes funding for nearly 19,000 full-time employees, including 5,578 criminal investigators in its Office of Investigations.¹³⁶ By contrast, states and localities employed 677,357 police officers in 2007 and an additional 717,354 correctional employees.¹³⁷ The staffing disparity explains why DHS views local law enforcement as a potential force multiplier and, indeed, why INS and its successor agencies have long depended on state and local support. In 1996, Congress created a formal mechanism to partner with local police forces and sheriffs' offices to perform certain immigration functions.¹³⁸ At this writing, ICE has entered 67 so-called 287(g) agreements (named after the relevant section of the Immigration and Nationality Act) with states and localities, and has trained and supervised 950 local officers and prison officials to perform immigration enforcement functions.¹³⁹

Many police chiefs and trade associations have opposed taking on immigration enforcement functions that, they believe, conflict with their core responsibilities to protect and serve the

¹³⁶ Information provided to MPI by ICE, Office of the Assistant Secretary (Washington DC: December 22, 2008); and DHS, *Budget-in-Brief, Fiscal Year 2009* (Washington, DC: Department of Homeland Security, 2008), http://www.dhs.gov/xlibrary/assets/budget_bib-fy2009.pdf.

¹³⁷ Census Bureau, "2007 Public Employment Data, State and Local Governments" (revised January 2009), <http://ftp2.census.gov/govs/apes/07stlus.txt>; see also, US Department of Justice, Bureau of Justice Statistics, "State and Local Law Enforcement Statistics," <http://www.ojp.usdoj.gov/bjs/sandle.htm> (Local police departments employed 580,749 full-time employees in 2003 and local sheriffs' offices employed 330,274).

¹³⁸ CRS, *Immigration Enforcement Within the United States*, 56.

¹³⁹ ICE, "The ICE 287(g) Program: A Law Enforcement Partnership" (fact sheet, November 19, 2008), http://www.ice.gov/pi/news/factsheets/section287_g.htm.

public. They argue that community policing and cooperation will suffer if police officers routinely screen immigrants for status violations. As the police chiefs of major US cities have noted:

Without assurances that contact with the police would not result in purely civil immigration enforcement action, the hard-won trust, communication, and cooperation from the immigrant community would disappear. Such a divide between the local police and immigrant groups would result in increased crime against immigrants and in the broader community, create a class of silent victims, and eliminate the potential for assistance from immigrants in solving crimes or preventing future terroristic acts.¹⁴⁰

In addition, local police forces lack expertise in immigration law, just as they do in tax or other areas of federal law. They do not want to enforce areas of the law beyond their jurisdiction, competence, and resources. At the same time, most recognize the importance of determining the identity of persons that they stop and arrest, ensuring that they do not release dangerous criminals, and assisting in the process of placing noncitizen criminals in removal proceedings prior to their release from prison. In addition, many see the need to cooperate with ICE in responding to crimes (such as human trafficking) which have a nexus with illegal immigration and in providing logistical assistance to ICE teams during dangerous or large operations.

Recommendations:

The administration should reassert the primacy of the federal government’s role in enforcing immigration law. ICE should only enter into formal and informal working arrangements with state and local law enforcement agencies that are consistent with both its own immigration enforcement responsibilities and with the mission of local police forces to protect and serve the public.

The federal government has the responsibility to enforce immigration law. Consistent with its pre-eminent role in this area, ICE should limit its formal agreements — including its 287(g) agreements — and its working relationships with local law enforcement agencies to three areas which reflect their missions and resource limitations.

First, local officials in prisons and jails should be trained and deputized to identify noncitizen criminals in their custody with support from ICE. Working relationships of this kind have long been in place and are relatively noncontroversial. Section 287(g) agreements can potentially formalize and professionalize working relationships with local correctional officials. This kind of arrangement will assist ICE to initiate removal proceedings against noncitizens prior to their release from prison, and serve both federal and local interests in protecting the public. Localities can also play a subsidiary role in transporting persons in removal proceedings to ICE custody.

¹⁴⁰ Major Cities Chiefs Association, “M.C.C. Immigration Committee Recommendations For Enforcement of Immigration Laws by Local Police Agencies” (position paper, June 2006), http://www.houstontx.gov/police/pdfs/mcc_position.pdf.

Second, state and local police should be supported in identifying persons that they stop and arrest in the course of their law enforcement work. The Law Enforcement Support Center (LESC) should continue to receive priority support. LESC allows federal, state, and local officers to secure identity, immigration status, and criminal history about foreign-born persons they are investigating or have arrested. ICE has made it a priority to add the records of certain immigration violators (including some absconders) to the National Crime Information Center (NCIC) database, which police can access through LESC. Overall, the NCIC database includes three sets of immigration files: a deported felon category that contains the records of persons deported for certain felonies; the absconder category for those ordered removed who have not departed; and the NSEERs category for persons who have allegedly violated NSEERs requirements.¹⁴¹

ICE should not enter into agreements that authorize local police to check the immigration status of persons in need of their assistance or who are assisting them. Routinely or randomly checking the immigration status of persons who have not been arrested, or are not in police custody or the subject of an investigation would interfere with the ability of police departments to fulfill their primary missions.

Third, ICE should formalize working relationships with states and localities (occasionally through joint task forces) to investigate and prosecute state/local crimes that can assist immigration enforcement efforts. For example, state nuisance abatement violations might be investigated and pursued as a way to close down smuggler safe houses in certain communities. Labor violations can also be prosecuted on a state level. Similarly, local police should continue to provide logistical support to ICE during operations that pose a risk to the public or to ICE officers.

E. The Use of Detention and Expansion of Alternative Programs

ICE's detention and removal activities seek to ensure that individuals ordered removed actually leave the United States and that their countries of origin permit their return.¹⁴² ICE's FY 2009 budget of \$5.9 billion includes \$4.9 billion in discretionary (appropriated) funds, \$640 million in fees paid to the Federal Protective Service, and other fee and penalty revenues.¹⁴³ More than half its appropriated revenues (nearly \$2.5 billion) support its Detention and Removal Operations (DRO) arm, with \$1.7 billion of that amount for custody operations. Two laws passed in 1996 — IIRIRA and the Anti-Terrorism and Effective Death Penalty Act (AEDPA)¹⁴⁴ — expanded the number of crimes for which noncitizens could be removed. They also diminished the ability of noncitizens to contest

¹⁴¹ Testimony of Thomas E. Bush III, Assistant Director, Criminal Justice Information Services Division, Department of Justice, before the Senate Committee on Homeland Security and Governmental Affairs, *Passport Information Sharing with Department of State*, 109th Cong., 1st sess., June 29, 2005, <http://hsgac.senate.gov/public/files/BushTestimony.pdf>.

¹⁴² DHS, *Budget-in-Brief, Fiscal Year 2009*, 33.

¹⁴³ Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Committee Print of the Committee on Appropriations, US House of Representatives, H.R. 2638, P.L. 110-329 (Government Printing Office, October 2008), 634-638, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_house_committee_prints&docid=f:44807p5.pdf; and ICE, "Fiscal Year 2009" fact sheet.

¹⁴⁴ P.L. No. 104-132.

removal and remain in the United States, and expanded the categories of noncitizens subject to mandatory detention. Under current law, ICE *can* detain all noncitizens in removal proceedings. However, it *must* detain virtually all noncitizens who are removable on criminal or national security grounds, asylum-seekers in the expedited removal process until they can demonstrate a credible fear of persecution, arriving aliens who appear inadmissible for other than document-related reasons, and persons ordered removed for at least 90 days following their removal orders.¹⁴⁵

Since 1996, immigrant detention has increased geometrically. Between FY 1994 and FY 1997, the average daily population in INS custody rose from 6,785 to 11,871.¹⁴⁶ By FY 2007, this figure had grown to 30,295 per night.¹⁴⁷ ICE's FY 2009 budget funds 33,400 detention beds per night.¹⁴⁸ Between FY 2003 and FY 2007, the total number of noncitizens detained by ICE per year increased from 231,500 to 311,213.¹⁴⁹

Beyond the exponential growth in its detention system, ICE faces several challenges in meeting its responsibilities in this area. First, mandatory detainees do not invariably represent a threat to the community. By definition, all ICE detainees have already served any criminal sentences they might have received. Many criminal aliens, even aggravated felons, are not violent criminals; some, in fact, are misdemeanants. As a result, the DHSOIG has warned that sharp increases in mandatory detainees could limit "ICE's ability to detain high-risk/high-priority aliens that CBP and DRO officials believe pose a potential national security or public safety risk."¹⁵⁰ It recommended that ICE "intensify efforts to obtain the resources needed to expedite the development of alternatives to detention to minimize required detention bed space levels," and urged it to "move forward in the development of cost-effective alternatives to detention."¹⁵¹

Second, ICE cannot control or even predict CBP's programmatic needs. Until recently, CBP was not required to notify ICE of its apprehension initiatives or its projected need for additional detention bed space.¹⁵²

Third, ICE has not fully taken advantage of cost-effective alternatives to detention for nonmandatory detainees. Nor has it extended its current programs (involving alternative forms of detention) to mandatory detainees. Yet alternatives *to* detention and alternative forms *of* detention have proven successful in ensuring court appearances and reducing costs.

¹⁴⁵ See generally, Donald Kerwin and Charles Wheeler, "The Detention Mandates of the 1996 Immigration Act: An Exercise in Overkill," *Interpreter Releases* 75, no. 40 (October 19, 1998).

¹⁴⁶ CRS, *Immigration Related Detention: Current Legislative Issues* (Washington, DC: Congressional Research Service, 2004), <http://www.fas.org/irp/crs/RL32369.pdf>.

¹⁴⁷ CRS, *Health Care for Noncitizens in Immigration Detention* (Washington, DC: Congressional Research Service, June 27, 2008), CRS-25, http://assets.opencrs.com/rpts/RL34556_20080627.pdf.

¹⁴⁸ Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Committee Print of the Committee on Appropriations, US House of Representatives, H.R. 2638, P.L. 110-329 (Government Printing Office, October 2008), 636, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_house_committee_prints&docid=f:44807p5.pdf.

¹⁴⁹ CRS, *Health Care for Noncitizens in Immigration Detention* (Washington, DC: Congressional Research Service, June 27, 2008), CRS-26, http://assets.opencrs.com/rpts/RL34556_20080627.pdf.

¹⁵⁰ DHS, Office of Inspector General, *Detention and Removal of Illegal Aliens*, 6.

¹⁵¹ *Ibid.*, 23, 25.

¹⁵² CRS, *Immigration Enforcement Within the United States*, 24.

Detention Standards

The word detention is something of a misnomer in the immigration context. As the US Commission on International Religious Freedom has put it, ICE detainees may technically be in civil proceedings, but for all intents and purposes they are held in prisons or prison-like facilities governed by standards that “are identical to, and modeled after, correctional standards for criminal populations.”¹⁵³ ICE does not exercise direct control over most of the noncitizens in its custody. It contracts with state prisons and local jails to hold 67 percent of its detainees, and with private prisons to hold another 17 percent.¹⁵⁴ Over the years, credible reports have catalogued problems related to the treatment of various detainee populations and in particular facilities.¹⁵⁵ Recent press reports, for example, have described substandard medical care and detainee deaths.¹⁵⁶

ICE has made substantial progress in establishing and enforcing credible detention standards. In September 2000, INS issued 36 national detention standards (it ultimately added two more) covering security, the exercise of religion, medical services, visitation, telephone access, legal rights presentations, and transfers. The standards have been applied in phases, first to ICE prisons known as Service Processing Centers (SPCs), followed by private contract facilities known as Contract Detention Facilities (CDFs), and finally to state and local jails with whom ICE enters Intergovernmental Services Agreements (IGSAs). Developed in conjunction with the American Bar Association, the standards respond to the unique needs of immigrants in “civil custody.”

In January 2010, ICE will implement performance-based standards, which build on the national detention standards and will include new standards on media interviews and tours, detainee searches, sexual abuse, and staff training.¹⁵⁷ In ICE’s view, the performance-based standards will improve upon its national detention standards by setting forth the results or outcomes that the national standards were intended to achieve.¹⁵⁸

ICE has established two entities to ensure compliance with its standards. The Detention Standards Compliance Unit contracts with two private corporations to conduct annual monitoring visits at all facilities that house ICE detainees and onsite compliance verification

¹⁵³ US Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal, Volume I: Finding and Recommendations* (Washington, DC: United States Commission on International Religious Freedom, 2005), 48-49.

¹⁵⁴ Eleanor Stables, “ICE Official Wants to Expand ‘Alternatives to Detention’ Programs,” *CQ.com* (March 16, 2007).

¹⁵⁵ See generally, Donald Kerwin, *Revisiting the Need for Appointed Counsel* (Washington, DC: Migration Policy Institute, 2005), 6-7.

¹⁵⁶ Dana Priest and Amy Goldstein, “System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost,” *Washington Post*, May 11, 2008; and Nina Bernstein, “Few Details on Immigrants Who Died in Custody,” *New York Times*, May 5, 2008.

¹⁵⁷ ICE, “Detention Management Program,” <http://www.ice.gov/partners/dro/dmp.htm>; and ICE, “ICE announces new Performance-Based National Detention Standards for all ICE detention facilities,” (September 12, 2008), <http://www.ice.gov/pi/nr/0809/080912washington.htm>.

¹⁵⁸ Letter from Stewart Baker, Assistant Secretary for Policy, Department of Homeland Security, to Felice Gaer, Chair, United States Commission on International Religious Freedom, November 28, 2008. On file with MPI.

at SPCs, CDFs, and state/local prisons with larger numbers of detainees.¹⁵⁹ The unit rates facilities based on their compliance with the standards.

In 2007, ICE created the Detention Facilities Inspection Group (DFIG) under its Office of Professional Responsibility (OPR). DFIG can review “critical incidents, detainee allegations of employee misconduct, and allegations of detainee mistreatment.”¹⁶⁰ In June 2008, the DHS OIG reported that “routine oversight of facilities has not been effective in identifying certain serious problems at facilities.”¹⁶¹ It also raised concerns over whether DFIG had sufficient resources (six employees at its initiation) to perform its mission.¹⁶²

Alternatives to Detention

As previously noted, IIRIRA expanded the categories of immigrants, particularly those facing removal on criminal grounds, subject to mandatory detention. It took several years after the act’s passage for the INS, and later the ICE, detention population to tilt decisively to mandatory detainees. Criminal aliens made up only 43 percent of the increase in INS detention between FY 1994 and FY 2001.¹⁶³ In FY 2002, 51 percent of detainees had criminal records.¹⁶⁴ By mid-2005, however, mandatory detainees (most facing removal on criminal grounds) accounted for 87 percent of the persons in ICE’s custody.¹⁶⁵ As these figures indicate, significant expansion of alternative programs can only occur if they are open to mandatory detainees.

Successful alternative-to-detention programs invariably include similar ingredients: family sponsorship, legal representation, meaningful supervision, and screening that excludes detainees who threaten public safety or represent a flight risk.¹⁶⁶ They also recognize the need for enhanced monitoring or detention (given the increased risk of flight) after a removal order has been entered. In FY 2005, for example, 60 percent of nondetained aliens failed to appear for their removal hearings, and only 18 percent of nondetained aliens who subsequently receive final removal orders leave the United States.¹⁶⁷

¹⁵⁹ ICE, “Protecting the Homeland: Semiannual Report on Compliance with ICE National Detention Standards, January – June 2007.”

http://www.ice.gov/doclib/pi/news/newsreleases/articles/semi_annual_dmd.pdf

¹⁶⁰ Letter from Stewart Baker to Felice Gaer, November 28, 2008.

¹⁶¹ DHS, Office of Inspector General, *ICE Policies Related to Detainee Deaths, and the Oversight of Immigration Detention Facilities*, OIG-08-52 (Washington, DC: Department of Homeland Security, 2008), 19, http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_08-52_Jun08.pdf

¹⁶² *Ibid.*, 21.

¹⁶³ US Department of Justice, Office of the Federal Detention Trustee, “Detention Needs Assessment and Baseline Report,” *A Compendium of Federal Detention Statistics* (Washington, DC: Department of Justice), http://www.usdoj.gov/ofdt/compendium_final.pdf.

¹⁶⁴ CRS, *Immigration-Related Detention: Current Legislative Issues*, RL32369 (Washington, DC: Congressional Research Service, 2004), CRS-12, <http://www.fas.org/irp/crs/RL32369.pdf>.

¹⁶⁵ DHS, Office of Inspector General, *Detention and Removal of Illegal Aliens*, 5-6.

¹⁶⁶ Megan Golden, Oren Root, and David Mizner, *The Appearance Assistance Program: Attaining Compliance with Immigration Laws Through Community Supervision* (New York: Vera Institute of Justice, 1998), http://www.vera.org/publication_pdf/aap.pdf.

¹⁶⁷ CRS, *Immigration Enforcement Within the United States*, 21.

Several alternative-to-detention models have proven successful.¹⁶⁸ Between February 1997 and March 31, 2000, the Vera Institute of Justice administered a pilot project designed to assure appearances by immigrants in removal proceedings who would otherwise have been detained. The project entailed careful screening, home visits, in-person and telephonic reporting, legal referrals, and accompaniment to court hearings. Ninety-one percent of the program's participants appeared for all of their required hearings, compared to 71 percent in control groups.¹⁶⁹ Asylum-seekers and lawful permanent residents with minor criminal records appeared at even higher rates, leading program administrators to conclude that these populations did not need to be detained throughout the removal process. The program cost \$12 per participant per day, compared to the \$61 average daily cost (\$95 today) to detain an immigrant.¹⁷⁰

At present, ICE administers two programs which might best be characterized as alternative *forms* of detention. The first, the Intensive Supervision Appearance Program (ISAP), begins with a period of electronic monitoring, home curfews, in-person reporting, and unannounced home visits. ICE gradually eases and eliminates various restrictions as participants demonstrate compliance with the program. Since its inception, the program has enjoyed a 99 percent appearance rate at immigration hearings and 95 percent at final removal hearings.¹⁷¹ The second, the enhanced supervision program, offers electronic monitoring (by itself) and a full-service enhanced supervision reporting program with electronic monitoring, home visits, in-person reporting, and other requirements.¹⁷²

ICE offers its alternative programs to asylum-seekers and others who might otherwise be released from detention, including mothers arrested in raids who must wear what are euphemistically called ankle bracelets.¹⁷³ Mandatory detainees cannot participate in these programs.

As ICE alternative-to-detention programs have expanded and moved beyond the pilot stage, they have become increasingly cost-effective. ICE budgeted \$43.6 million for alternatives to detention in FY 2007,¹⁷⁴ and extended this program to 11,478 participants, including 2,884 in its ISAP program and 8,594 who were subject to electronic monitoring.¹⁷⁵ In FY 2008, its alternative-to-detention budget grew to \$53.9 million, and the programs covered 24,034 detainees, including 6,825 in ISAP, 7,378 in enhanced supervision, and 9,831 in electronic

¹⁶⁸ For a description of several modest, but successful alternative-to-detention programs, see Catholic Legal Immigration Network, Inc., *The Needless Detention of Immigrants in the United States* (Washington, DC: Catholic Legal Immigration Network, Inc., 2000), *The Needless Detention of Immigrants in the United States*.

