

From a Publication by the Century Foundation

**The Department of Homeland Security's First  
Year: A Report Card  
Immigration**

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This chapter is reprinted from a publication by The Century Foundation's Homeland Security Project, which is supported by the John D. and Catherine T. MacArthur Foundation, the John S. and James L. Knight Foundation, the Robert Wood Johnson Foundation, and the Carnegie Corporation of New York. To help formulate sound ideas for strengthening the nation's homeland security in ways that will receive broad public support, this project organized bipartisan, expert working groups focusing on the federal response, federalism issues, the public's need to know, bioterrorism, and immigration. Their mission is to provide policy recommendations and oversee the production of explanatory issue briefs and longer publications to help inform the nation's continuing search for answers in this complex and sensitive area of public policy. More details about the membership of these groups and the publications produced in connection with the project is available at [www.tcf.org](http://www.tcf.org) and [www.homelandsec.org](http://www.homelandsec.org).

# **IMMIGRATION**

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The transfer of immigration functions to the new Department of Homeland Security (and the abolishment of the Immigration and Naturalization Service) sought to accomplish two major goals: (1) ensuring that immigration regulation and control enhances national security, and (2) improving the performance of both the service side (responsible for applications for immigration status, work authorization, asylum cases, naturalization) and the enforcement side (responsible for border patrol, detention and removal of illegal aliens, and investigations) of the immigration system by placing them in separate units within DHS.

A year later, some progress toward these goals has been achieved. On the enforcement side, the Department has merged overlapping INS, Customs, and Agriculture functions into unified programs at the border and the interior of the U.S. New technology has been installed at airports to record biometric information (inkless “finger-scanning” of both index fingers and a digital photograph) of some arriving non-citizens (US-VISIT), and a system for electronically recording the entry and matriculation of foreign students (SEVIS) has been put in place. Major enforcement operations have been oriented toward

protecting critical infrastructure sites like power plants, major bridges, and chemical factories, as well as removing non-citizens convicted of sexual predator offenses. Immigration and customs officials are also working more closely together to combat smuggling of illegal aliens across borders.

On the service side, some progress has been noted in improved customer relations in local immigration offices. But more significant and deeply troubling is the burgeoning backlog of pending immigration and naturalization cases—now totaling about 6 million. The Department is thus a long way from the President's stated goal of a 6-month processing period. The causes of those delays may be traced in large part to September 11, 2001: officials now spend more time checking security databases and appear to operate within a culture that promotes caution and rejection of claims rather than the exercise of expertise and judgment. It seems that the Department of Homeland Security (and perhaps the nation) has decided that lengthy processing times remain acceptable if such delays enhance security. If the process is not improved, millions of people will continue to wait many years for naturalization and immigration benefits to which they are entitled as a matter of law.

All immigration-related DHS units need to improve their capacity to share information and integrate their databases—both among DHS systems and also among systems operated by other agencies of the government (e.g., the Departments of Justice and State). Furthermore, policy and legal coordination with DHS units and across the federal government appears largely ad hoc. Structures need to be put in place for effective, coherent policy development.

It is difficult to conclude, at this point, that the transfer of immigration functions to DHS has significantly aided in the nation's fight against terrorism. The new programs undertaken by DHS hold the promise of bringing greater integrity to the immigration system, but this will not be accomplished without (1) a substantial increase in resources to reduce overwhelming backlogs and to apprehend visa over-stayers, (2) a realistic plan for introducing entry and exit control at land borders, (3) accurate information in databases, and (4) technology

that integrates databases. Furthermore, no new steps have been taken by DHS to stop the large and continuous flow of undocumented migrants across America's land borders. Finally, based on past experience, President Bush's proposal to legalize undocumented workers in the U.S. will be more likely to increase rather than decrease the undocumented flow.