¹⁶⁹ Oren Root, *The Appearance Assistance Program: An Alternative to Detention for Noncitizens in US Immigration Removal Proceedings* (New York: Vera Institute of Justice, 2000)

¹⁷⁰ *Ibid.*, 8.

¹⁷¹ ICE, "Alternatives to Detention" (fact sheet, November 26, 2008), <http://www.ice.gov/pi/news/factsheets/080115alternativestodetention.htm>.

¹⁷² *Ibid.*

¹⁷³ ICE, "Endgame: Office of Detention and Removal Strategic Plan, 2002-2012: Detention and Removal Strategy for a Secure Homeland," 2-10, 4-7.

¹⁷⁴ ICE, "Fiscal Year 2007" fact sheet.

¹⁷⁵ DHS, "Budget-in-Brief, Fiscal Year 2009."

monitoring.¹⁷⁶ The program's daily averages in FY 2008 included 3,016 persons in ISAP, 2,805 in enhanced supervision, and 6,192 subject to electronic monitoring.

ICE's FY 2009 budget includes \$63 million for alternatives to detention, 3 percent of its detention and removal budget.¹⁷⁷ As of November 2008, 5,200 persons were enrolled (per night) in the ISAP program, 5,400 in electronic monitoring, and 6,500 in enhanced supervision.¹⁷⁸

Recommendations:

ICE detention standards should apply to all facilities that house ICE detainees, whether federal, state, or local, and should be promulgated in a regulation. ICE should strictly enforce its standards and devote sufficient resources to ensuring compliance with them.

Several factors argue for particular vigilance in ensuring the humane treatment of those in ICE custody, including the explosive growth in its detention system, its civil detainee population, its use of contractors, its longstanding challenges, and ongoing problems in certain facilities.

ICE's detention standards apply to every facility (including BOP prisons) that house ICE detainees. To ensure their enforcement, the standards should be promulgated in a regulation and sufficient resources should be devoted to both the Detention Standards Compliance Unit and the Detention Facilities Inspection Group.

ICE should expand its supervised release programs for discretionary detainees who do not threaten national security or public safety, and who would not (under the program) represent a flight risk. It should determine whether its enhanced electronic monitoring program constitutes a legal "form" of civil detention. If so, ICE should extend eligibility for this program to mandatory detainees who do not represent a national security, public safety, or flight risk.

Immigrant detention serves one principal purpose: to facilitate removal; and two subsidiary purposes: to reduce flight risk and to protect the public. ICE should pursue humane and proven alternatives to detention that serve the same purposes. ICE alternative programs virtually guarantee court appearances, represent a fraction of the cost of "hard" detention, and allow ICE to focus its resources on noncitizens who may abscond or threaten others. An expansion of alternative programs may also obviate the need for extensive contracting by ICE with local prisons and for-profit prisons, and, as a result, may allow ICE to manage this program more effectively.

¹⁷⁶ ICE, Information provided to MPI regarding ICE alternatives to detention programs, January 16, 2009.

¹⁷⁷ Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Committee Print of the Committee on Appropriations, US House of Representatives, H.R. 2638, P.L. 110-329 (Government Printing Office, October 2008), 637, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_house_committee_prints&docid=f:44807p5.pdf.

¹⁷⁸ ICE, "Alternatives to Detention" fact sheet.

For these reasons, ICE should expand its alternative *to* detention programs (supervised release) for discretionary detainees. If determined to be legally feasible, it should offer alternative *forms* of detention (enhanced electronic monitoring) to mandatory detainees who do not threaten national security or public safety or constitute a flight risk. Alternative programs satisfy the purpose of detention, reduce costs, and reserve detention space for high-risk, dangerous immigrants. Because flight risk increases after a removal order has been entered, these programs should primarily be available during the pendency of removal proceedings.¹⁷⁹

Eligibility for alternatives could fruitfully be based on the detention guidelines issued by INS in 1998 in response to IIRIRA. The INS guidelines set forth four detention categories: required, and high-, medium-, and low-priority. Mandatory detainees fell in the required, Category 1.¹⁸⁰ Category 2, high-priority detainees included nonmandatory detainees removable on security or criminal grounds who were a danger to the community or a flight risk, whose detention was essential to border enforcement, or who had engaged in human smuggling. Category 3, medium-priority included nonmandatory, noncriminal arriving noncitizens, noncitizens who had committed fraud before the INS, and those arrested at worksites who committed fraud in obtaining employment. Category 4, low-priority detainees included other removable noncitizens and those originally placed in expedited removal but who had demonstrated a credible fear of persecution.

Adapting these guidelines, Category 1 (mandatory) detainees who do not constitute a threat to national security or to public safety would be *prima facie* eligible for an alternative form of detention, in particular electronic monitoring combined with other appropriate safeguards. Category 2 detainees could likewise be screened for alternative forms of detention but would be less likely to qualify for an alternative program. Most of the persons in Category 3 should be eligible for supervised release. Persons in “Category 4 should be released, although some might appropriately be subject to supervision.

¹⁷⁹ Megan Golden, Oren Root, and David Mizner, *The Appearance Assistance Program: Attaining Compliance with Immigration Laws Through Community Supervision*.

¹⁸⁰ Memorandum from Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, INS, to Regional Directors, October 7, 1998, Vol. 3, No. 21 (Bender’s Immigration Bulletin, Nov. 1, 1998).

IV. United States Citizenship and Immigration Services

Overview

US Citizenship and Immigration Services is primarily responsible for administering the policies and programs that constitute the nation's legal immigration system. In creating USCIS, Congress's goal was improved legal immigration processes and services. When part of INS, immigration services were seen to be chronically overshadowed by INS's law enforcement mission, culture, and greater resource allocations. Creating a self-standing new agency provided the promise of a true customer service organization whose mission to serve both legally eligible US citizen and noncitizen applicants seeking immigration benefits could be carried out through efficient, timely adjudications processes and the development of an organizational culture anchored in customer service and responsiveness.

At the same time, USCIS came into being in the wake of 9/11 with security imperative as the organizing principle for a new DHS. Thus, since its inception, USCIS has seen its responsibilities first and foremost as insuring the integrity of immigration application processes from a security standpoint. Wider-ranging security checks and related safeguards have been established. However, they brought with them substantially greater processing delays and extreme bureaucratic caution, dubbed by many stakeholders as the "culture of 'no'."

During FY 2008, USCIS completed about 1.1 million citizenship applications, up from 422,000 the year before. It has reduced the average waiting time from 18 to nine months. In response to a mandate in the Homeland Security Act (HSA), it has established Infopass, a system that allows customers to make appointments with immigration officers and submit benefit applications online (E-filing). Customers are now also able to check the status of their cases online, by calling a customer service number, and via e-mail updates from USCIS. In addition, new, less forbidding-looking offices designed to improve the customer experience are being piloted at four Florida locations as a model for offices around the country.

There have been other improvements in service that are signs of welcome change. However, the transformational change required for the agency to truly function as a service-driven organization has yet to be achieved. Such change is essential if USCIS is to succeed in carrying out both the service and enforcement roles and responsibilities with which it is charged in the performance of the immigration system overall.

Instead, the applicant experience too often includes misplaced or lost records, brusque or inadequately trained staff, fragmented and outdated information systems, arbitrary decision-making, unreasonably long delays, redundant or needlessly complex requirements, paper-based processing, and high application fees. Because of the volume of cases USCIS handles and the centrality of its decisions to people's lives and futures — as well as those of their families, employers, and communities — the agency's failings have shaped its overall image in the minds of many decisionmakers and the broader public.

Beyond its image and operational shortcomings, however, there are several broad, pressing policy reasons that make it imperative that USCIS meet its promise as a free-standing agency.

Supporting Legal Immigration

The first involves managing legal immigration processes so that those who seek to play by the rules can do so. The vast majority of applications USCIS adjudicates are filed by US citizens, lawful permanent residents, and US institutions and employers seeking a benefit for which they are eligible under the nation's immigration laws. Collectively, their applications represent flows of family members, skilled and unskilled workers, and various other categories of immigrants and nonimmigrants whose admission to the country has been deemed by Congress to be in the national interest.

Such applicants and their sponsors deserve predictable processing times, access to information regarding their cases, clear instructions regarding requirements, and consistency in decision making. Many applicants do indeed experience good service. However, many do not. The agency's failings frustrate not only individuals, but seriously hamper legitimate, lawful immigration. Incentivizing legal immigration when avenues are in place for it to occur is especially important in the face of widespread illegal immigration, some of which occurs because individuals and employers will not wait for, or cannot gauge, the time or steps required to play by the rules.

Protecting Security

Second, USCIS must also aggressively combat benefit fraud. Applicants who misuse the immigration system by filing fraudulent applications can pose dangers to their communities or to the nation. As immigration enforcement becomes more effective at the borders and in the workplace, misuse of legal immigration processes is likely to intensify.

Since 9/11, USCIS has invested extraordinary effort in strengthening the integrity of its screening processes. However, in its emphasis on security-clearance processes, it has given insufficient attention to the timeliness of adjudications. The biggest security threat inherent in the USCIS mission may well be backlogs and inordinate delays in completing adjudications. When USCIS does not know who is in its caseload — many of whom are individuals who are already in the United States — there is risk. Timely decision-making must be on a par with strengthened screening and antifraud protections to achieve meaningful security. Bringing these imperatives into alignment is an important challenge for the future.

Implementing Immigration Reform

Finally, there is the issue of immigration reform. Most immigration reform proposals have included variants of four principal ideas: strong border control; employer accountability through mandatory verification of new hires; provisions for future flows of needed workers, either through increased permanent immigration or a guest worker program; and legal status eligibility for the unauthorized population residing in the United States.

If such a reform package is enacted, three of its four principal provisions (border control is the exception) would be the responsibility of USCIS to implement. Legislation would entail sweeping new mandates that would generate volumes of work far larger than any the agency

— or the immigration system — has handled before.¹⁸¹ Thus, it is essential that USCIS modernize and build capacity if it is to be equipped to implement ambitious new policies.

Key Issues and Recommendations

A. The Cycle of Backlogs

In October 2000, Congress mandated INS to develop a plan to eliminate its backlog, or the number of immigration cases with benefits applications pending for more than six months.¹⁸² For FY2002, INS received an appropriation for a five-year initiative to achieve a standard processing time of six months for all applications. The goal, championed by the Bush administration, was to eliminate the backlog by the end of FY2006.

When USCIS was established in 2003, substantial backlogs in application processing already existed and had been a pattern for many years. The HSA specified that the USCIS Director was to implement any pilot programs available to eliminate the backlog within a year and prevent any future backlog from developing. Neither has occurred.

By the end of FY2006 and the five-year initiative, USCIS announced that it had reduced the caseload of applications pending more than six months to just 9,500. Yet this number is deceptive because it results from fundamental changes in USCIS' methodology for counting backlogs and pending cases — not from actual case processing. In fact, many more applications were actually pending, including tens of thousands awaiting security checks by the FBI, whose tightened post-9/11 screening procedures led to processing delays that stretched to three years and more for tens of thousands of cases by the end of FY 2006.

Metrics

USCIS has changed its definitions of pending cases, backlogs, and related metrics several times in recent years. In general, immigration cases pending with USCIS past the processing time goal of six months are counted as a backlog. However, the methodology that USCIS uses today is opaque and makes it exceedingly difficult to determine the actual average waiting time applicants experience against the longstanding goal of a six-month processing norm.

The most recent change came at the end of FY2005 when USCIS redefined the backlog to no longer include work it cannot complete because of factors outside its control, such as the FBI name checks.¹⁸³ The current definitions are as follows:

¹⁸¹ Approximately 2.7 million people were legalized through IRCA. See Betsy Cooper and Kevin O'Neil, *Lessons from the Immigration Reform and Control Act of 1986* (Washington, DC: Migration Policy Institute, 2005), 3, http://www.migrationpolicy.org/pubs/PolicyBrief_No3_Aug05.pdf.

¹⁸² GAO, *Immigration Benefits: Improvements Needed to Address Backlogs and Ensure Quality of Adjudications*, GAO-06-20 (Washington, DC: Government Accountability Office, 2005), 2, <http://www.gao.gov/new.items/d0620.pdf>

¹⁸³ USCIS Ombudsman, *Annual Report 2006* (Washington, DC: US Citizenship and Immigration Services Ombudsman, 2006), 8-9, http://www.dhs.gov/xlibrary/assets/CISOmbudsman_AnnualReport_2006.pdf.

- **Frontlog** — Delays in depositing fees accompanying applications, issuing receipts to customers, and entering initial data for applications into USCIS databases.¹⁸⁴
- **Gross backlog** (or Overall Backlog) — Total number of cases pending that exceed the total acceptable pending (cases filed in the past six months). In other words, the gross backlog = total pending minus acceptable pending. If the remainder is equal to or less than zero, no backlog exists.¹⁸⁵
- **Net backlog** — Number of cases pending once cases that cannot be adjudicated due to reasons outside USCIS' control (i.e. FBI name check, visa regression) are deducted from the gross backlog, or the true number of cases needing action. (Gross backlog minus deductible cases = Net backlog).¹⁸⁶

After the FY 2005 redefinition, USCIS reported that the backlog declined from 1.08 million to 914,864. However, the USCIS Ombudsman and DHS OIG have criticized the redefinition because, although the net backlog was reduced, the cases were still awaiting adjudication, just classified differently. Another illustration dates to March 2007, when more than 800,000 of the 1.2 million pending I-130 green card petitions for foreign national relatives were classified as “active suspense,” and not part of the backlog or due for first-in, first-out processing.¹⁸⁷

In July 2007, USCIS initiated a multiyear effort to improve case management as part of its Secure Information Management Service (SIMS), which will allow more detailed reporting on the scope of the backlog problem. GAO reports that this improved system for tracking backlogs will not be fully deployed until FY2010.¹⁸⁸

The Surge

During summer 2007, a variety of factors converged to result in an enormous surge in new applications.¹⁸⁹ They included a fee increase that became effective on June 30, 2007; outreach campaigns to encourage legal residents to become citizens and vote in 2008; extensive congressional debate and public attention focused on immigration reform and enforcement issues; and efforts by immigrants to protect themselves from a sense of growing hostility to the foreign born in many communities.¹⁹⁰

¹⁸⁴ *Ibid.*, 9.

¹⁸⁵ USCIS, *Production Update: Fiscal Year 2008, 2nd Quarter* (Washington, DC: US Citizenship and Immigration Services, 2008), Glossary.

¹⁸⁶ *Ibid.*

¹⁸⁷ UCIS Ombudsman, *Annual Repor2007* (Washington, DC: US Citizenship and Immigration Services Ombudsman, 2007), http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf; also see GAO, *Progress Report on Implementation of Mission and Management Functions*, GAO-07-454 (Washington, DC: Government Accountability Office, 2007), 72, <http://www.gao.gov/new.items/d07454.pdf>.

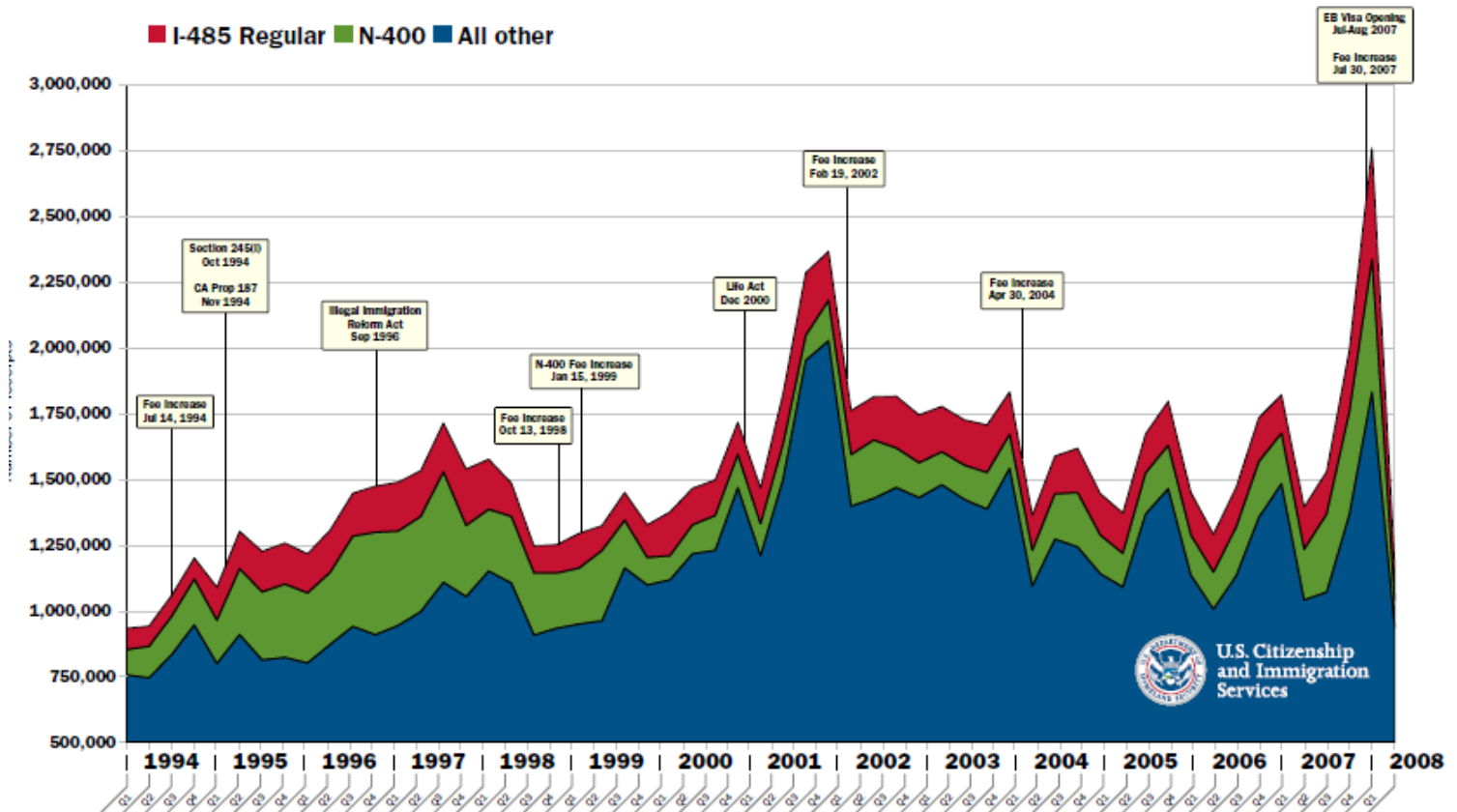
¹⁸⁸ *Ibid.*, 74.

¹⁸⁹ USCIS, *USCIS Surge Response Plan FY2008-FY2009* (Washington, DC: US Department of Homeland Security, 2008), 3.

¹⁹⁰ Written testimony of Emilio T. Gonzalez, Director, US Citizenship and Immigration Services, before the House Judiciary Committee, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, *Naturalization Delays: Causes, Consequences, and Solutions*, 110th Cong., 2d sess., January 17, 2008, http://www.uscis.gov/files/testimony/testimony_ETG_17jan08.pdf.

The surge caused waiting times to increase substantially and highlighted the agency’s insufficient staffing levels, outdated paper processes, and processing bottlenecks, particularly FBI name checks. Although surges have happened periodically in the past — particularly in advance of fee increases — the size of this one was historically unprecedented (see Figure 10).

Figure 10. USCIS Receipts, FY 1994 to 2008



Source: Written testimony of USCIS Director Emilio Gonzalez to the House Judiciary Committee, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, January 17, 2008).

Notes: The I-485 form is the application for adjustment of status to lawful permanent residence; the N-400 form is for naturalization to US citizenship.

In June, July, and August alone, over 3 million immigration benefit applications and petitions of all types were received, compared to 1.8 million applications and petitions received in the same period the previous year. In FY 2007, USCIS received nearly 1.4 million applications for naturalization, nearly double the volume received the prior fiscal year. For June and July 2007, the spike in naturalization applications represented an increase of nearly 350 percent compared to the same period in 2006.¹⁹¹

The surge sparked heavy criticism of the agency and substantial pressure to fix the problem from Congress, a broad range of stakeholders, and the media. USCIS engaged in significant outreach to notify the public of new delays and moved aggressively to address the new backlog. Short-term efforts included adding overtime and additional shifts, hiring more contract staff, and bringing back retired employees. With support from Congress, USCIS also increased funding and pressure on the FBI to reduce its processing times.

Longer-term efforts included adding new full-time staff, technology expansion, centralizing application intakes, and digitization of files. However, with the exception of hiring, these are multiyear initiatives that have only just begun.

The Current Picture

USCIS has improved its processing times and case completions, a development that must be acknowledged and praised.

- In April 2008, USCIS announced a three-month reduction in naturalization processing times and stated that it expected to finish 36 percent more naturalization cases than in FY2007.¹⁹²
- As of second quarter FY2008, the net backlog was 33 percent of pending cases. The gross backlog decreased from 2,802,250 to 2,711,693 cases between the first and second quarters of FY2008.¹⁹³
- By the end of FY 2008, USCIS completed more than 1.17 million naturalization applications, up more than 50 percent from FY07.¹⁹⁴

USCIS has stated that, “the revenue from the new fee structure will lead to a 20 percent reduction in average application processing times by the end of fiscal year 2009, and will cut

¹⁹¹ US House Judiciary Committee Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law Hearing on *Naturalization Delays: Causes, Consequences and Solutions* (Washington, DC: January 17, 2008), http://www.uscis.gov/files/testimony_ETG_17jan08.pdf

¹⁹² USCIS, “USCIS Updates Projected Naturalization Case Processing Time” (news release, April, 2, 2008), http://www.uscis.gov/files/article/naturalization_processing_2apr08.pdf.

¹⁹³ USCIS, “Production Update: Fiscal Year 2008, 2nd Quarter.”

¹⁹⁴ USCIS, “USCIS Makes Major Strides During 2008,” (news release, November 6, 2008), <http://www.uscis.gov/files/article/2008accomp.pdf>.

processing times by the end of fiscal year 2008 for four key application types¹⁹⁵ that represent one-third of all applications filed.”¹⁹⁶

Despite the agency’s efforts, significant immigration application backlogs remain today, and longer-than-promised waiting times continue to characterize the agency’s interactions with much of its client population. USCIS must often make “squeaky-wheel” decisions, shifting scarce resources from one application type where backlogs have not yet reached a point of crisis, to others that are in crisis. In so doing, not only are naturalization cases adjudicated at the expense of adjustment-of-status cases, for example, but individuals stand to lose precious statutory rights, like portability of their visas or aging out of eligibility, due to the unpredictability of case processing times. Then waiting times mount to unacceptable levels with the categories of cases that have languished, and the pendulum swings back again.

Unfortunately, these are not just recent or temporary phenomena. Backlogs have been a chronic condition in immigration services, both for USCIS, as a new agency within DHS, and reaching back 20 years and more at INS. Successive administrations and agency leaders, often with congressional support and assistance, have pledged and made impressive efforts to eliminate backlogs. Unfortunately, successes have been short-lived and efforts to achieve “normal” processing and sustain it have repeatedly failed.

The “Why” of Backlogs

The reasons underlying backlogs are both statutory and administrative. The nation’s immigration laws provide for one person’s change in immigration status to serve as the basis for additional family members to be eligible for benefits. Although a firm ratio does not exist, key adjudications (especially in naturalization cases) typically generate three or more additional new applications, often in quick succession. Backlogs are also generated by statutory limits on the number of visas which can be issued in a given year within particular categories and to immigrants from particular source countries. Thus, visa demand outpaces supply, and the design of the immigration laws creates structural backlogs.

Administrative reasons for backlogs are a function of resources, productivity, and the volume of applications. In addition, however, backlog reduction has historically stimulated increased filings. That is because long delays discourage applicants who do not have urgent reasons to apply for an immigration benefit. When waiting times decrease, numbers of new applications often increase. This pattern is particularly apparent with citizenship applications.

Backlogs have posed an intractable problem that not only hamper USCIS operations, effectiveness, and image, but also represent personal hardships for countless immigrants and nonimmigrants, their family members, and employers. Unduly long waiting times affect everyone from talented young people who cannot compete in the Olympics or enter a military academy if they are not citizens, to specialty-skills professionals recruited by

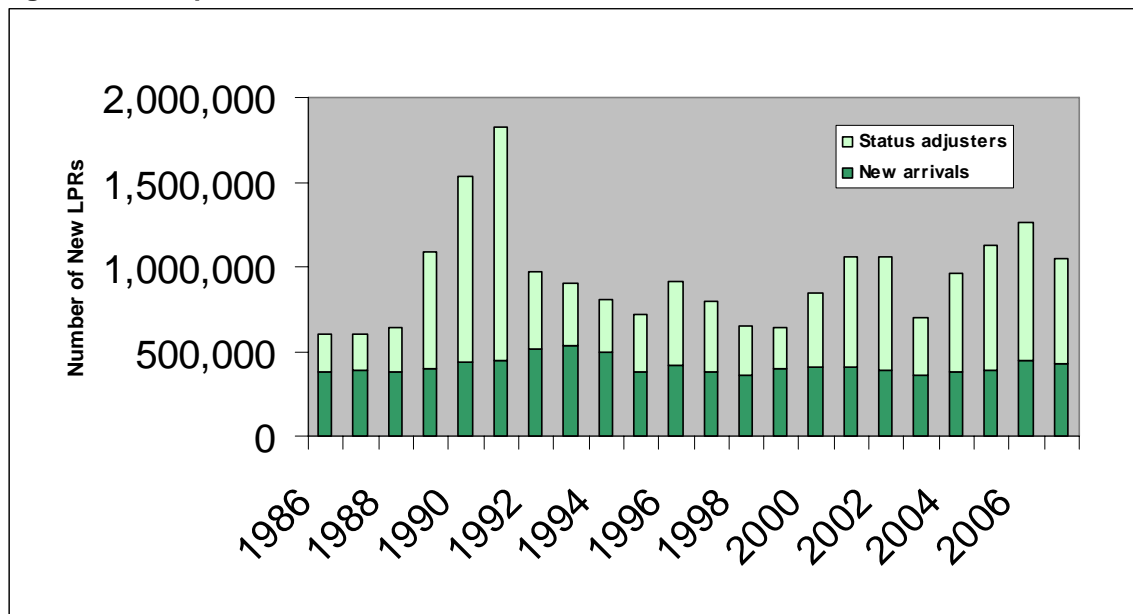
¹⁹⁵ The applications are the I-90 (Renew/Replace Permanent Resident Card), I-140 (Immigration Petition for Alien Worker), the I-485 application for adjustment of status to lawful permanent residence, and the N-400 (Naturalization).

¹⁹⁶ USCIS Office of Communications, “USCIS Sets Final Fee Schedule to Build an Immigration Service for the 21st Century” (news release, May 30, 2007), <http://www.uscis.gov/files/pressrelease/FinalFeeRulePressRelease052907.pdf>.

government agencies for which citizenship is an employment prerequisite, to ordinary people who must travel to their home country because of sickness or death of a loved one.

Beyond their human and institutional consequences, backlogs and uneven levels of processing also impede legal immigration overall (see Figure 11). With adjustment of status accounting for 60 percent of immigrant admissions, legal immigration levels have varied by as much as 400,000 to 500,000 annually because of administrative delays. In a period of peak immigration flows and public anger over high levels of illegal immigration, the national interest is poorly served by a system and practices that fail to allow legal immigration to the full extent permitted by immigration laws, and that experiences such a high level of year-to-year variation in legal immigration independent of statutory limits set by Congress.

Figure 11. Composition of Lawful Permanent Residents Admitted, FY 1986 to 2007



Source: Department of Homeland Security, Office of Immigration Statistics, *Yearbook of Immigration Statistics*, various years.

Adjudication of Hardship Waivers in the United States

Eligibility for most US immigrant visas is based on close family ties to a US citizen or lawful permanent resident. Between FY 2003 and FY 2007, family-based visas constituted 64 percent of all visas granted.¹⁹⁷ While there is no ceiling on the number of visas available for immediate relatives of US citizens (spouses, parents, and minor children), caps on “preference” category visas (which are based on other family relationships), combined with ceilings on admission by nationality, have led to multiyear visa backlogs. Particularly affected are persons from the major migrant-source nations who have been approved for heavily subscribed visas. For example, a Mexican spouse or minor child of a lawful permanent resident would currently need to wait more than seven years for a visa to become available.¹⁹⁸

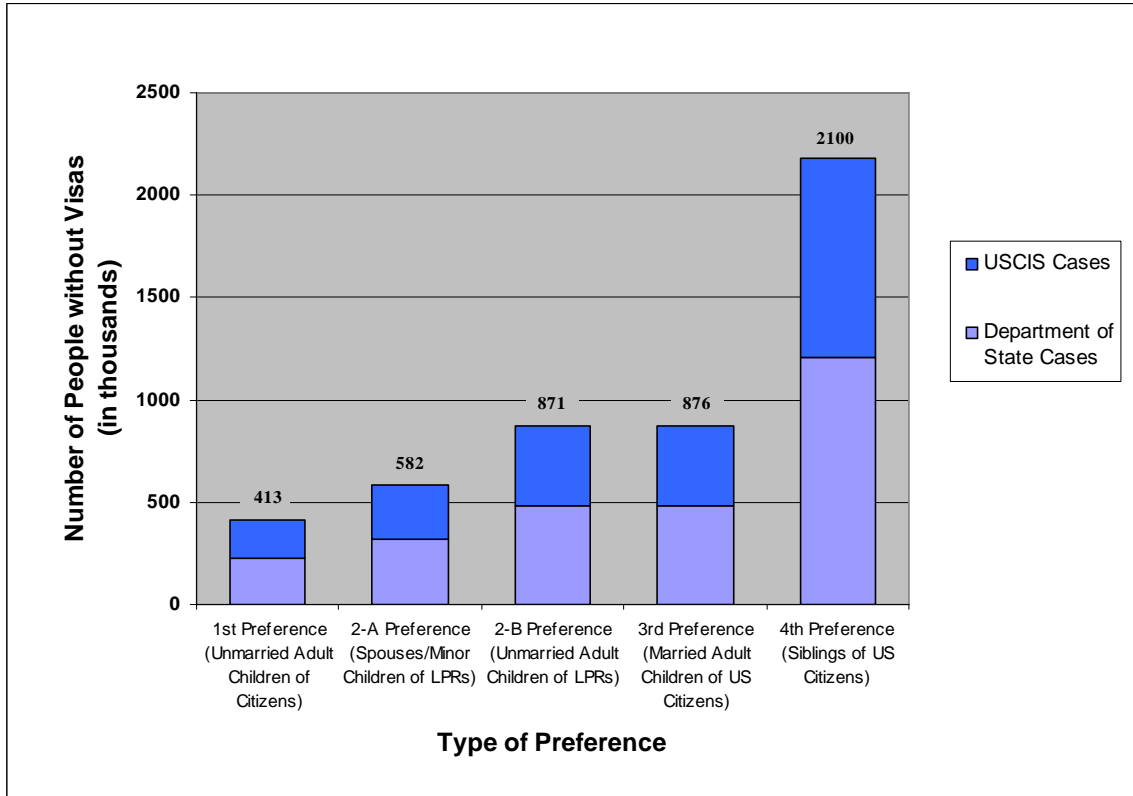
¹⁹⁷ DHS, Office of Immigration Statistics, *2007 Yearbook of Immigration Statistics*, 18-19.

¹⁹⁸ US Department of State, *Visa Bulletin*, November 2008 (Washington, DC: Department of State, 2008), http://travel.state.gov/visa/frvi/bulletin/bulletin_4371.html.

Depending on the preference category and nationality, backlogs for such applicants can span more than a decade or two.

In 2007, the Bush administration estimated that 3.5 million to 4 million people had been approved for family-based immigrant visas, but had not yet received them as a result of annual statutory limits on visa issuance.¹⁹⁹ In 2009, the DOS Immigration Visa Control and Reporting Division revised those estimates up to 4.9 million, and provided a detailed breakdown of the backlog figures (see figure 12).

Figure 12. People Approved for Family-Based Visas Who Have Yet to Receive Them



Source: MPI analysis of figures provided by Charles Oppenheim, US Department of State, Chief Immigrant Visa Control and Reporting Division, Bureau of Consular Affairs, January 30, 2009.

The 4.9 million figure includes 2.7 million awaiting consular processing outside the United States and an estimated 2.2 million (many of them on temporary visas) who are in the United States awaiting permanent visas. This figure does not account for people in the backlog who have subsequently immigrated through another channel or have decided not to pursue their cases. It is likely that a high percentage of persons who have been approved for visas wait in the United States (often in unauthorized status) with their sponsoring family members until their visa numbers become current.

The 1996 Immigration Act created a series of bars to admission to the United States based on unlawful presence, past removals, illegal reentries, and other immigration offenses.

¹⁹⁹ See also, The White House, “Immigration Fact Check: Responding to Key Myths” (fact sheet, May 22, 2007), <http://www.whitehouse.gov/news/releases/2007/05/20070522.html>.

Persons who have been unlawfully present in the United States for 180 days are subject to a three-year bar on reentry and those unlawfully present for more than one year are subject to a ten-year bar.²⁰⁰ The bars can be waived, but only upon a showing that the immigrant's exclusion would create "extreme hardship" to his or her US citizen or lawful permanent resident spouse or parent, but not to his or her child.²⁰¹

For persons ultimately granted waivers, processing times can take months and even years; in Ciudad Juarez, Mexico, for example, current wait times are 13-14 months.²⁰² The uncertainty whether the waiver will be approved, and the length of time required leads to an unknown — but likely significant — number of persons who might be eligible for visas opting to remain in the United States. As a result, they forgo the possibility of legal status rather than risk permanent separation from their families. USCIS adjudication of such cases in the United States, rather than at US consulates abroad, would facilitate legal immigration and reduce backlogs to an extent.

Recommendations:

USCIS and the new administration must finally break the recurring cycle of backlogs by right-sizing USCIS and streamlining adjudications procedures.

Backlogs continue to hobble USCIS and remain its most critical recurring problem. Recent history has proven that backlogs cannot be eliminated by one-time or even periodic backlog-reduction initiatives, regardless how generously funded.

Immigration backlogs are systemic because of the way immigration laws are designed. In addition, timely processing stimulates new filings because of prior unmet needs and large numbers of applicants who can choose when to file for particular benefits, such as naturalization. Finally, wide-ranging factors such as new fees, elections and voter registration efforts, social conditions perceived as pro- or anti-immigrant, and the economy and job creation can shape the size and character of caseloads and application surges.

Nevertheless, the regularity and size of backlogs can be much better managed and their negative consequences — which can include significant administratively induced swings in legal immigration levels — can be mitigated by right-sizing USCIS. Backlog reduction efforts have traditionally been built on the idea of getting over an abnormal, temporary hump and establishing normal processing henceforward. Such efforts have treated backlogs as a temporary occurrence. As a result, they have not succeeded; there is no such thing as a new "normal" that can be sustained.

To break recurring cycles of backlogs, the premise must change. It must be understood, once and for all, that immigration adjudications caseloads are unpredictable by their nature. In addition to technology, modernization, and streamlining procedures as outlined below, right-sizing the agency requires permanently resourcing it at levels previously considered to

²⁰⁰ Immigration and National Act (INA) § 212(a)(9)(B)(i)(I)-(II).

²⁰¹ INA § 212(a)(9)(B)(v).

²⁰² US Consulate in Ciudad Juarez, Mexico, "Form I-601 - Application for a Waiver of Ground of Inadmissibility," <http://ciudadjuarez.usconsulate.gov/hcis601.html>.

be in emergency mode. Not only must USCIS have quick expansion capacities in its staffing and contract-support functions, the agency must also be larger on a permanent basis to be sufficiently nimble to address perpetual, substantial fluctuations in caseloads.

Right-sizing and streamlining will require that:

- The administration develops a multiyear growth plan for USCIS and works with Congress to implement it. The plan should include, among other things, increased staffing levels of full-time permanent government-employee adjudicators compared with contractor personnel.
- USCIS reassesses procedural and regulatory requirements that are duplicative or redundant. Examples of changes to consider include granting work authorization as part of Temporary Protected Status (TPS) adjudications, issuing work authorization for duration of status for noncitizens eligible to work, and redesigning advance parole requirements and procedures. Although streamlining would initially reduce certain fee revenues, productivity, timeliness, and customer-service gains would outweigh revenue reductions and must drive the streamlining process.

USCIS should develop standards and norms characteristic of organizations that provide services and hold itself accountable for achieving them. Such norms would insure that both its service and enforcement responsibilities are reliably met.

Organizations of excellence that provide service establish and adhere to strict performance norms that their employees and clients alike adopt. In the case of USCIS, examples of standards that should be established include the following:

- Case-processing times should not vary geographically by more than 30-45 days. Currently, USCIS announces average processing times for interview cases, such as permanent residence and naturalization. However, the averages mask wide variations depending on the office nearest to where an applicant lives. At the end of FY 2008, a naturalization case could be completed in as short a time as five months in Cincinnati, Denver, and Spokane or as long as 14 months or more in Charleston, Hartford, and Los Angeles.²⁰³ The agency must be more nimble in overcoming these variations by re-assigning staff from low-volume offices, creating rotating teams to serve as troubleshooters, and similar measures. The guiding principle should be a one applicant-one government-one transaction experience.
- The longstanding case-processing time of six months for interview cases must be adhered to and should guide resource planning and allocation. Explicit standards for noninterview application processing — generally 30, 60, or 90 days — should also be set, firmly observed, and communicated to stakeholders. When the standards cannot be met, applicants should receive notice of the delay, the

²⁰³ US Citizenship and Immigration Services, “Naturalization Processing Times at End of Fiscal Year 2008” (news release, November 6, 2008), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=d5fa02a84727d110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>

reason, the new timeline, and a process for recourse or further information if needed.

- Online access to case-status tracking information through all the pertinent stages of the process should be available to applicants at all times.
- Communication, consultation, and robust working partnerships with stakeholders and others at both the district office and national levels must be an established, valued business practice in the normal course of USCIS work.

Metrics must reflect the totality of the applicant experience and be customer focused. The key metrics are case-processing times, pending caseload, and true backlog.