### **REORGANIZING THE IMMIGRATION FUNCTIONS**

Before September 11, 2001, both the Clinton and Bush Administrations had developed plans to reorganize immigration activities within the Executive Branch. The 1997 report of the U.S. Commission on Immigration Reform (the "Jordan Commission") had called for dismantling the Immigration and Naturalization Service (INS) and placing its parts in other federal departments.<sup>1</sup> Legislation introduced in Congress would have folded the immigration apparatus more fully into the Department of Justice, creating separate bureaus (akin to the FBI) for the service and enforcement agencies.<sup>2</sup> The Clinton Administration's plan was more modest: abolish the INS district offices and establish separate service and enforcement chains of command within the INS. Outside experts suggested more radical plans, such as the establishment of a new free-standing immigration agency within the Executive Branch.<sup>3</sup>

All of these proposals were based on the recognition that the INS was a troubled agency. Underfunded and inadequately managed for years, the agency accomplished neither its service nor enforcement missions well. Millions of applicants waited for their applications for status to be processed and resolved; and millions of undocumented migrants resided within the United States with

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<sup>1</sup> U.S. Commission on Immigration Reform, *Becoming an American: Immigration and Immigrant Policy* (1997).

<sup>2</sup> One version, introduced after September 11, passed the House of Representatives in April 2002, several months before the Administration announced its plans for a Department of Homeland Security. H.R. 3231, 107<sup>th</sup> Cong., 2d Sess. (2001).

<sup>3</sup> D. Papademetriou, T.A. Aleinikoff, D. Meyers, *Reorganizing the Immigration Function Toward a New Framework for Accountability* (Carnegie Endow. for Int'l Peace 1998).

little likelihood of being apprehended or removed. The Clinton Administration devoted significant new funds to border enforcement (more than doubling the size of the Border Patrol), but it could point to no credible evidence that the added resources had in fact deterred illegal entry into the U.S. The INS also struggled under the burden of major legislative initiatives in 1990 and 1996 that required new programs, regulations, and substantial retraining of personnel.

The events of September 11 put new emphasis on reorganization. The hijackers were non-citizens who had entered through lawful immigration channels (although subsequent investigation has found that some were improperly granted visas). The straw that broke the camel's back was the arrival of immigration documents at a Venice, Florida flight school for two of the hijackers six months after they had flown planes into the Twin Towers. The event was widely misreported: the documents were not visas, but rather copies of visas approved in July and August 2001 that had been retained by INS contractors and mailed as a matter of routine to the flight school. But the damage was done. President Bush showed anger at a press conference a day after the news broke. Stating that he was "stunned and not happy," he continued: "Look, the INS needs to be reformed. And it's one of the reasons why I have called for the separation of the paperwork side of the INS from the enforcement side. And obviously the paperwork side needs a lot of work. It's inexcusable." As plans proceeded with the new Department of Homeland Security, the Bush Administration stated its intention that all INS functions be transferred there.

Some members of Congress had other ideas, arguing that only the enforcement side of the INS should go to Homeland Security. The service side could stay at the Department of Justice or go to the State Department. Ultimately the Administration prevailed, but the battle resulted in a peculiar arrangement within DHS. The Homeland Security Act placed the enforcement function under the DHS Directorate for Border and Transportation Safety. Headed by an Undersecretary, the Directorate also took over the functions of the Customs Service, Agricultural Inspections, the Transportation Security Agency, and the

Federal Protective Service. Because there was no obvious place for the INS's service functions in the enforcement-minded new Department, they were placed in a DHS Bureau of Citizenship and Immigration Services (now known as USCIS), reporting directly to the Deputy Secretary.

The Bush Administration brought the Homeland Security Act into force on March 1, 2003, officially abolishing the INS as of that date. The statute would have permitted a transition date as late as January 2004. And, curiously, the March 1 date preceded by three months the time frame set by Congress for providing a detailed implementation plan for the immigration reorganization.<sup>4</sup> Under authority granted by the statute, the Bush Administration rearranged the Directorate for Border and Transportation Safety. The Homeland Security Act had placed all immigration enforcement activities in one bureau. The President's reorganization adopted a more functional approach. It established: (1) a Bureau of Customs and Border Protection, which included the Border Patrol, immigration inspectors, agricultural inspectors, and Customs border inspectors, and (2) a Bureau of Immigration and Customs Enforcement (dubbed "ICE"), which combined immigration and customs investigators focused on interior enforcement and the Federal Protective Service. This complicated arrangement is shown in the Appendix, which clearly illustrates the potential structural obstacles to effective coordination of immigration functions within DHS.