The current categories of frontlog, gross backlog, and net backlog may be useful to USCIS managers, but they are meaningless or purposely confusing from an applicant's standpoint. To the applicant, it does not matter what part different agencies play in deciding a case; what matters is the overall time required and the applicant's ability to plan often-critical personal and professional decisions around the timetable for government actions.

Metrics and accountability must include the government's actions overall. It is unacceptable to limit effectiveness measures to processes over which USCIS alone has control. As the lead agency for immigration adjudications, USCIS must take responsibility for managing intra- and inter-agency relationships to meet established processing standards. The obfuscation and lack of transparency in USCIS metrics constitute a serious impediment to building public confidence and advancing a meaningful service agenda.

To encourage legal immigration for all who are eligible for benefits under current laws, USCIS should adjudicate "extreme hardship" waivers in the United States, not at consulates abroad, for persons approved for family-based visas

USCIS should encourage those eligible for legal status under current laws to seek it. Such adjustments of status strengthen families, foster immigrant integration, and generate additional fee revenues. USCIS can further these goals by adjudicating "extreme hardship" waivers for persons approved for family-based visas *prior* to their departure from the United States. This administrative change would also strengthen immigration enforcement by:

- removing persons who have been approved for family-based visas from the population of unauthorized immigrants; and
- collecting an additional fee or fine for a waiver application to support adjudications and enforcement functions.

B. Naturalization

Naturalization is the legal culmination of the immigration process. It is the adjudication that confers upon immigrants the full rights, privileges, and responsibilities of membership in society that all Americans enjoy.

Naturalization is not obligatory — immigrants can remain in the United States indefinitely as lawful permanent residents and many do. But the evidence is clear that those who naturalize

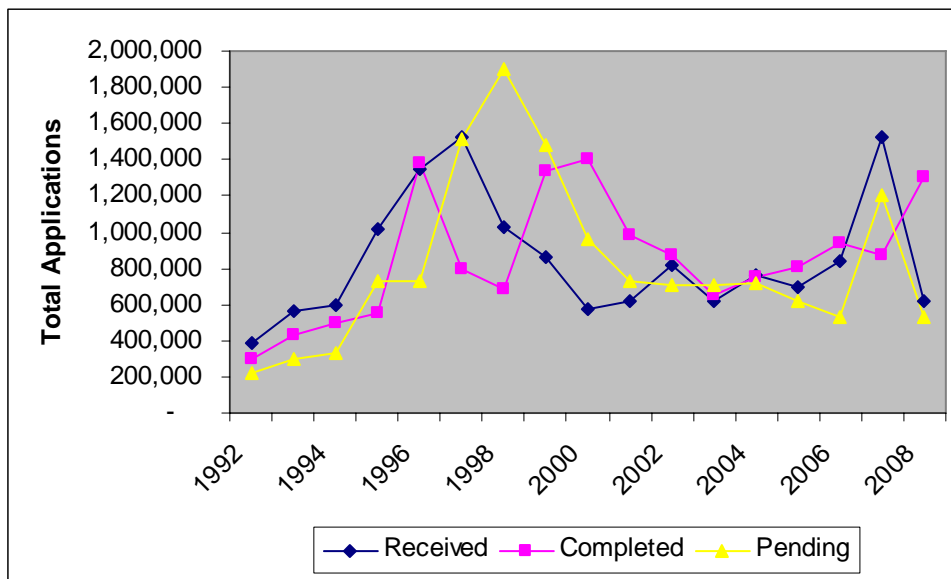
improve their wages and standards of living, pay more taxes, and buy and own homes at higher rates over time than those who do not. In addition, only citizens may vote and qualify for certain kinds of occupational licensing and employment — principally public sector jobs.

In these and many other ways, citizenship is a powerful tool for immigrant integration and enables civic engagement and participation — essential characteristics of a vibrant democracy. At a time when the United States is in a peak immigration period historically, effective immigrant integration is vitally important. Thus, core community and national interests are served by timely naturalization processing and by encouraging the largest numbers eligible to claim citizenship to do so.

For many reasons outlined above, large numbers of eligible applicants have sought to naturalize in recent years. Between USCIS’s creation in 2003 and September 2008, the agency completed 4,143,473 naturalization applications, of which about 86 percent (or 3,572,924) were approved and the applicants became new US citizens. During the same time, the agency received 4,221,398 naturalization applications. Twenty-seven percent of these applications (or 1,147,105) were received in the first seven months of 2007, mostly in response to the 80 percent fee increase effective July 30, 2007.

Figure 13 shows the historical trends of naturalization applications.

Figure 13. Naturalization Applications Received, Completed, and Pending at USCIS, FY 1992 to 2009



Source: Data provided to the Migration Policy Institute by DHS Office of Immigration Statistics, PAS G-22.2-G-22.3 CD, January 9, 2009.

Note: Monthly data are preliminary as of January 6, 2009 and subject to change.

Despite USCIS’s six-month processing goal, many intending citizens who filed their applications as early as June 2007 did not gain their citizenship in time to participate in the 2008 election. An analysis by MPI estimates that the total number of “unrealized”

naturalizations resulting from USCIS' inability to meet its six-month processing standard numbered roughly 300,000 as of September 2008.²⁰⁴

For USCIS as an agency to carry out its responsibilities properly and for the immigration system to fully realize its public-policy goals, shortcomings such as those illustrated by naturalization processing impediments must be overcome.

Recommendation:

Naturalization is key to successful immigrant integration. USCIS should treat naturalization as a high priority and exercise strong leadership in encouraging it.

At a time of historically high levels of immigration for the nation, the ultimate test of the success of immigration policies is effective immigrant integration. Naturalization, with its requirements to learn English and demonstrate knowledge of the history and laws of the United States, is an important milestone in the immigrant integration experience. Encouraging and facilitating citizenship strengthens the nation's economic and social fabric.

The most important role USCIS can play in supporting naturalization is to decide cases properly and in a timely fashion. However, USCIS can also play a leadership role in immigrant integration by keeping the spotlight on naturalization in its own work and serving as a catalyst for partnerships that support naturalization wherever possible.

Naturalization lends itself to public-private partnerships of many kinds, including different levels of government, employers, educational institutions, faith communities, civic organizations, ethnic groups, and many others. Such partnerships can serve as key bridges between established and newcomer communities.

USCIS took important steps in that direction by establishing a Task Force on New Americans in 2006.²⁰⁵ It has also developed customer-oriented materials and publications for new citizens. These initiatives should be reviewed at an early opportunity as efforts to build on in the coming period.

In October 2008, USCIS implemented a new naturalization test, an effort that began more than ten years ago. The goal has been to make the test standardized, fair, and meaningful in encouraging civic learning. Monitoring the new test will be an important task for new USCIS leaders in their work and relationships with immigrant communities to ensure it has met its objective to be meaningful and also examine whether applicants' pass rates have been unduly

²⁰⁴ MPI analyzed monthly data on naturalization applications received and processed to estimate the number of "unrealized" or "expected" naturalization based on a six-month processing time. USCIS inherited 645,717 pending applications in March 2003, and received a total of 4,187,750 additional naturalization applications as of March 2008, for a total of 4,833,467 applications which should have been processed by September 2008. In fact, the agency processed 4,443,956 applications, for a total processing gap of 389,511. The number of "unrealized naturalizations" is calculated on a monthly basis by multiplying the number of unprocessed applications by the average naturalization approval rate for the previous three months (an average of 86 percent for the entire period).

²⁰⁵ George W. Bush, "Executive Order 13404, Task Force on New Americans," *Federal Register* 71, no. 112, June 7, 2006, <http://edocket.access.gpo.gov/2006/pdf/06-5351.pdf>.

affected. The outcomes of the new test should be evaluated beginning with the first anniversary of its inception.

C. Security Clearances and Application Integrity

In the aftermath of 9/11, USCIS' highest priority was to revamp the scope of security checks for all categories of immigration-benefit applications. USCIS identifies strengthened security screening to be its most important accomplishment as an agency.

Prior to 2002, applicant names were checked electronically against the main files of the FBI National Name Check Program (NNCP). Since 9/11, USCIS has added four kinds of security checks.²⁰⁶ They are:

- Interagency Border Inspection System (IBIS);
- FBI Automated Fingerprint Identification System (AFIS);
- Automated Biometric Identification System (US-VISIT/IDENT).and
- Full FBI name check (NNCP).

In addition, in 2004 the agency established a new entity, the Office of Fraud Detection and National Security (FDNS), to provide policy direction, institutional oversight, and expertise required to manage security-check processes and anti-fraud operations within USCIS and in cooperation with other law enforcement agencies. Such a capability and focal point within the agency represents a realistic acknowledgment of the potential for misuse and fraud in legal immigration processes. The challenge is to protect the integrity of adjudications processes while also combating the culture of “no” as a path of least resistance to possible risks.

FBI Name Check

Three of the security checks, IBIS, IDENT, and AFIS, return results within days, if not minutes.²⁰⁷ However, the FBI name check system is only partially automated and can result in severe delays in returning information.

The NNCP provides regular name check service to more than 70 federal and state agencies for a wide range of purposes. The FBI experienced a sharp rise in demand for background checks after 9/11.²⁰⁸ Some of the FBI delay has been a function of its ongoing effort to work its way through 2.7 million requests submitted in a single batch by USCIS in December 2002.²⁰⁹ According to information provided to the US Senate Judiciary Committee in

²⁰⁶ DHS, “Immigration Security Checks: How and Why the Process Works” (fact sheet, April 25, 2006), http://www.uscis.gov/files/pressrelease/security_checks_42506.pdf.

²⁰⁷ USCIS Ombudsman, *Annual Report 2008* (Washington, DC: US Citizenship and Immigration Services Ombudsman, 2008), p. 6. http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2008.pdf.

²⁰⁸ Prior to 9/11, the NNCP handled 2.5 million requests per year; that number grew to 3.2 million in FY 2002 and 6.3 million in FY 2003. Since then, the number of NNCP requests has hovered between 3.3 million and 4.1 million; see <http://www.fbi.gov/hq/nationalnamecheck.htm>.

²⁰⁹ Testimony of Robert J. Garrity, Jr., Acting Assistant Director, Records Management Division, FBI, before the House Committee on Government Reform, July 10, 2003, *The FBI's Visa Name Check Process*, 108th Cong., 1st sess., July 10, 2003, <http://www.fbi.gov/congress/congress03/garrity071003.htm>

November 2006, over 100,000 name-check requests had been pending for more than a year at that time, including almost 45,000 related to naturalization and 52,000 related to adjustment of status.²¹⁰

The FBI generally attempts to confirm negative (i.e., no FBI record) name checks to USCIS within 30 to 60 days. This includes an initial electronic check (48-72 hours) and a follow-up manual search. In a small percentage of cases, the applicant name is found to be the possible subject of an FBI file record.²¹¹ In these cases the name check may take considerably longer than 30 to 60 days.

If the check surfaces a name as having arisen in an investigation of any kind, a manual file review is required. Such paper files reside in one or more of 265 local FBI offices around the country. Analysts must track down all records associated with the applicant. Although USCIS pays the FBI for each check, the bureau is understaffed for manual reviews, and does not treat them as priority tasks. As a result, delays in substantial numbers of cases have sometimes stretched to three years or more.

Table 2. Pending FBI Name Checks, 2006 to 2008

Age of pending response	Total count (May 6, 2008)	Total count (May 4, 2007)	Total count (May 17, 2006)
< 3 months	50,328	117,819	82,636
3 - 6 months	34,453	55,749	33,450
6 - 9 months	85,955	28,029	20,047
9 - 12 months	24,947	20,825	16,845
12 - 15 months	17,860	14,133	15,064
15 - 18 months	13,489	13,931	10,636
18 - 21 months	11,759	11,035	8,144
21 - 24 months	13,102	12,398	8,325
24 - 27 months	5,836	11,765	9,754
27 - 30 months	4,461	6,600	4,435
30 - 33 months	2,924	5,732	4,896
>33 months	4,829	31,144	21,570
Total pending	269,943	329,160	235,802

Source: US Citizenship and Immigration Services Ombudsman, *Annual Report 2008* (Washington, DC: US Citizenship and Immigration Services Ombudsman, June 2008).

After mounting pressure from Congress and stakeholders, and in the face of more than 5,000 lawsuits by applicants caught up in years-long delays, USCIS and the FBI signed a Memorandum of Agreement to limit the searches of FBI databases to avoid receiving information that did not contain relevant law-enforcement or immigration-eligibility

²¹⁰ Testimony of Arturo Vargas, Executive Director National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund, before the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, *Naturalization Delays*, 110th Cong., 2nd Sess., January 17, 2008, <http://judiciary.house.gov/hearings/pdf/Vargas080117.pdf>.

²¹¹ Testimony of David M. Hardy, Acting Assistant Director, Record/Information Dissemination Section, Records Management Division, FBI, before the Senate Subcommittee on International Operations and Terrorism, *The FBI Name Check Process*, 108th Cong., 1st sess., October 23, 2003, <http://www.fbi.gov/congress/congress03/hardy102303.htm>.

information.²¹² In FY 2007 and 2008, Congress also appropriated funds for reducing FBI delays. USCIS transferred nearly \$30 million to the FBI, mainly to hire contract staff. These resources led to a significant decrease in the name-check backlog.

In February 2008, USCIS announced that certain types of applications would be adjudicated after 180 days based on the IBIS, AFIS, and IDENT checks, whether or not the FBI name check had been received. The new policy applies to adjustment of status applications and several others, but completed FBI name checks are still required for naturalization applicants.²¹³

In April 2008, USCIS and the FBI developed a joint plan and timetable to address the FBI case backlog (see Table 3).

Table 3. FBI Name Check Processing Times

Completion goal	Category
May 2008	Process all name checks pending more than three years
July 2008	Process all name checks pending more than two years
November 2008	Process all name checks pending more than one year
February 2009	Process all name checks pending more than 180 days
June 2009	Process 98 percent of all name checks within 30 days and process the remaining two percent within 90 days ²¹⁴

Source: US Citizenship and Immigration Services, "USCIS and FBI Release Joint Plan to Eliminate Backlog of FBI Name Checks," (press release, April 2, 2008),

At this writing, USCIS and the FBI are ahead of schedule in meeting these goals.

Name check considerations

Even if the delays of recent years are eliminated, USCIS has had a difficult time grappling with the question of how to assess the information it receives from the case file check.

- FBI file information is generally incomplete or very general. Specific, actionable information would likely already have led to an arrest, surveillance, or other law enforcement action.
- The FBI does not instruct USCIS to deny an immigration benefit applicant based on its file information; it simply provides the unclassified portions of the information. It is the responsibility of the adjudicator to evaluate the information and determine whether it is relevant to statutory and regulatory criteria for approving or denying an application. This places USCIS in a very difficult position, and it has struggled throughout its short tenure to design a workable system for reviewing and deciding such cases.

²¹² Ibid., 7.

²¹³ Michael Aytes, "Waiver of Ground of Inadmissibility, Status as a Temporary Resident, and Adjustment of Status from Temporary to Permanent Resident" (Revised National Security Adjudication and Reporting Requirements interoffice memorandum, February 4, 2008), <http://www.uscis.gov/files/pressrelease/DOC017.PDF>.

²¹⁴ USCIS intends to continue to process 98 percent of cases within 30 days and the remaining 2 percent within 90 days after June 2009.

- When it denies cases, it must defend its decisions in court if applicants litigate, but it does not have access to classified information, which, even if available, could not be introduced in judicial proceedings to support a denial.
- Given all these circumstances, few, if any, cases are denied based on the case file name check that would not also have been flagged through the other checks. However, the institutional effort and resources that have been invested, coupled with lengthy applicant delays, have been extraordinary.

USCIS has asked the National Academy of Public Administration (NAPA) to conduct an analysis of the effectiveness and efficiency of the case file name-check process for naturalization applications. The study, due to have been completed by January 23, 2009, was to determine, among other things, whether the name-check information is, or can be, obtained through alternative processes and whether its continuation represents the “most effective threat abatement and risk management of national security, public safety, and anti-fraud concerns.”²¹⁵

Recommendation:

USCIS and the FBI must sustain and hold themselves accountable to the 180-day security clearance timetable they have agreed to and achieved. Based on the evidence from the National Academy for Public Administration analysis, USCIS should determine whether future naturalization cases should move forward after 180 days on the same clock as permanent residence cases now do.

USCIS and all immigration agencies, including the Department of State, have expanded sources of information for security-clearance checks and improved the integrity of the process significantly since 9/11. Although the problem of FBI delays languished far too long, USCIS and the FBI have now added sufficient resources and are cooperating effectively to manage the security clearance process. They must continue to adhere to the standards and performance they have established. Backlogs and the lack of timely decision-making constitute security vulnerabilities. They are also an unacceptable burden for large numbers of law-abiding applicants who are simply trying to play by the rules.

D. Fee Funding

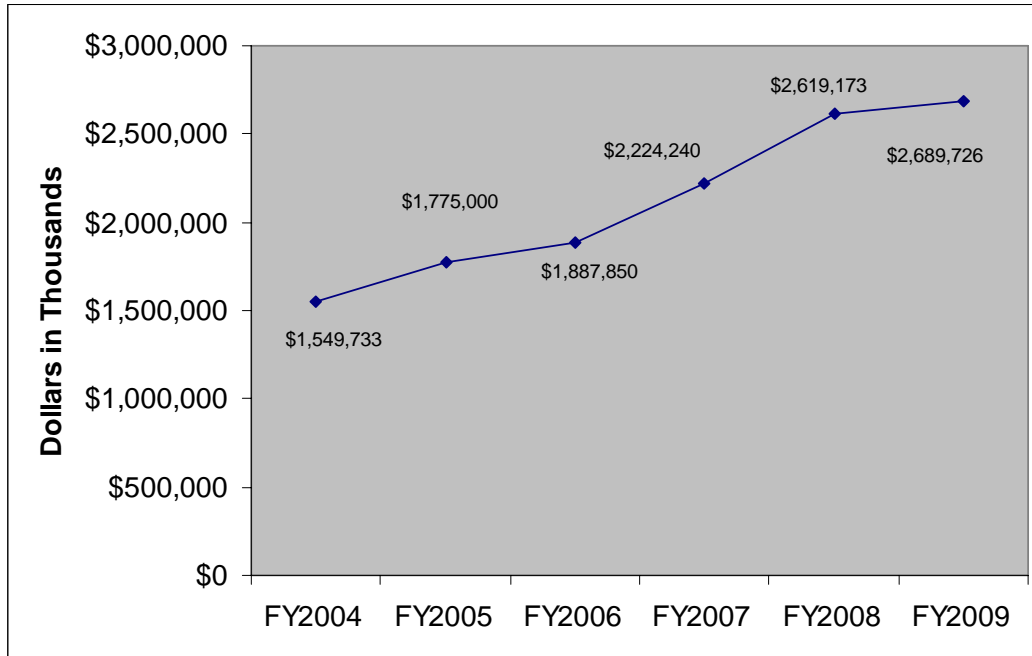
Resources and workload

The USCIS budget for FY2009 is \$2.7 billion with a personnel ceiling of 10,620 employees. Figures 13 and 14 below show the growth in budget and staffing for USCIS from FY2004-2009.

Since USCIS was formed, its budget has grown by approximately 74 percent. Staffing levels have grown by only about 6 percent, however, because substantial aspects of USCIS work increasingly are carried out through contracts. Mail services, call-in centers, and document production (employment authorization and “green” cards) are examples of functions that are almost entirely performed through procurements rather than by USCIS employees.

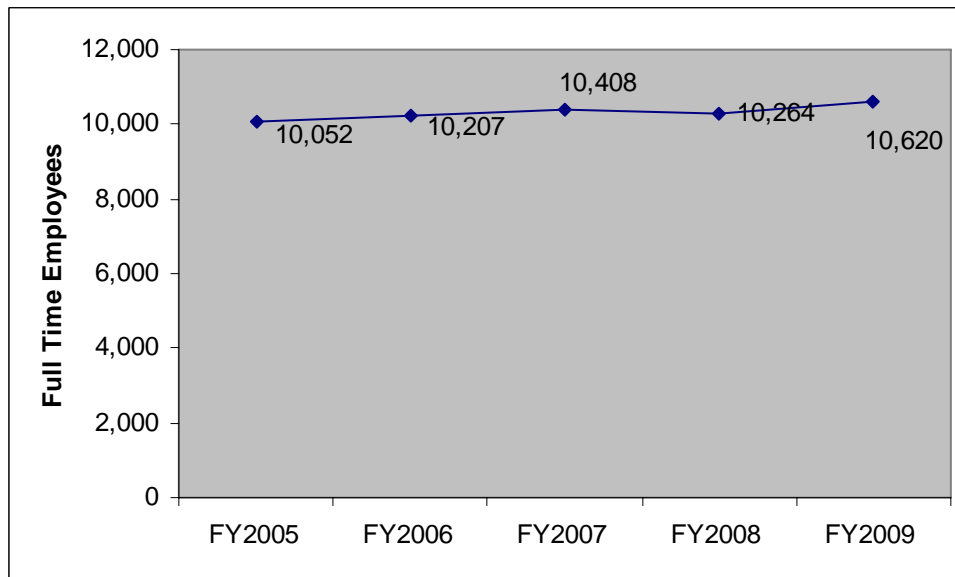
²¹⁵ National Academy of Public Administration, NAPA statement of Sept 26, 2008.

Figure 15. USCIS Total Budget Authority, FY 2004 to 2009



Source: US Department of Homeland Security, *Budget in Brief Reports*, various years.

Figure 16. USCIS Staffing Levels, FY 2005 to 2009



Source: US Department of Homeland Security, *Budget in Brief Reports*, various years.

The heart of USCIS work is adjudications. The approval or denial of millions of applications each year must be done, case by case, by government employees. Growth in that key dimension of the agency's budget has been modest, at best, and has not nearly kept pace with staffing increases of its counterpart DHS immigration agencies. USCIS is faced with consistently heavy workloads and chronic backlogs; a high point for immigration applications was in FY2001, when 7.3 million new petitions were filed. A new high point

came in FY2007, when approximately 7.4 million cases were received. Managing immigration services workloads effectively, even with considerable resource growth, remains an elusive goal.

The Fee Model

In 1988, Congress mandated that immigration applicant fee revenues be returned to the INS budget to support its immigration services mission. Until then, applicant fees had gone into the general treasury, and Congress appropriated funds for immigration services without regard to fees applicants paid. Immigration services had been chronically underfunded and Congress did not provide sufficient funds to cover application processing.²¹⁶ Using fees as the funding model to support immigration services represented a welcome reform and reflected a broader governance philosophy that called for placing the financial burden of providing special services and benefits, which do not accrue to the public at large, on the recipients.

The immigration services budget is made up of appropriations from the user fee account, trust funds, and discretionary appropriations from Congress. Nonetheless, the vast majority of USCIS funding comes from fee revenues. Other appropriations have been relatively small and ad hoc.²¹⁷

The Fee Model Experience

An improvement at the time, fee funding for immigration services has proven in practice to have some serious limitations. The idea is for government agencies to be run more like businesses by generating revenues from services they provide and using the revenues to pay the costs of providing subsequent services. However, Congress continues to hold the purse strings. It sets annual appropriations ceilings for USCIS spending that are lower than fee receipts, holds a portion of fee receipts in reserve, and specifies how fee revenues in the appropriation are to be spent.

During the 1990s and even today after the creation of USCIS, a portion of fee revenues was allocated for detention, which was nonimmigration services spending altogether. Therefore, fees continue to pay for programs that are not fee-based, principally the refugee and asylum program. More problematic, however, is the lag time between when fees are paid and when they are available through the appropriations process for USCIS to use in doing its adjudications work. Unlike a business, USCIS is not permitted to spend the fee revenues when they come in.

Because of large numbers of pending cases, backlogs, extended processing times, unpredictable variations in caseload volumes, and lags in calculating and collecting fee increases, fee receipts will always be imperfectly aligned with actual processing costs. Thus, for example, the fees paid by naturalization applicants who rushed to file to beat the 2007

²¹⁶ MPI, *Fact Sheet: Immigration Fee Increases in Context* (Washington, DC: Migration Policy Institute, 2007), http://www.migrationpolicy.org/pubs/FS15_CitizenshipFees2007.pdf.

²¹⁷ Initiatives that have received appropriated funds include operating expenses (FY04 only), backlog elimination, business transformation, digitization, FBI name check backlog, Cuban-Haitian Entrant Program (CHEP) staffing, immigration grants, Systematic Alien Verification for Entitlements (SAVE), REAL-ID, and E-Verify (FY07-FY09).

fee increase are not sufficient to pay the cost of the adjudication in 2008 when the processing is actually done. So underfunding is systemic.

The deeper problem is that fees have been calculated on the basis of processing costs, but have been required to also fund infrastructure investment. INS and USCIS have suffered for many years from outdated technology and practices. When vital infrastructure investments have been made, to the tune of many tens of millions of dollars, they have been funded with monies that would otherwise support processing.

As a result, processing has perpetually been shortchanged because only a portion of the fees applicants pay actually supports processing. Similarly, infrastructure investment is also consistently shortchanged, because the fee-revenue model has not generated sufficient capital to build a modern, robust technology infrastructure for delivering immigration services.

The 2007 Fee Increase

In accordance with fee requirements, INS and USCIS have periodically adjusted the fee schedule. The most recent increase was in 2007 and reflected the first comprehensive review of the fee structure since 1998. New fees raised the average application cost to \$438, an increase of \$174, or 66 percent (see Table 4).

The 2007 increases were widely criticized by immigrant advocates. But they were not relatively greater than earlier increases. In March 1991, fees increased by as much as 100 percent for some applications. And in 1998, increases averaged 76 percent. Other changes have been introduced to pay for new requirements. For example, INS began charging for fingerprinting in 1998, increased fees in February 2002, and then adjusted the charge for fingerprinting services to recover full costs in April 2004. USCIS adjusted fees to account for inflation in 2005.²¹⁸

Table 4. USCIS Fee Increases since 1998

	Percent increase
October 1998	76
February 2002	12
April 2004	33
October 2005	4
June 2007	66

Source: USCIS, "Supporting Documentation to the Proposed Rule: Adjustment of the Immigration Benefit Application/Petition Fee Schedule," FY2008/2009 Fee Review Supporting Documentation. (February 2007).

Still, the 2007 increase was different in one important respect. It changed the longstanding policy of calculating fees based solely on processing costs, and instead calculated both processing costs and infrastructure investment. The purpose for the change was to give USCIS the resources required to implement an ambitious modernization effort, known as

²¹⁸ USCIS Office of Communications, "Building an Immigration Service for the 21st Century" (press release, January 21, 2007), <http://www.uscis.gov/files/pressrelease/FSbuilding.pdf>.

the Transformation Initiative, while still having sufficient funding to support case processing.²¹⁹

Exemptions and fee waivers are available, and there were cost reductions for some applications. However, the cost to applicants overall continues to climb, and leads inevitably to the question of whether the fee model alone is viable in the longer term to finance USCIS.

Recommendation:

The USCIS funding model must be redesigned to direct applicant fees to legitimate application processing costs, and to develop additional revenue sources to support critical infrastructure investments.

Organizations that exhibit excellence in serving their customers continuously invest in maintaining a sound infrastructure and refurbish it regularly. USCIS needs to do the same. The Transformation Initiative is possible only because OMB allowed, for the first time, fee increases to be assessed that can pay for both processing costs and infrastructure investment. However, infrastructure investment cannot be a one-time project.

Not only are applicant fees high and a likely deterrent to some proportion of otherwise qualified applicants, the rationale for application fees is to cover costs of special services which do not accrue to the public at large. Immigration-benefit decisions are certainly of unique value and importance to the individuals eligible for them, so fees — even if they are high — are legitimate to support legitimate processing costs. But the effective, timely management of the nation's legal immigration processes and system is also an important governmental and national interest. A sound, modern USCIS infrastructure clearly constitutes a public good as well.

Public monies and appropriations will be hard to generate, despite strong agreement on the merits. Thus, the administration must work with the Congress to generate better mechanisms for generating increased resource flexibility and amounts. Two ideas that should receive strong consideration are a revolving fund and restoration of 245(i):

- Congress could create and fund a revolving trust so that USCIS can have access to funds outside its fee-based revenue stream. This would allow the agency to upgrade personnel and infrastructure in anticipation of increased fee revenues, which would then be restored to the trust.²²⁰
- Congress could use the appropriations process to reinstate Section 245 (i). Under this section of immigration law, persons whose applications for permanent residence were approved but who entered the country illegally or overstayed nonimmigrant visas were permitted to adjust status without leaving the country by paying a \$1,000 penalty.²²¹ In FY1996, INS received roughly 224,000 Section 245(i) applications,

²¹⁹ The change in the methodology for establishing fees is permissible under statute. But it required approval by the Office of Management and Budget (OMB) that had not before been granted. Until 2007, OMB policy had been to base fees on case-processing costs only.

²²⁰ USCIS Ombudsman, *Annual Report 2007*.

²²¹ INA § 245(i).

generating \$224 million.²²² The 245(i) provision now applies only to the beneficiaries of visa petitions filed by April 30, 2001.²²³ The provision could be updated and waiver policies changed.²²⁴ The provision is controversial because some believe strongly that allowing adjustment of status in the United States rewards acts of illegal entry. However, the ability to file for adjustment of status while in the United States for those already eligible for visas is a pragmatic acknowledgment that they will eventually become lawful permanent residents, so it imposes appropriate penalties on the applicant through payment of a substantial fine that improves immigration services overall.

E. The Transformation Initiative

USCIS has embarked on an agency-wide initiative to transform itself from a paper-based organization to one having a “centralized, person-centric, consolidated environment utilizing electronic adjudication.”²²⁵ The goals of the Transformation Initiative are national security and integrity, improved customer service, and increased operational efficiency.²²⁶

USCIS believes the initiative will result in vast improvements in the agency’s performance and has established a Transformation Program Office (TPO), reporting directly to the USCIS Deputy Director, to implement the program. The transformation idea picks up on modernization program concepts developed in the 1990s. The new fee structure has allowed modernization to become a focus once again. USCIS plans call for completing the Transformation Initiative by 2013 at an estimated cost of \$536 million, mostly funded by fee revenues.²²⁷

The core idea is to change the current approach used by the agency to a “person-centric” model. This means that all information related to an individual, including all past transactions and applications filed and processed with the agency, would be available in the same electronic location, or account. The idea has also been referred to as a single immigration history file. Currently, the USCIS system is form-centric and is tied to Alien

²²² Andorra Bruno, *Immigration: Adjustment to Permanent Resident Status Under Section 245(i)* (Washington, DC: Congressional Research Service, 2002), <http://fpc.state.gov/documents/organization/10087.pdf>.

²²³ Legal Immigration and Family Equity (LIFE) Act and LIFE Act Amendments of 2000, P.L. 106-554, 114 Stat. 2764, § 1502.

²²⁴ The 1996 Immigration Act created a series of bars to admission to the United States based on “unlawful presence,” past removals, illegal reentries, and other immigration offenses. Persons who have been “unlawfully present” in the United States for 180 days are subject to a three-year bar and those unlawfully present for more than one year are subject to a ten-year bar. The bars can be waived, but only upon a showing that the immigrant’s exclusion would create “extreme hardship” to his or her US citizen or lawful permanent resident spouse or parent, but not to his or her child.

²²⁵ *Federal Register* 72, no. 107 (June 5, 2007).

²²⁶ USCIS, *USCIS Transformation Program Concept of Operations*, Version 1.5 (Washington, DC: US Citizenship and Immigration Services, 2007), http://www.uscis.gov/files/nativedocuments/TransformationConOps_Mar07.pdf.

²²⁷ GAO, *USCIS Transformation: Improvements to Performance, Human Capital, and Information Technology Management Needed as Modernization Proceeds*, GAO-07-1013R (Washington, DC: US Government Accountability Office, 2007), <http://www.gao.gov/new.items/d071013r.pdf>.

Numbers and A-files. Applications are processed according to the benefit being requested, then filed, and not linked to one another.

The goal is to speed processing times, improve work flow, and increase the efficiency of biometric identification checks, particularly with the FBI. For example, an applicant's account would be automatically updated when security checks are complete. An individual account would also contain all past applications that have been filed. Subsequent applications would simply update and provide additional information that may be required for the benefit being sought. In this way, repetitive, redundant steps would be eliminated for applicants and adjudicators would be freed from checking for past records and addressing the same issues each time a new benefit is adjudicated.

USCIS also plans to implement modern, Web-based tools for paperless filing and adjudication, new performance measurement, and upgrades to hardware and infrastructure. The Transformation Initiative contract was awarded in November 2008 to IBM.²²⁸

Recommendation:

The Transformation Initiative, which will modernize USCIS information technology and move from paper-based to electronic processing, merits high-priority management attention and support by new leaders.

In addition to right-sizing, modernization of the agency's technology platform, information systems, and caseload management is essential for USCIS to be able to develop a culture of service, do its work effectively, and lay the groundwork for possible new mandates in the years ahead. The Transformation Initiative is a major, multiyear procurement — and as such requires diligent oversight, careful contract management, and clear-eyed design planning. Analogous DHS procurements by the Coast Guard and the Border Patrol, for example, have failed to perform as they were intended and led to accusations of wasted taxpayer resources. Other government agencies, such as FBI and IRS, have also experienced massive modernization procurement breakdowns. USCIS, with DHS support, must learn from the lessons of those experiences.

But it would be a serious mistake for the new administration to delay or re-think the Transformation Initiative. Its approach and requirements have been vetted for more than ten years. It was sidelined too long after 9/11 and has been reviewed and re-reviewed. Long overdue, the contract has now been signed. The task now must be tight, careful, learning-oriented, collaborative management of the contract, new technology processes, and the institutional change embedded in the initiative.

F. E-Verify

E-Verify, earlier termed the Basic Pilot program, was one of three pilot programs mandated by Congress in 1996²²⁹ to test the feasibility of electronic verification of employment

²²⁸ "SiloSmashers Awarded \$31.4 million Contract to Support US Citizenship and Immigration Services." *Reuters*, <http://www.reuters.com/article/pressRelease/idUS218404+29-Jan-2008+PRN20080129>

²²⁹ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)

eligibility. As discussed in the ICE section of this report, electronic verification assists employers to comply with the 1986 immigration law bar against hiring unauthorized workers. The program is voluntary and was first made available in 1997. Congress has extended E-Verify three times; reauthorization is due again by March 7, 2009. E-Verify is available to employers at no charge in all 50 states.

Key statistics USCIS provides regarding the program are as follows:²³⁰

- As of January 2009, over 100,000 employers were registered for the system nationwide. Approximately 1,000 new employers register for E-Verify each week.
- To date in FY2009, over 2 million queries have been run through the system. In FY 2008, approximately 6.6 million queries were run, nearly double the 3.27 million in FY2007 and more than triple the 1.74 million in FY2006. The program has grown quickly because of rapid voluntary enrollment, legislation in approximately 15 states requiring all or certain types of employers (public agencies or public contractors) to use E-Verify, an executive order requiring all federal agencies to use the system, and a recent amendment to the Federal Acquisition Regulation (FAR) requiring all federal contractors to register for and use the system as of January 15, 2009.
- Currently, 96.1 percent of queries are automatically verified as employment authorized immediately or within 24 hours.²³¹

In recent years, E-Verify has been improved in several ways:

- In September 2007, USCIS added photo screening. It enables employers to compare the photo on the identification document of a new hire against the approximately 17 million images stored in DHS immigration databases for those employees that present Employment Authorization Documents (EADs) or Permanent Resident Cards (green cards). The photo tool is an effort to prevent identity and document fraud.
- In May 2008, E-Verify added access to real-time arrival and departure data as well as naturalization data. Naturalization data automatically confirm work authorization for SSA records that have not been updated, the largest category of work-authorized persons who had improperly received tentative nonconfirmation (TNC) notices. In addition, TNC's due to citizenship status may now be resolved by calling DHS, rather than being required to visit SSA offices.
- E-Verify is working with the Department of State to add passport data and photos, as well as visa records, to E-Verify to further reduce identity fraud.

²³⁰ USCIS, Statement for the Record, "Employment Eligibility Verification Systems and Potential Impacts on SSA's Ability to Serve Retirees, People with Disabilities, and Workers," House Ways and Means Committee, Subcommittee on Social Security, May 6, 2008, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=bca6fa693660a110VgnVCM1000004718190aRCRD&vgnnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD>

²³¹ Of the remaining 3.9 percent who receive an initial mismatch (TNC), only 0.37 percent contest the TNC, correcting their record with SSA (0.19%) or DHS (0.18%), and become work authorized. The remaining 3.5 percent receive a final nonconfirmation (FNC) response. E-Verify Statistics, "E-Verify Program Highlights" (October 23, 2008), <http://www.dhs.gov/e-verify>.

The Critique

E-Verify is hotly debated within Congress and by many stakeholders. E-Verify has been criticized for:

- “*False negatives*” (workers incorrectly found to be ineligible to work) as a result of SSA and DHS errors. The failure to challenge a TNC does not prove ineligibility to work. Of the 3.9 percent of all workers nonconfirmed by the system, fewer than one in ten (0.37 percent of all workers in the program) go all the way through the system and are known to be unauthorized.²³² Others are nonconfirmed by default: they are either not authorized to work in the United States; do not know that they have the opportunity to challenge an initial mismatch (or TNC); or choose not to follow the necessary procedures to prove work authorization after receiving an initial mismatch. E-Verify record-keeping does not allow a precise estimate of how many nonconfirmed workers are actually eligible to work in the United States. False negatives disproportionately affect foreign-born citizens and legal immigrants.
- *Improper use by employers*. At least 47 percent of employers screen job applicants or new hires before they begin work (in violation of the E-Verify requirements), meaning that workers who are screened are less likely to be informed of a TNC. At least nine percent of employers fail to provide workers consistently with written notice of TNCs, and many employers notify workers of TNCs but do not explain the appeals process.²³³ An additional concern has been employers who enter the same identity information to authorize multiple workers.²³⁴
- *Inefficiency*. Employers have sharply challenged DHS-reported database error rates and DHS estimates of the time and cost required to participate in the program and to correct database errors.²³⁵
- “*False Positives*” (unauthorized immigrants not successfully screened out by the system) as a result of identity fraud. As noted above, E-Verify only confirms whether a given name and identity data are in the SSA and DHS databases, not whether they belong to the individual worker presenting them. Even if the photo screening tool were expanded to cover most or all authorized workers — a major undertaking which would require the collection of millions of new digital photographs — the system as currently configured would still require employers to make judgment calls about workers’ identity.
- *Loss of privacy*. Privacy advocates warn that E-Verify creates important new incentives for identity theft. In addition, because the system relies on two-way communication between the DHS and SSA databases and millions of employers,

²³² Ibid.