## **PROMISES MADE**

The original impetus for reorganization at the INS was to improve performance by separating units that deal with immigration, naturalization, and asylum applications from law enforcement units. For years these had been combined in 33 district offices around the country, and the poor results were obvious to all. This core goal of improved performance was adopted in the creation of DHS. The

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<sup>4</sup> See David A. Martin, "Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements," Migration Policy Institute *Insight* (April 2003).

statute required reports from both units detailing how they planned to improve their performance.<sup>5</sup> As to benefits, Congress mandated that DHS “reduce the backlog in the processing of immigration benefit applications, with the objective of the total elimination of the backlog one year” after the date of enactment of the Homeland Security Act.<sup>6</sup> And once up and running, the new Department affirmed a goal announced by President Bush in July 2001, at a ceremony on Ellis Island, of a “six-month standard from start to finish” for processing immigration applications.

Just a year later, it is too early to judge full success or failure in meeting these goals. Reorganization on the scale mandated by the legislation—involving not just a division of INS functions but also merging them with Customs and Agriculture activities—is a difficult undertaking. But a preliminary assessment based on extensive interviews with officials in the Department of Homeland Security and others is that the results to date have been mixed. While progress has been made on some fronts, structural and cultural factors may continue to impede effective performance of immigration agencies for some time to come.

## PERFORMANCE

### Immigration Services

According to U.S. Citizenship and Immigration Services Director Eduardo Aguirre, the Bureau has established three overriding priorities: (1) reducing processing time for all benefits applications to six months, (2) improving customer service, and (3) enhancing national security.

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<sup>5</sup> HSA §§ 445 (plan must detail how BTS will enforce the immigration laws “comprehensively, effectively and fairly”); 459 (requiring plan describing how USCIS will complete adjudications “efficiently, fairly, and within a reasonable time”). See also § 478(b) (sense of Congress that after transfer of functions to DHS “quality and efficiency” of services should improve).

<sup>6</sup> HSA § 458 (amending § 204(a)(1) of the Immigration Services and Infrastructure Improvements Act of 2000 (8 U.S.C. § 1573(a)(1))).

*Backlog Reduction.* Backlogs have substantially increased, rather than declined, over the past year. In March 2003, USCIS faced a backlog of about 5.2 million pending immigration applications. As of October 31, 2003, the number was more than 5.4 million. The number of pending naturalization applications remained virtually unchanged (over 600,000), despite a 25 percent decrease in filings for FY 2003.<sup>7</sup>

The number of pending cases is not necessarily a measure of delay. That is, with enough personnel or a re-engineered application process, even a heavy caseload could be decided speedily. But resources for this work have not increased at USCIS, nor has the application process been made significantly more efficient. Thus, the number of pending cases translates into exceptionally long waits for applicants. For example, there are more than 1.2 million applications for green cards in the backlog. Ripple effects include delays in the eligibility of individuals for naturalization and their ability to bring family members to the United States.

The immigration reform proposal announced by President Bush on January 7, 2004 would only serve to worsen the existing backlogs and delays. Under the plan, employers could file applications for a legal temporary status for their undocumented workers. The numbers here are potentially huge—there are perhaps as many as 8 million undocumented immigrants in the United States today.

The administration's budget for fiscal year 2005 proposes a \$60 million increase for backlog-reduction efforts. In addition, DHS has recently proposed increases in fees charged to applicants for immigration benefits that are estimated to net an additional \$150 million, which would be applied to the resolution of immigration and naturalization cases. It remains to be seen whether these proposals will actually yield new resources and how quickly new resources can be translated into hiring and training new personnel.

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<sup>7</sup> The number of applications filed has declined for each month after March 2003 until a spike in October 2003.

There are several reasons for the growing backlogs. Any reorganization plan entails initial delays as new channels of authority are established, personnel is reassigned (or positions go unfilled), and support services are reorganized. But far more important appears to be the continuing impact of September 11, in three respects.

First, all benefits applications are subject to multiple security checks—through FBI, CIA, State Department, and other government databases. These searches are neither fully automatic nor coordinated. Frequently they will produce “hits”—based, for example, on a name check or prior immigration violation—that require additional checking of files. Because of variations in name spellings, particularly with the rampant discrepancies in the transliteration of Arabic names, investigators searching databases must be alert to possible misspellings. Furthermore, it was discovered after September 11 that the FBI checks relied on by INS were incomplete and inaccurate because they had been run through only one of the Bureau’s databases—based on individuals’ names—and not another database that collected information based on investigations of companies.<sup>8</sup> Because of the obvious security defects of that process, the INS then decided to run all pending applications—more than 3.2 million—through another FBI check. The administration made no public announcement of the problem or the delays caused by the solution. (Apparently, no plans exist for subjecting previously approved applications to the new, full FBI check.) The new security measures will improve the applications process. But until fully automated and integrated systems can be put in place, these measures will inevitably slow down application processing.