²³³ Westat, *Findings of the Web Basic Pilot Evaluation* (Rockville, MD: Westat, 2007), 71-76. Statistics are based on employer self-reporting, and may therefore underestimate actual noncompliance.

²³⁴ Richard M. Stana, Director, Homeland Security and Justice Issues, US Government Accountability Office, “Employment Verification, Challenges Exist in Implementing a Mandatory Electronic Employment Verification System” (Statement for the record, GAO-08-895T, Government Accountability Office, June 2008), 17.

²³⁵ National Immigration Law Center, *Basic Pilot / E-Verify Reality Check, Businesses Challenge DHS’s Claims* (fact sheet, October 2008), <http://www.nilc.org/immsemplymnt/ircaempverif/e-verify-reality-check-2008-10-27.pdf>.

E-Verify creates substantial new opportunities for would-be cyber-thieves to gain access to these data.

State Laws

Although IRCA established employer verification requirements as federal functions, the vacuum in immigration policy reform at the federal level has led increasing numbers of states to enact varying forms of immigration-control measures. Such measures include requirements — some mandatory for all employers, some for prescribed programs or types of employers — to use E-Verify. The result has been a growing patchwork of verification regimes that require USCIS to design different kinds of training and compliance regimes for employers in different locations. Different state laws also require companies with operations in more than one state to use different hiring procedures in different locations. A proliferation of state verification laws is a recipe for confusion and errors in implementing proper compliance procedures.

Recommendation:

Mandatory employer verification must be at the center of legislation to combat illegal immigration. Until such legislation is enacted, the E-Verify system provides a valuable tool for employers who are trying to comply with the law. E-Verify also provides an opportunity to determine the best electronic means to implement verification requirements. The administration should support reauthorization of E-Verify and expand the program based on²³⁶:

- **its use as a voluntary program, thereby allowing for its steady expansion and improvement in moving to scale as a mandatory program in immigration reform legislation;**
- **continued improvement in the accuracy rates of SSA and DHS databases;**
- **expansion of training and compliance mechanisms;**
- **progress in establishing reliable systems of identification;**
- **thorough evaluation of the program’s impact in states with mandatory schemes; and**
- **analysis whether it is the proper platform for mandatory verification in new immigration legislation.**

The E-Verify program represents the most viable technology platform for improving DHS’s system of employer verification. However, E-Verify’s expansion should be contingent on remedying problems that diminish its effectiveness and undermine its purpose, including error rates in SSA and DHS databases, its vulnerability to employer misuse, and “false positives”, i.e. workers who use valid documents belonging to other persons.²³⁷ The need for

²³⁶ This recommendation is consistent with an analysis conducted by MPI for DHS attempting to develop an evaluation strategy and research agenda to assess the costs, effectiveness, and impacts of E-Verify on a state level.

²³⁷ GAO, “Employment Verification, Challenges Exist in Implementing a Mandatory Electronic Employment Verification System: Statement for the Record of Richard M. Stana, Director Homeland Security and Justice Issues,” GAO-08-895T (Government Accountability Office, June 2008), 5.

a reliable system of identification is crucial to the program's long-term success in providing a means for true employer compliance.

Mandatory verification is highly likely if immigration reform legislation is enacted and would be the most sweeping of all the new measures. With about 7.6 million employers and a workforce of approximately 144 million, mandatory verification would need to accommodate an estimated 63 million queries for newly hired workers each year. Most of those affected would be US citizens.²³⁸ Verification would establish a new labor standard for workplaces everywhere. Accordingly, policymakers must also decide whether such an employment eligibility program belongs at DHS or elsewhere, such as SSA or the Department of Labor. If it remains in DHS, should it stay within USCIS?

USCIS should continue its aggressive evaluation activities and extend them to include state mandatory verification regimes that provide opportunities to study database error rates, costs to businesses, effects on workers, and impacts on local communities and economies. Particular attention should be directed to the causes of final nonconfirmation: how many US citizens and legal immigrants fail to contest tentative nonconfirmations, and how can this number be reduced? It would be irresponsible not to study how mandatory verification works in practice, given that Congress has provided funding that allows for real-time testing.

USCIS should also be attentive to compliance education and oversight, and design a system for penalizing noncompliant employers.²³⁹ At the same time, good-faith compliance with the program should safeguard employers against sanctions or raids. For this reason, USCIS initially opposed ICE efforts to seek information from E-Verify as a way to target its worksite enforcement initiatives, arguing that it would create a disincentive to employer participation.²⁴⁰ However, a recently finalized Memorandum of Agreement between ICE and USCIS established a referral process between the two agencies and identifies instances where limited data sharing is acceptable.

E-Verify has mushroomed in a few years from a struggling, unfunded pilot program to a well-resourced, learning-driven tool the government can, for the first time, offer to employers seeking a way to comply with laws that bar hiring unauthorized workers. Employer compliance through effective employer verification is the linchpin of interior immigration enforcement. Getting worker verification right will be essential for new immigration policies to succeed.

²³⁸ *Ibid.*, 10.

²³⁹ According to USCIS officials, as of November 2008, only 82 agents were assigned to monitoring and compliance and 190 more were scheduled to be added. The only penalty employers now face for violating workers' rights in the MOU is exclusion from the E-Verify program.

²⁴⁰ GAO, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, 21-22.

V. The Sum of the Parts: Immigration Policymaking and Coordination

Overview

DHS and its agencies charged with implementing the nation's immigration laws continue to be plagued with many of the same problems that INS struggled for decades to resolve. As could be expected, restructuring has not been an adequate answer for all the ills the new organization was supposed to cure. Moreover, new problems have arisen as a result of dividing immigration functions and combining them with other functions in new agencies.

The deeper question is whether, at their core, immigration functions are a continuum of steps and processes that regulate the admission and legal status of noncitizens — ultimately leading to citizenship and integration into American life of immigrants — or whether immigration functions consist fundamentally of separable law enforcement and benefit-granting adjudicatory activities. Organizationally, INS reflected the idea of a continuum. Today's structure rests on the idea that immigration functions embody different missions that are broadly part of the nation's security infrastructure, but are best accomplished through separate organizational entities within DHS. Accordingly, the new structure should lead to better performance by each of its now-distinct parts.

Originally, the case for restructuring INS was driven by the goal of separating its enforcement and immigration services missions. However, immigration enforcement functions became further divided into two agencies — ICE and CBP — reportedly because of administration concerns that a single new agency would have been too large and powerful.²⁴¹

In addition, the post-9/11 anger over visas having been issued to terrorists led to a bid to move consular functions from the Department of State to DHS. Ultimately, visa policy was assigned to DHS, while consular operations remained with State.²⁴² In the end, restructuring produced awkward anomalies, including organizational separation of visa policy from visa operations and three peer immigration agencies, each headed by an appointee carrying a different title — CBP Commissioner, ICE Assistant Secretary, and USCIS Director.

Whatever the organizational and bureaucratic design, immigration is a system. The system is guided by one statute and body of rules that regulate the conditions of admission and residence in the United States of noncitizens — either for temporary periods or permanently — by stipulating different forms of legal status and the criteria for changing legal status.

²⁴¹ Edward Alden, *The Closing of the American Border: Terrorism, Immigration, and Security Since 9/11* (New York: HarperCollins, 2008), 224.

²⁴² The practical application of this formulation has been spelled out in a Memorandum of Understanding that stipulates that DOS maintains the right to propose and issue visa regulations subject to DHS consultation and final approval, as well as the right to determine who, how many, and the scope of functions DHS officials are allowed at consular posts. The arrangement remains an uneasy one with some arguing it leaves too much power with DOS, while others hold that State is the only department with sufficient knowledge to regulate visa issuance.

Each of the immigration agencies has embedded in its mission both enforcement and services mandates. For example:

- USCIS not only adjudicates petitions for changes in status that constitute benefits for immigrants, it also produces documents — e.g. “green” cards and work authorization documents — that must be secure and are essential to effective law enforcement and national security processes.
- The CBP enforcement mission includes the inspection and admission of travelers into the United States, which is the largest single-volume workload that facilitates immigration in the immigration system. Overwhelmingly, most of those admissions are legitimate and benefit the nation’s economy, key institutions, communities, and families.
- As part of its duties to investigate immigration violations, ICE administers foreign student tracking requirements and protects law-abiding or vulnerable individuals from exploitation and abusive practices, such as trafficking and document fraud.

Because immigration is a system, it must be coherent to serve the nation’s interests. The three other traditional countries of immigration — Australia, Canada, and New Zealand — all have cabinet-level immigration ministries dedicated to administering the immigration policies of their nations, as do several European Union Member States.

With the creation of DHS, the United States has gone in the opposite direction. One result has been fragmentation of responsibility and weak, largely ineffective immigration policy development and coordination by the executive branch. There is an urgent need to mobilize executive branch resources and authorities more effectively, develop and implement new policy agendas, and strengthen performance and accountability in carrying out immigration mandates.

Key Issues and Recommendations

A. The Security Lens

The creation of DHS has resulted in immigration being treated almost solely as a security issue. The 9/11 attacks brought into clear focus the long-established fact that immigration processes are an intrinsic element of the nation’s security defenses. Immigration agencies have always understood that they have security roles and responsibilities, and the immigration system, working properly, provides strong tools for protecting national-security interests. Greater public awareness of those roles and broad political support for implementing them effectively, e.g. meaningful entry controls through US-VISIT, have been long-needed improvements that are now in place.

However, immigration enforcement and immigration policy are not synonymous with anti-terrorism. Immigration has many additional goals and purposes that have been seriously compromised in recent years. Given the numbers of people and volumes of work that the immigration system touches daily and the strong, broad interests to the US economy and

myriad institutions that temporary and permanent immigration serve, principles of risk management and multiple policy objectives must guide immigration decisions and practices.

Secure Borders/Open Doors

The Secretaries of State and Homeland Security have pronounced Secure Borders/Open Doors to be the nation's policy in our post-9/11 world. Yet in many areas of DHS work, muscular enforcement tactics and extreme legal interpretations and practices in the name of national security belie the spirit of Secure Borders/Open Doors. The nation has come a long way toward achieving secure borders; open doors remain a work in progress.

NSEERS

The perpetuation of the National Security Entry-Exit Registration System (NSEERS), or special registration," offers an example of contradiction to the idea of Secure Borders/Open Doors. The program was created after 9/11 and requires visitors from certain countries deemed to be of national-security risk to be fingerprinted, photographed, and interrogated by immigration officers when they arrive at ports of entry. In addition, special registrants were to re-register every 30 days and annually during their stays in the United States. There are criminal and civil penalties associated with NSEERS, including arrest, detention, monetary fines, or removal from the United States.

Currently, certain nonimmigrant alien visitors from Iran, Iraq, Libya, Sudan, Syria, Pakistan, Saudi Arabia, and Yemen are subject to NSEERS registration.²⁴³ Originally, the program involved many more countries.²⁴⁴

The re-registration requirements were lifted in December 2003 as part of the launch of the US-VISIT program. DHS stated that "when the US-VISIT system is fully implemented, it will provide the information necessary to account for nearly all temporary foreign visitors in the United States. Any remaining elements of NSEERS, such as port-of-entry arrival registration, will become part of the US-VISIT system."²⁴⁵

NSEERS and US-VISIT are now duplicative programs, yet NSEERS remains operational. NSEERS port-of-entry registration is almost identical to the biometric and data tracking done by the US-VISIT program of all nonimmigrant visitors. Yet many of the NSEERS requirements — including change of address, departure checks, and employment and education notifications— are still in effect. So is the authority to call special registrants by groups or individuals to re-register. Thus, the prospect of re-initiating a call-in program stays

²⁴³ DHS, "Frequently Asked Questions" (November 10, 2008), <http://www.ice.gov/pi/faqs.htm>

²⁴⁴ The original program included citizens or nationals from Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Libya, Lebanon, Morocco, North Korea, Oman, Pakistan, Qatar, Somalia, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. However, to date [12/01/03], individuals from more than 150 countries have been registered in the NSEERS program. US Department of Homeland Security, "Changes to National Security Entry/Exit Registration System" (fact sheet, December 1, 2003), http://www.dhs.gov/xnews/releases/press_release_0305.shtm.

²⁴⁵ DHS, "US-VISIT Program," (fact sheet, May 19, 2003), http://www.dhs.gov/xnews/releases/press_release_0155.shtm.

alive. Finally, nearly 14,000 persons were placed in immigration removal proceedings for violations of NSEERS program requirements.²⁴⁶

NSEERS has been widely criticized, not only by leaders of Muslim and Arab communities, but by the 9/11 Commission, congressional leaders, and independent experts. The reasons are familiar: it was ineffective in producing terrorism-related convictions; cost dearly in foreign relations terms; misdirected precious counterterrorism resources; and deeply alienated important immigrant communities in the United States whose cooperation is critical in countering terrorism.

Material Support

A different example of how the security lens has dominated all others in DHS immigration decision making is illustrated by the issue of material support. Based on the Patriot Act's bar to admitting those who may have provided material support to terrorist organizations, small but important groups of individuals with compelling claims for refugee status or political asylum protection have been denied protection as a consequence of an extreme legal interpretation of the statute. Particular cases involving, for example, child soldiers, interpreters, rape victims, and others who would otherwise be eligible to come to the United States or adjust their immigration status here have been rejected because they had had contact with terrorist groups, even though the contact was involuntary, inadvertent, or coerced.

Such denials have not only been excessively harsh from a humanitarian standpoint, they have in the case of the Iraqi refugee resettlement program created an inexplicable contradiction in a critical US foreign-policy realm. Although procedures for waivers have now been established, it took years of interagency debate and disagreement among DHS, Justice, and the State Department staff to establish them. Moreover, the waivers can be granted only by the DHS Secretary and the Secretary of State in consultation with each other and the Attorney General on a case-by-case basis. Thus, waivers are granted sparingly, and the image of the United States as a nation that abandons its promises and principles persists among populations and places important to broad US interests.

Recommendations:

DHS must embrace its commitment to the policy of Secure Borders/Open Doors in practice. To that end, and with NSEERS and US-VISIT being essentially duplicative, DHS should end NSEERS, the post-9/11 special registration requirements for travelers from designated Middle Eastern countries.

New visa controls, intelligence and information-sharing, and US-VISIT have eclipsed NSEERS. Moreover, nonimmigrant aliens from any country may be registered on an individual basis if they meet criteria established by the Homeland Security Secretary or are referred by a consular officer or immigration inspector in the interest of law enforcement or national security.

²⁴⁶ ICE, "Changes to National Security Entry/Exit Registration System (NSEERS)" (fact sheet, December 1, 2003), <http://www.ice.gov/pi/news/factsheets/nseersFS120103.htm>.

NSEERS did not have any discernible impact on security, is now redundant, has alienated important immigrant communities, and has contributed to weakening the international standing of the United States. Most importantly, it continues to symbolize an approach that treats immigration solely as a security vulnerability. NSEERS information should be incorporated into US-VISIT and the remaining aspects of the program terminated. Given the program's discriminatory nature, DHS should exercise case-by-case prosecutorial discretion to terminate removal proceedings against the nearly 14,000 individuals who were placed in proceedings because of their participation in NSEERS. Similar discretion should apply to those charged with NSEERS violations.

Finally, DHS must broaden its vision of national security to recognize that healthy, welcoming immigration policies and procedures strengthen the nation's true national security

Visa and immigration processes have been substantially strengthened since 9/11. DHS should undertake a rigorous review of all the post-9/11 security protections that have been introduced to strengthen the immigration system. The goal should be to:

- **Rationalize the range of new procedures and protections that are in place;**
- **Identify gaps that must still be addressed;**
- **Streamline processes to eliminate redundancies; and,**
- **Build confidence in the role immigration-system improvements are playing in protecting national security.**

There has been significant progress in building robust security protections into immigration processes since 9/11. Layers of security have been added to visa and immigration processes at each stage in the system. Thus, identity and document checks are based on biometrics; key anti-terrorism and criminal information databases are interoperable and available to immigration officials; and well-funded technologies and capacity-building initiatives have been fielded. (See Appendix I)

At the same time, important questions must still be answered. Should security-check requirements be standard across all immigration agencies and all steps in the immigration process? Where do gaps remain? For example, each of the immigration agencies requires name-check information from FBI records to implement various programs. Yet each agency carries out such security checks differently. Beyond DHS, security checks performed by consular officers in issuing visas — which are for many the first step in the immigration process — are also distinct. Setting standards across agency lines, even when they are as fundamental to the DHS and immigration missions as security checks, has not been done.

At the outset, some of the new visa and immigration requirements proved counterproductive. Over time, such problems have largely been addressed, and the numbers of business travelers, foreign students, and tourists coming to the United States again approximate pre-9/11 levels. However, the damage that many post-9/11 measures brought to America's reputation as an open, inclusive society driven by democratic ideals is taking longer to repair. DHS leaders must always take care not to sacrifice true national security for the appearance of it.

B. Performance and Policy Coordination

Although successive presidential and congressional initiatives to enact comprehensive reforms have failed, a parallel policy process — appropriations — has quietly and steadily succeeded in generating substantial immigration funding. Overall, funding for DHS immigration functions now stands at approximately \$22 billion, a doubling since 2003.²⁴⁷ The result has been a policy frequently termed “enforcement-only,” as the largest increases in budget have been for ICE and CBP (see Figure 15).

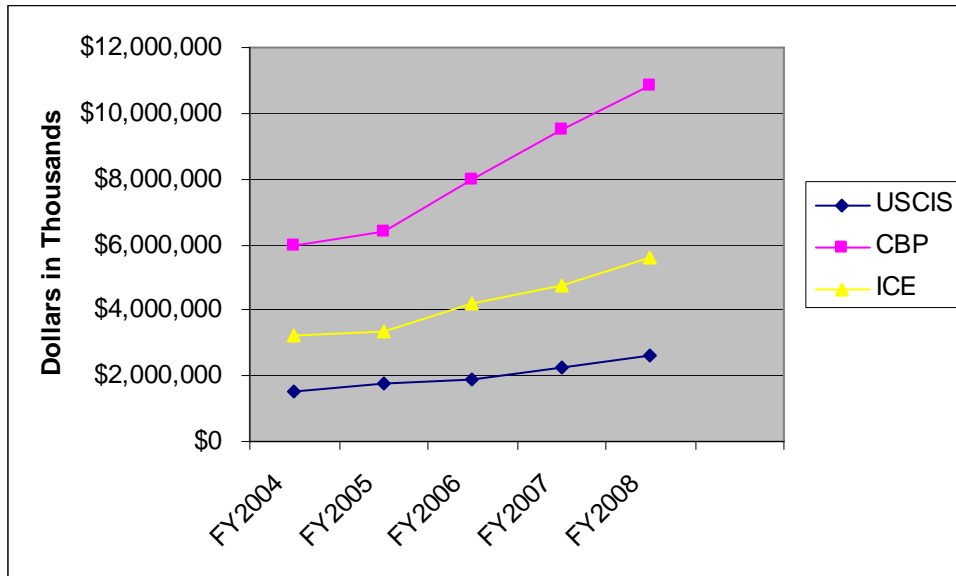
Comparing Immigration Agencies: USCIS, CBP, and ICE

All three of the immigration agencies have prospered. However, the growth has been uneven and not always well aligned with workloads or relative resource needs. As detailed in the foregoing sections of this report, the most dramatic growth has been in CBP (82 percent). ICE and USCIS (76 and 74 percent, respectively) also grew rapidly, but less than their CBP counterpart. Staffing levels show considerably greater disparities. USCIS grew by only about 6 percent because of heavy reliance on contractor support — compared to CBP at 35 percent and ICE at 30 percent.

Within these agencies, the functions that continue to win disproportionately large funding allocations are the Border Patrol and detention and removal. This picture mirrors the politics of immigration: border enforcement and removal are among the few areas of immigration policy around which there have long been broad, bipartisan consensus and support for funding. In addition, because of the role that border control plays in national security, Border Patrol funding has been treated as an urgent post-9/11 requirement.

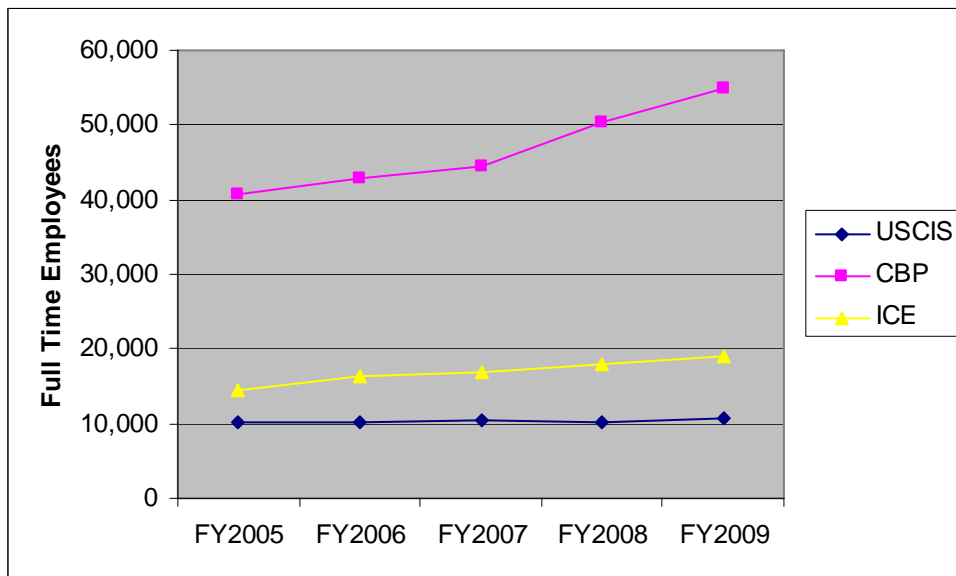
²⁴⁷ Budget figure includes funding for ICE, USCIS, CBP, and US-VISIT. However, the numbers reflect the merging of immigration and customs responsibilities within DHS, therefore the budget numbers reflect customs operations, not just the programs related to the immigration system. US Department of Homeland Security, DHS Budget in Brief Documents, various years, <http://www.dhs.gov>.

Figure 15. Budget Comparison: USCIS, CBP, ICE, FY 2004 to 2009



Source: Department of Homeland Security, *Budget in Brief Reports*, various years, 2004-2009.

Figure 16. Staffing Comparison: USCIS, CBP, ICE, FY 2004 to 2009



Source: Department of Homeland Security, *Budget in Brief Reports*, various years, 2004-2009.

Workload and performance measures

More difficult to assess are the returns on investments that have been made. Because the immigration system historically has been chronically underfunded and immigration is an exceptionally dynamic area of public policy, how much is enough may be an elusive metric.

Nonetheless, some basic workload measures are available. Taken together, they show that the system overall is not handling historically high workloads. In 2006, the Congressional Research Service reviewed eight key service and enforcement workload trends.

They were:

- Immigration petitions filed and pending;
- Naturalization petitions filed and pending;
- Asylum cases filed and pending;
- Border inspections and apprehensions;
- Border Patrol apprehensions at the Southwest border;
- Prosecutions, arrests, and removals;
- Arrests for violating immigration law; and
- Completed alien removals.

CRS found that in seven of these eight, workloads had declined or remained flat since 2001.²⁴⁸ Another systemic measure shows that the numbers of people placed in removal proceedings by ICE on criminal, national security, and terrorism grounds have also decreased from INS levels.²⁴⁹

The CRS report noted that adjudications trends were inching upward. In 2007, naturalization applications surged to an all-time high, an example of how volatile immigration workloads can be. Perhaps trends have changed in other areas of immigration work. However, the difficulty of obtaining reliable workload data makes it difficult to assess. CRS has been unable to update its 2006 report, for example, because of the unreliability and unavailability of pertinent performance measurement information.

Cross-Cutting Issues and Policy Coordination

The three principal immigration agencies are co-equal, each headed by a Presidential appointee who reports to the DHS Secretary through the Deputy Secretary. In addition, the DHS Assistant Secretary for Policy and the General Counsel play important roles in immigration matters. Each of the agencies also has its own policy office that reports to the agency head. For legal matters, there is a General Counsel in each agency. However, the agency General Counsels report to the DHS General Counsel, not to the respective agency heads.

While the daily business of immigration is conducted through the divisions of labor among the immigration agencies, there are numerous, consequential cross-cutting issues that require cross-agency consideration and direction. The performance of the immigration system has been hampered by the absence of mechanisms for resolving such issues in the new DHS structure. Negotiating formal MOUs has been one way cross-cutting issues have been addressed. Thus, an MOU between USCIS and ICE on benefit fraud outlines criteria for cases USCIS wishes to refer for ICE investigation. On all other cases where USCIS determines irregularities, it has agreed to resolve them through its own administrative means. Similarly, USCIS and ICE recently signed an MOU on E-Verify information-sharing issues.

²⁴⁸ CRS, *Immigration Enforcement Within the United States* (Washington, DC: Congressional Research Service, 2006), 21. <http://www.fas.org/sgp/crs/misc/RL33351.pdf>.

²⁴⁹ TRAC, *Immigration Enforcement: The Rhetoric, The Reality.*”

Nevertheless, even where there is cooperation and best efforts by agency leaders to work together, unresolved cross-cutting issues have persistently compromised performance because of inattention, breakdowns in intradepartmental communication, or inordinate delays. Moreover, unless the requisite agency heads agree, as well as the DHS General Counsel and Assistant Secretary for Policy, issues where there are disagreements do not get resolved. That is because in the absence of a more senior decisionmaker, any one of the pertinent players can, as a practical matter, stop progress by failing to cooperate or continuing to raise objections.

Apart from the Secretary, the only decisionmaker in the chain of command who can resolve disagreements is the Deputy Secretary. That individual is effectively the Chief Operating Officer of a vast bureaucracy that spans an estimated 200,000 employees and 22 agencies with vastly different missions, and is therefore able to devote very little time to immigration matters. As a result, stalemates abound.

The absence of a robust department-level mechanism for resolving cross-cutting immigration issues also constitutes a serious vulnerability should immigration reform legislation be enacted. Many of the reform ideas likely to be under consideration in Congress — mandatory employer verification, legalization, increases in employment-based visas — are more ambitious than anything that has been attempted before in the immigration arena. Sizeable resource infusions and rapid institutional capacity-building would be required, as would both an intra-DHS and interagency policy superstructure to handle the myriad policy decisions, regulations, and coordination tasks required to implement new legislation.

Performance Report Card²⁵⁰

A consistent theme which emerges from the MPI review is the need for more systematic and coherent approaches to the implementation of US immigration policy overall.

- Investments in border resources have given CBP a needed degree of operational control at the border and raised the costs of illegal entry. However, because these investments have not been matched by better facilitation of legal flows at ports of entry or to broader immigration reforms, their overall effect on illegal immigration has been limited, while costs have been high. More careful monitoring of migration and enforcement outcomes is needed to inform future guidance and border enforcement policy thinking.
- ICE interior enforcement has not consistently focused on the worst or most dangerous immigration offenders; and precious resources are devoted to immigrant detention without consistent regard to flight risk or egregious law enforcement threats and security vulnerabilities. In addition, careful thought must be given to the best forms of cooperation and use of scarce law enforcement resources between federal and state/local levels of government.
- Immigration services have often been treated almost entirely as a caseload management task and security vulnerability. Providing immigration benefits in timely and efficient ways strengthens the economic, social, and security fabric of the nation. Customer service should be taken seriously. And incentivizing legal immigration by

²⁵⁰ Also see GAO's assessment of DHS' immigration and other agencies, *Progress Report on Implementation of Mission and Management Functions*.

- rewarding those who play by the rules is an important ingredient in effective immigration enforcement and policy.
- Immigration agencies have had chronic problems producing reliable data. Their restructuring into DHS has deepened the problem substantially. Reporting categories have been changed and important measures are no longer being collected. The gaps are especially pronounced in ICE. As a result, basic information necessary to inform responsible decision making and oversight is not available. Until data gathering and accessibility improve, it will continue to be very difficult to determine the effectiveness of current policies, programs, and resource investments.

There has been substantial growth in the immigration agencies' budgets. Yet agency workloads have been essentially flat during the same period. By many measures (number of administrative arrests, benefits backlog, border safety, and probability of immigrant apprehension), program quality has diminished.

Perhaps more importantly, the overall effectiveness of US immigration policy has been undermined by an absence of policy coordination across the individual immigration agencies. Border enforcement cannot succeed in the absence of efficient admissions and interior enforcement; worksite enforcement relies on a secure and reliable system of identification and on employer and family access to immigration benefits. Such considerations are common policy goals at the heart of a healthy system that must always drive and inform daily decision making.

DHS is a new cabinet department whose institutional behaviors and department-wide capacities are not fully formed. Enormous in size and scope of responsibilities, DHS has a flat organizational structure. Its lack of hierarchy means that the immigration agencies are among 25 direct reports to the Deputy Secretary. Others of its counterpart agencies oversee comparably challenging portfolios, e.g. the Transportation Security Administration (TSA) and the Federal Emergency Management Agency (FEMA). As a result, the span of control places demands on DHS leaders that make it unrealistic to be able to focus on any but the most urgent or broad-gauged matters.

Recommendations:

DHS should strengthen immigration policy coordination by appointing a Senior Assistant to the Secretary and Deputy Secretary whose sole duty is to oversee all aspects of DHS immigration policy implementation and coordination. The position should have adequate staff support and the individual should be empowered to act with the authority, as appropriate, of the Secretary and Deputy to ensure clear policy direction and coherence in DHS's immigration functions.

Incoming heads of the DHS immigration agencies should be selected, in part, because of complementary skills that enable them to function as an effective team. However, teamwork is not enough. Institutional disagreements are inevitable and healthy. There must be a mechanism to channel policy debates, resolve issues once they are ripe, and provide

leadership in developing and implementing broad new initiatives, including possible immigration reform legislation. The Senior Assistant should fill this role.²⁵¹

The principal responsibilities of a Senior Assistant for immigration should include the following:

- Work with the three immigration agency heads, the Assistant Secretary for Policy, and the General Counsel to foster effective communication and policy/operational coordination;
- Serve as a focal point for resolving cross-cutting problems;
- Represent DHS in staff-level interagency deliberations, with Congress; with state and local officials; and with other governments, especially Mexico and Canada;
- Coordinate and oversee development and implementation of DHS-wide new initiatives and legislative mandates; and
- Monitor accountability for policy outcomes and organizational performance.

In all of these areas of DHS's immigration work, DHS as a cabinet agency has been a weak player. A Senior Assistant for immigration would provide DHS with greater wherewithal to mobilize the requisite expertise to advance its agenda and be an effective participant in the broad sweep of policy debates and decisions that DHS, the administration, and the nation must confront in the years ahead.

DHS's immigration agencies must significantly improve the quality and transparency of their workload and performance data and metrics. Immigration information and analysis should be on par with the work produced by agencies such as the Bureau of Labor Statistics and the Census Bureau.

When DHS was formed, INS's Office of Immigration Statistics was placed in the Office of the Assistant Secretary for Policy and was given additional resources. The office brought with it a tradition of professional competence and service to users that has continued and grown at DHS. However, quite the opposite is true of the data collection systems and work of the individual immigration agencies, especially ICE. Partly, the failings are due to organizational and budget changes brought about by the restructuring. However, those issues should have been resolved by now.

Data integrity and transparency are not only essential tools for internal DHS planning and decision making; they play a critical role in negotiations surrounding new legislation. Congressional leaders have been deeply frustrated with DHS's inability to provide reliable data regarding issues of momentous importance to the design of potential new laws. They report repeatedly receiving different and contradictory data, and in some cases are simply no longer willing to use immigration agencies' information. The significance of the role immigration will play in the future of the nation demands high standards of data quality.

²⁵¹ Some have recommended adding a management layer by creating an Undersecretary for Immigration at DHS. The idea should be actively considered by the new administration. However, such a change may require Congressional action and is therefore beyond the scope of this report. The immediate need is to strengthen DHS oversight and direction of its immigration portfolio which can be done administratively.

In meeting its quadrennial review mandate, DHS should develop a multiyear immigration system growth and resource investment strategy to guide annual budget requests and spending. The elements should include not only DHS activities, but also consular and immigration judicial functions. The strategy should be data-driven and reconcile service, security, compliance, and enforcement needs for all steps and layers of the immigration system, as well as border and interior enforcement imperatives.

Congress has mandated a quadrennial strategic planning process for DHS, patterned on similar requirements for the defense and intelligence communities. The first plan for DHS is due in December 2009. It provides an opportunity for DHS to develop a long-term vision and multiyear plan for strategically allocating resources for the immigration system. The review should take the full spectrum of activities into account in a balanced manner.

Currently, the growth of the Border Patrol has been disproportionate to other needs in the system. At the same time, the part of the system that has experienced unprecedented workload growth – USCIS – has had more modest increases and has been unable to control persistent and extreme backlogs that, in turn, undermine compliance with the legal immigration system. From an immigration enforcement standpoint, a healthy balance between border and interior enforcement funding is critical. Jobs are the magnet for illegal immigration. Increases in border enforcement have diminishing returns absent more robust employer compliance and enforcement, with resources that are adequate to support them.

Looking ahead, as border and interior enforcement improve, fraudulent practices compromising legal avenues of admission at ports of entry and through applications for benefits can be expected to increase and cannot be allowed to become the weak links in the chain. Moreover, it is the legal ports of entry that have been the focus for terrorist entry. Yet, these are, comparatively, the least well-resourced parts of the system.

At more than \$20 billion annually and having doubled in size in just five years, the immigration agencies now receive substantial funding. DHS has a responsibility to assure that expenditures of this magnitude enable the system as a whole to perform at maximum effectiveness.

DHS should take the lead in developing a comprehensive immigration enforcement vision and strategic plan that involves all key stakeholders within the administration and beyond. The plan should be consistent with the quadrennial resource planning outlined above and should provide a benchmark for annual assessments of enforcement impact, cooperation with other levels of government, international cooperation, and interagency efforts as the foundation for new policies and changing requirements.

The need to secure US borders and enforce US immigration laws may be the only common ground in the fractious immigration debate. However, to achieve smart enforcement requires workable, humane, and integrated measures that encompass long-term economic development in sending nations, multilateral security and law enforcement strategies, diplomacy related to the return of foreign nationals, legislative reform of the US immigration system, and the right combination of domestic immigration and labor law enforcement

measures. At present, no such vision exists and there is no obvious vehicle for doing the planning and taskings required to carry it out.²⁵²

The stakeholders extend well beyond DHS. Smart and humane immigration-control policies will depend on close collaboration within DHS; between DHS and other federal agencies; between federal, state, and local agencies; and with migrant-sending and other like-minded nations. Dismantling transnational criminal networks, for example, requires supranational and multilateral law enforcement strategies, including financial and technical assistance to partner nations. Similarly, hard questions need to be answered about the utility of high-profile raids and their costs to US families, businesses, communities, and charitable organizations, compared to the opportunity costs of resources being directed at serious criminal conspiracies.

Depending on how the new administration pursues broad policy coordination within the executive branch, the process and forum for adopting and assessing the progress of such a plan could be through the White House's National Security Council, Homeland Security Council, or Domestic Policy Council. However, the processes should be inclusive and DHS immigration agencies should be at the table.

²⁵² Such a plan could conceivably be developed within the Homeland Security Council (HSC). Established by the HSA, the HSC is broadly tasked with coordinating the activities of federal agencies and departments that contribute to homeland security and making recommendations to the President on homeland security policies. HSA §§ 903-904. The HSC consists of the President, Vice President, DHS Secretary, Attorney General, Secretary of Defense, and others designated by the President. Some have argued that the HSC should be subsumed within the National Security Council (NSC) in order to better coordinate domestic and foreign-policy security functions. In our view, neither the HSC nor the NSC constitutes the right vehicle for this purpose. The HSC is a creature of the federal government devoted to homeland security, but an effective enforcement policy must enlist nonfederal stakeholders and include more than security strategies. The NSC, in turn, encompasses the 30 federal agencies and departments with homeland security functions and an even broader group of agencies with overseas security responsibilities.

VI. Final Thoughts

This report has raised many challenges of immense consequence for the US immigration system and the nation as a whole. They include whether DHS can

- target its programs and resources more effectively at human smuggling networks; enterprises that flagrantly violate immigration, labor, and workplace safety laws; and individuals who threaten US security and public safety;
- meet its homeland security responsibilities and meaningfully contribute to the nation's counter-terror efforts;
- create an appropriately broad, integrated, effective, and humane immigration enforcement plan, and evaluate and adjust that plan on a regular basis;
- accommodate the extraordinary increases in workload that meaningful immigration reform legislation would entail;
- institutionalize a culture of efficient, reliable and respectful services that reflects the importance of immigration to the nation's wellbeing;
- establish appropriate metrics and collect sufficient data for reliable planning and program evaluation.

To meet challenges of this magnitude will demand smart policy, continual recalibration of funding, and innovative operations. Equally importantly, however, is better policy and operational coordination and, ultimately, comprehensive immigration reform.

VI. Appendices

Appendix I. CBP: Post-9/11 Border Control Measures

A. Ports of Entry

Enforcement

- End of “Catch and Release”
- Operation Streamline and the expanded use of Expedited Removal

Border Security

- Operation Jump Start (National Guard deployed to border)
- Border Patrol Agent staffing increase

Documentation Requirements and other Legal Immigration Initiatives and Agreements

- Biometric Passport requirement (DOS)
- US-VISIT Program
- Model Ports Initiative
- Global Entry Program
- SPOT (behavioral observation)
- Passenger Name Record (PNR) agreement with the European Union
- Western Hemisphere Travel Initiative
 - Northern Border rule changes to require passports, passport card, or enhanced drivers license when available
 - Passport Card created (DOS)
- Visa Policy: DHS issues regulations regarding visa issuances and assigns staff to consular posts abroad to advise, review, and conduct investigations, and that DOS’s Consular Affairs continues to issue visas.