Second, the post–September 11 culture among the immigration officials has clearly favored denials of applications where any doubt at all exists. After the flight school incident, then-INS Commissioner James Ziglar issued a “zero

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<sup>8</sup> This was discovered when the FBI challenged an INS naturalization proceeding, asserting that the applicant was under surveillance by the Bureau. The INS noted that the name had been run through the FBI database and had been cleared. The FBI then discovered that the name had not been checked against its other database.

tolerance” order. The memorandum lectured INS employees that “disregarding field guidance or other INS policy will not be tolerated. The days of looking the other way are over. . . . Individuals who fail to abide by issued field guidance or other INS policy will be disciplined appropriately.” The memo seems unobjectionable; it simply asks employees to do what is already required of them. But in field offices, the memo generated great concern because INS policy guidance had not been centrally collected and disseminated. Thus, officials feared that they would be held responsible for violating policies of which they were unaware. This produced a better-safe-than-sorry attitude: better to deny an application than violate some policy in approving it.

According to immigration attorneys around the nation, there has been a dramatic increase in denials and requests for additional information in routine business and family visa applications. Indeed, attorneys have a phrase for this development: “the culture of no.” Ziglar’s “zero tolerance” order was rescinded in late 2003 by Director Aguirre, who stated that other measures have been put in place to make the application process more secure; so officials now are being asked to rely on their expertise and exercise judgment, instead of routinely denying cases in which there is even the slightest question about eligibility. But it is not clear that this shift has had an impact among the decision-makers.

Third, immigration officials were tapped to implement the “call-in” registration program of the Department’s National Security Entry Exit Registration System (NSEERS). Under this program, males from specified countries (all but one were from predominantly Muslim or Arab nations) holding non-immigrant visas were required to report to local DHS offices to be fingerprinted, photographed, and interviewed. Approximately 83,500 people were registered under the program. In December 2003, DHS eased rules requiring registrants to come back to DHS offices a year later, and no new call-ins are planned. This has permitted the USCIS officials to return to their normal tasks.

USCIS intends to roll out a comprehensive backlog reduction plan in the spring of 2004. According to a January 6, 2004 fact sheet, the plan will focus on:

1) producing immigration documents more efficiently; 2) streamlining the process for some family and business visas, as well as naturalization and work authorization requests; and 3) eliminating requirements that contribute to delays (for example, by lengthening the time that certain documents are valid in order to cut down on renewal applications).

*Customer Service.* USCIS has implemented first steps toward improved customer service. The Bureau now permits electronic filing of several applications (such as work authorization and green-card replacement and renewal). In the future, perhaps 90 percent of all immigration applications will be filed electronically. The Miami district office has piloted a program that permits people to electronically schedule meetings with USCIS personnel. Measures such as these can reduce time spent waiting in lines at USCIS local offices. (Of course, policies that make filing applications easier may also have the effect of adding to the backlog of pending cases). Other offices have reduced lines by reconfiguring waiting rooms, installing information kiosks, and informing people of availability of forms and other information on-line.<sup>9</sup>

USCIS has created a new toll-free customer service line that handles about one million calls per month. The bureau states that its monthly surveys show 80 percent customer satisfaction with the system, although some immigration attorneys complain the new system has caused them to lose direct access with the Bureau's service centers where applications are processed and resolved.<sup>10</sup>

Immigration advocates and attorneys are mixed in their reviews of USCIS customer service. Some report more courteous service, fewer lost files, and better scheduling practices. Others state that little has changed at the local level and that significant inconsistencies in practice around the country, and even among bureau

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<sup>9</sup> The USCIS website registers about 3 million hits a month, and about 1 million forms are downloaded.

<sup>10</sup> And 20% of 12 million calls a year means that the telephone system is generating 2.4 million dissatisfied customers for the agency.

employees in the same office, has continued. They also report frustration at not knowing whom to contact in the new system to resolve problems.