B. Between Ports of Entry

Enforcement

- End of “Catch and Release”
- Operation Streamline and the expanded use of Expedited Removal (including between ports of entry)

Border Security

- Operation Jump Start (National Guard deployed to border)
- Border Patrol Agent staffing increase
- SBI*net* (part of overall Secure Border Initiative)

Appendix II. Comparison of INS and DHS Immigration Agencies Budget and Staffing

Table A2-1. INS and DHS Immigration Agency Budgets (\$1000s), FY 1990 to 2009

	INS	DHS—all immigration agencies	CBP	ICE	USCIS	US-VISIT
1990	1,183,500					
1991	1,270,500					
1992	1,458,500					
1993	1,533,300					
1994	1,586,200					
1995	2,158,700					
1996	2,600,200					
1997	3,132,700					
1998	3,688,200					
1999	4,001,700					
2000	4,277,300					
2001	4,902,000					
2002	6,208,200					
2003		10,951,000	5,887,000	3,262,000	1,422,000	380,000
2004		11,093,917	5,997,287	3,218,804	1,549,773	328,053
2005		11,939,866	6,457,688	3,367,178	1,775,000	340,000
2006		13,574,668	7,144,375	4,206,443	1,887,850	336,000
2007		15,057,634	7,746,259	4,732,641	2,216,240	362,494
2008		17,627,817	9,306,725	5,581,247	2,539,845	200,000
2009		19,697,342	10,941,231	5,676,085	2,689,726	390,300

Figure A2-1. INS and DHS Immigration Agency Budgets (\$1000s), FY 1990 to 2009

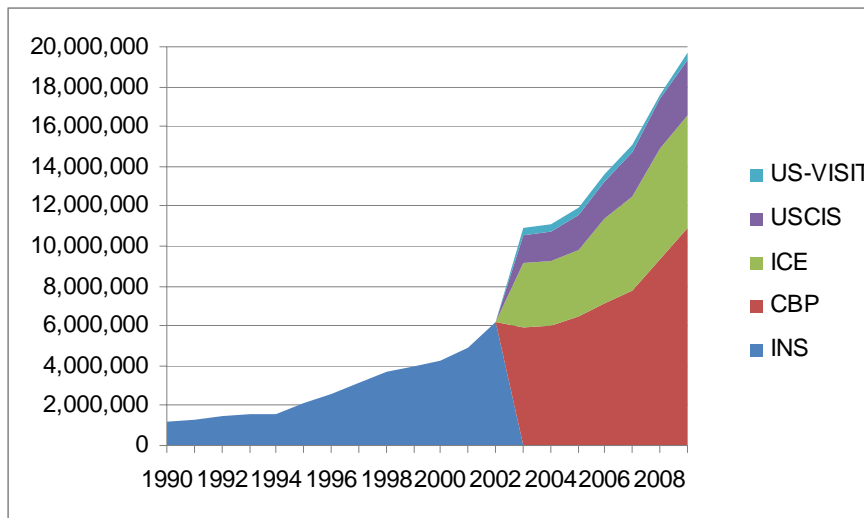
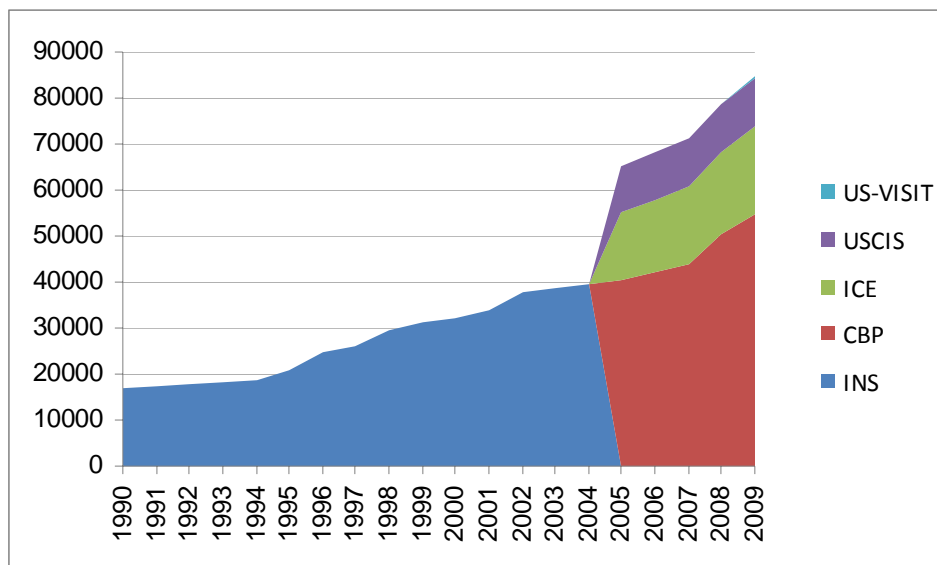


Table A2-2: INS and DHS Immigration Agency Staffing (FTEs), FY 1990 to 2009

	INS	DHS—all immigration agencies	CBP	ICE	USCIS	US-VISIT
1990	17,010					
1991	17,187					
1992	17,676					
1993	18,417					
1994	18,622					
1995	21,048					
1996	24,704					
1997	26,123					
1998	29,349					
1999	31,502					
2000	32,187					
2001	33,990					
2002	37,698					
2003	38,574					
2004	39,598					
2005		65,390	40,636	14,600	10,052	102
2006		68,212	41,986	15,917	10,207	102
2007		71,422	44,058	16,854	10,408	102
2008		78,721	50,417	17,938	10,264	102
2009		84,572	54,868	18,965	10,620	119

Figure A2-2: INS and DHS Immigration Agency Staffing (FTEs), FY 1990 to 2009



Sources: Department of Justice, *Budget Trend Data 1975 Through the President's 2003 Request to the Congress*, http://www.justice.gov/archive/jmd/1975_2002/btd02tocpg.htm; US Government

Accountability Office, *Transfer of Budgetary Resources to the Department of Homeland Security (DHS)*, GAO-04-329R, <http://www.gao.gov/new.items/d04329r.pdf>; Department of Homeland Security, *Budget in Brief FY 2004-2009*, <http://www.dhs.gov/xabout/budget/>; US Immigration and Customs Enforcement, Budget Fact Sheet, FY 2005-2009, <http://www.ice.gov/pi/news/factsheets/#B>.

Appendix III. Migration Policy Institute Roundtable Participants

List of participants for the roundtables convened by MPI in 2008 to examine key issues and challenges facing each of the immigration agencies within DHS, and the broader department.

US Citizenship and Immigration Services Roundtable

Michael Aytes	<i>Acting Deputy Director, US Citizenship and Immigration Services, United States Department of Homeland Security</i>
Jeanne Butterfield	<i>Executive Director, American Immigration Lawyers Association</i>
Muzaffar Chishti	<i>Director, MPI's office at New York University School of Law</i>
Bo Cooper	<i>Of Counsel, Paul Hastings, and Former General Counsel, United States Immigration and Naturalization Service</i>
Carol Dewey	<i>Program Director, Homeland Security, SI International</i>
Lou DeBaca	<i>Majority Counsel, Committee on the Judiciary, United States House of Representatives</i>
Michael T. Dougherty	<i>US Citizenship and Immigration Services Ombudsman, United States Department of Homeland Security</i>
Rosalind Gold	<i>Senior Director of Policy, Research, and Advocacy, National Association of Latino Elected and Appointed Officials</i>
Joshua Hoyt	<i>Executive Director, Illinois Coalition for Immigrant and Refugee Rights</i>
Donald Kerwin	<i>Executive Director, Catholic Legal Immigration Network, Inc.</i>
Ur Mendoza Jaddou	<i>Chief Counsel, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, United States House of Representatives</i>
David Martin	<i>Warner-Booker Distinguished Professor of International Law, University of Virginia; Nonresident Fellow, MPI; and Former General Counsel, United States Immigration and Naturalization Service</i>

Doris Meissner *Senior Fellow and Director, US Immigration Policy Program, MPI; and Former Commissioner, United States Immigration and Naturalization Service*

Lynden Melmed *General Counsel, US Citizenship and Immigration Services, United States Department of Homeland Security*

Bruce A. Morrison *Chairman, Morrison Public Affairs Group; Former Chairman, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, United States House of Representatives; and Member, United States Commission on Immigration Reform (1992-1995)*

Cecilia Muñoz *Senior Vice President, Office of Research, Advocacy, and Legislation, National Council of La Raza*

Fuji Ohata *Senior Executive, Ohata Group; and Former Director of Service Center Operations, US Citizenship and Immigration Services, United States Department of Homeland Security*

Esther Olavarria *Senior Fellow and Director, Immigration Policy, Center for American Progress; and Former Chief Immigration Counsel to Senator Edward Kennedy (D-MA), Judiciary Committee, United States Senate*

Mary E. Pivec *Partner, Keller and Heckman, LLP*

Gerri Ratliff *Deputy Associate Director, National Security and Records Verification, US Citizenship and Immigration Services, United States Department of Homeland Security*

Lisa S. Roney *Director, Research and Evaluation, Office of Policy and Strategy, US Citizenship and Immigration Services, United States Department of Homeland Security*

Jonathan Scharfen *Acting Director, US Citizenship and Immigration Services, United States Department of Homeland Security*

Mark Schlakman *Senior Program Director, Center for the Advancement of Human Rights, Florida State University*

Daniel A. Sepulveda *Legislative Assistant, Office of Senator Barack Obama*

Damian Thorman *National Program Officer, John S. and James L. Knight Foundation*

Igor V. Timofeyev *Director of Immigration Policy and Special Advisor for Refugee and Asylum Affairs, United States Department of Homeland Security*

William R. Yates *Executive Staff, Border Management Strategies, LLC, and Former Chief, Domestic Operations, US Citizenship and Immigration Services, United States Department of Homeland Security*

Wendy Young *Chief Counsel, Subcommittee on Immigration, Refugees, and Border Security, United States Senate*

James W. Ziglar *Senior Fellow, MPI; and Former Commissioner, United States Immigration and Naturalization Service*

US Immigration and Customs Enforcement Roundtable

Eleanor Acer *Director, Refugee Protection Program, Human Rights First*

T. Alexander Aleinikoff *Dean, Georgetown University Law Center; Executive Vice President for Law Center Affairs, Georgetown University; and Member of Board of Trustees, MPI*

Andrea Black *Network Coordinator, Detention Watch Network*

Victor X. Cerda *Partner, Jackson Lewis LLP; and Former Acting Director of Detention and Removal Operations (DRO), US Immigration and Customs Enforcement, United States Department of Homeland Security*

Muzaffar Chishti *Director, MPI's office at New York University School of Law*

Lou DeBaca *Majority Counsel, Committee on the Judiciary, United States House of Representatives*

Craig E. Ferrell, Jr. *Deputy Director and Administrative Legal Counsel, Houston Police Department*

Susan Ginsburg *Director, Mobility and Security Program, MPI*

James T. Hayes, Jr. *Director, Office of Detention and Removal Operations, US Immigration and Customs Enforcement, United States Department of Homeland Security*

Gil Kerlikowske *Chief, Seattle Police Department*

Donald Kerwin *Vice President for Programs, MPI and Former Executive Director, Catholic Legal Immigration Network, Inc. (CLINIC)*

Chandler Keys *Head, Government and Industry Relations, JBS SA*

Esther López *Director, Civil Rights and Community Action Department, United Food and Commercial Workers Union*

David Martin *Warner-Booker Distinguished Professor of International Law, University of Virginia; Nonresident Fellow, MPI; and Former General Counsel, United States Immigration and Naturalization Service*

Doris Meissner *Senior Fellow and Director, US Immigration Program, MPI and Former Commissioner, United States Immigration and Naturalization Service*

Ur Mendoza Jaddou *Chief Counsel, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, United States House of Representatives*

John Morton *Chief, Domestic Security Section, Criminal Division, United States Department of Justice*

Julie L. Myers *Assistant Secretary, US Immigration and Customs Enforcement, United States Department of Homeland Security*

Michael Neifach *Principal Legal Advisor, Office of Principal Legal Advisor, US Immigration and Customs Enforcement, United States Department of Homeland Security*

Ali Noorani *Executive Director, National Immigration Forum*

William Riley *Acting Director, Office of State and Local Coordination, US Immigration and Customs Enforcement, United States Department of Homeland Security*

Marc R. Rosenblum *Associate Professor of Political Science and Robert Dupuy Professor of Pan-American Studies, University of New Orleans and Nonresident Scholar, MPI*

Kevin Sibley *Unit Chief for Worksite Enforcement, US Immigration and Customs Enforcement, United States Department of Homeland Security*

Nicholas J. Smith *Chief of Staff, US Immigration and Customs Enforcement, United States Department of Homeland Security*

Igor V. Timofeyev *Former Director of Immigration Policy and Special Advisor for Refugee and Asylum Affairs, United States Department of Homeland Security*

Wendy Young *Chief Counsel, Subcommittee on Immigration, Refugees, and Border Security, United States Senate*

James W. Ziglar *Senior Fellow, MPI; and Former Commissioner, United States Immigration and Naturalization Service*

Jamie Elise Zuieback *Senior Policy Advisor, Immigration, Judiciary Committee, United States House of Representatives*

US Customs and Border Protection and US-VISIT Roundtable

David V. Aguilar *Chief, Office of Border Patrol, United States Department of Homeland Security*

Jayson P. Ahern *Deputy Commissioner, US Customs and Border Protection, United States Department of Homeland Security*

Dennis Burke *Former Chief of Staff, Governor Janet Napolitano*

James Jay Carafano *Assistant Director, Kathryn and Shelby Cullom Davis Institute for International Studies and Senior Research Fellow, Douglas and Sarah Allison Center for Foreign Policy Studies, The Heritage Foundation*

Muzaffar Chishti *Director, MPI's office at New York University School of Law*

Lou DeBaca *Majority Counsel, Committee on the Judiciary, United States House of Representatives*

Brian deVallance *Director, Office of State of Arizona Affairs, Washington, DC*

Fernando García *Executive Director, Border Network for Human Rights*

Susan Ginsburg *Director, Mobility and Security Program, MPI*

Lucas Guttentag *Director, Immigrant Rights Project, American Civil Liberties Union*

Donald Kerwin *Vice President for Programs, MPI and Former Executive Director, Catholic Legal Immigration Network, Inc. (CLINIC)*

David Martin *Warner-Booker Distinguished Professor of International Law, University of Virginia; Nonresident Fellow, MPI; and Former General Counsel, United States Immigration and Naturalization Service*

Doris Meissner *Senior Fellow and Director, US Immigration Program, MPI and Former Commissioner, United States Immigration and Naturalization Service*

Robert Mocny *Director, US-VISIT Program, United States Department of Homeland Security*

Cecilia Muñoz *Presidential Immigration Transition Team; Senior Vice President, Office of Research, Advocacy, and Legislation, National Council of La Raza (on leave)*

Jeffrey Passel *Senior Demographer, Pew Hispanic Center*

C. Stewart Verdery, Jr. *Founder and Partner, Monument Policy Group; and Former Assistant Secretary for Policy and Planning, United States Department of Homeland Security*

Wendy Young *Chief Counsel, Subcommittee on Immigration, Refugees, and Border Security, United States Senate*

James W. Ziglar *Senior Fellow, MPI; and Former Commissioner, United States Immigration and Naturalization Service*

Immigration Policymaking and Coordination Roundtable

Jayson P. Ahern *Deputy Commissioner, US Customs and Border Protection, United States, Department of Homeland Security*

Dennis K. Burke *Attorney at Law and Former Chief of Staff, Governor Janet Napolitano*

Jeanne Butterfield *Executive Director, American Immigration Lawyers Association*

Muzaffar Chishti *Director, MPI's office at New York University School of Law*

Bo Cooper *Of Counsel, Paul Hastings; and Former General Counsel, United States Immigration and Naturalization Service*

Brian de Vallance *Director of Federal Relations, Office of Governor Janet Napolitano, State of Arizona*

Lou DeBaca *Majority Counsel, Committee on the Judiciary, United States House of Representatives*

Tony Edson *Senior Advisor to Assistant Secretary of Consular Affairs and Former Deputy Assistant Secretary for Visa Services, United States Department of State*

Susan Ginsburg *Director, Mobility and Security Program, MPI*

Janice Jacobs *Assistant Secretary, Bureau of Consular Affairs, United States Department of State*

Donald Kerwin *Vice President for Programs, MPI*

David Martin *Warner-Booker Distinguished Professor of International Law, University of Virginia Law School; Nonresident Fellow, MPI; and United States Department of Homeland Security Transition Team*

Doris Meissner *Senior Fellow and Director, US Immigration Policy Program, MPI; and Former Commissioner, United States Immigration and Naturalization Service*

Ur Mendoza Jaddou *Chief Counsel, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, United States House of Representatives*

Cecilia Muñoz *Senior Vice President, Office of Research, Advocacy, and Legislation, National Council of La Raza; and Director-designee, Office of Intergovernmental Affairs, The White House*

Julie L. Myers *Former Assistant Secretary, US Immigration and Customs Enforcement, United States Department of Homeland Security*

Esther Olavarria *Senior Fellow and Director, Immigration Policy, Center for American Progress; and Former Chief Immigration Counsel to Senator Edward Kennedy (D-MA), Judiciary Committee, United States Senate; and Presidential Immigration Transition Team*

Demetrios G. Papademetriou *President, MPI*

David Pagan *Advisor to the Commissioner, US Customs and Border Protection, United States Department of Homeland Security*

Marc R. Rosenblum *Associate Professor of Political Science and Robert Dupuy Professor of Pan-American Studies, University of New Orleans; Nonresident Scholar, MPI; and Presidential Immigration Transition Team*

Jonathan Scharfen *Vice President of International Operations, Northrop Grumman Technology Services Sector; and Former Acting Director, US Citizenship and Immigration Services, United States Department of Homeland Security*

Frank Sharry *Executive Director, America's Voice*

Roberto Suro *Nonresident Scholar, MPI; and Professor, Annenberg School for Communication, University of Southern California*

C. Stewart Verdery, Jr. *Founder and Partner, Monument Policy Group; and Former Assistant Secretary for Policy and Planning, United States Department of Homeland Security*

James W. Ziglar *Senior Fellow, MPI; and Former Commissioner, United States Immigration and Naturalization Service*

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Doris Meissner, former Commissioner of the US Immigration and Naturalization Service (INS), is a Senior Fellow at the Migration Policy Institute (MPI) where she directs MPI's work on US immigration policy. She also contributes to the Institute's work on immigration and national security, the politics of immigration, administering immigration systems and government agencies, and cooperation with other countries.

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From 1993 to 2000, she served in the Clinton administration as Commissioner of the INS, then part of the US Department of Justice. She first joined the Department of Justice in 1973 as a White House Fellow and Special Assistant to the Attorney General. She served in various senior policy posts at Justice until 1981, when she became Acting Commissioner of INS and then Executive Associate Commissioner, the third-ranking post in the agency.

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