To help improve customer service, the Homeland Security Act established an Office of Ombudsman within the USCIS, charged with assisting individuals and employers in resolving problems and proposing changes to practices that cause “customer” problems.<sup>11</sup> The statute mandates that the ombudsman appoint local ombudsmen, including at least one per state. One might think that the ombudsman and his or her staff would handle some of the huge number of inquiries directed at congressional district offices from employers, family members, and immigrants about delays in application processing, lost files, and the like. But if that were the goal of the legislation, it is not being fulfilled: no budget has been provided for the ombudsman to open offices across the nation and to handle the large number of likely inquiries. (The 1 million calls that USCIS’s customer service line receives each month gives some glimmer of the kind of workload that might face local ombudsman offices.) In practice, the office, located in Washington, D.C. with a small staff, focuses on bigger picture issues, such as working with the USCIS on backlog and customer service goals and policies.

Overall, it is clear that the emphasis on customer service is taken seriously at the top. In this regard, the reorganization of functions has succeeded: it has produced a cohesive program dedicated to a single mission. It is also true that security has been enhanced in the application process. The difficult questions that remain are how to put in place systems that permit both efficiency and security and how to overcome the cultural effects of September 11 that continue to grip immigration officials. The USCIS Director is confident that the President’s six-month goal for application processing is attainable by 2006. But mounting backlogs and the prospect of millions of additional applications occasioned by the possibility a new temporary worker program make that seem unlikely, particularly

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<sup>11</sup> HSA § 452(a). Interestingly, the Ombudsman is instructed to file reports directly with Congress without any prior comment from the USCIS Director, DHS Secretary or Deputy, or OMB. HSA § 452(c)(2). This arrangement raises difficult constitutional questions.

without substantial new resources, personnel, and the development of an effective security-check system. It seems that the Department of Homeland Security (and perhaps the nation) has decided that lengthy processing times remain acceptable if such delays enhance security. But if the process is not improved, millions of people will continue to wait many years for naturalization and immigration benefits to which the law entitles them.

### **ENFORCEMENT CHALLENGES**

The integration of former INS enforcement functions into DHS has posed a more complex problem than encountered with the integration of the service functions: the INS units have been combined with bureaus from other Executive Branch departments. Thus the “acculturation” process has had two elements—understanding the immigration enforcement functions from a DHS perspective and melding those functions with agencies that had established cultures of their own. As that process has unfolded, the INS agencies have been at a disadvantage because they have traditionally been viewed by other federal enforcement departments as ineffective and poorly managed. The best evidence here is the fact that the vast majority of senior supervisory positions in the field have gone to former Customs bureau officials, not former INS agents. The morale of INS enforcement officers, some say, has suffered as a result. Immigration enforcement has also been hampered because Customs agents, trained to investigate complex money laundering and export/import violations, are largely uninterested in arresting undocumented immigrants or fining employers who hire unauthorized workers.

On the other hand, immigration officers have generally welcomed the new opportunity to be part of agencies solely dedicated to enforcement activities. No longer do they have to report to INS district directors who supervised both immigration services and enforcement activities at the local level. While former INS officers are now part of a bureau with broader functions—including customs

and agriculture duties—the mission of is more sharply defined: enforce the law by detaining, prosecuting, and removing those who violate it.

Both the border and the interior enforcement bureaus are moving toward the goal of having each officer trained in all the laws enforced by his or her unit. This will, of course, take time. But that process is essential for creating a more flexible and skilled enforcement effort. Immigration and Customs Enforcement reports that its existing corps of more than 7,000 agents will be fully cross-trained by next year. Customs and Border Protection has recently graduated its first class of new agents, trained to perform immigration, customs, and agriculture duties. Plans are underway to retrain officers who worked in INS, Customs, and Agriculture agencies before the move to DHS.

*Interior Enforcement.* The website of Immigration and Customs Enforcement (ICE) reports its mission as follows:

To be the nation's preeminent law enforcement agency, dedicated to detecting vulnerabilities and preventing violations that threaten national security. Established to combat the criminal and national security threats emergent in a post 9/11 environment, ICE combines a new investigative approach with new resources to provide unparalleled investigation, interdiction, and security services to the public and to our law enforcement partners in the federal and local sectors.<sup>12</sup>

Undersecretary for Border and Transportation Safety Asa Hutchinson says that combining resources under the ICE mantle has made enforcement more effective. He points to the investigation of the deaths of 18 aliens in a smuggling operation in Texas as an example: Customs' expertise in money tracing, combined with INS's skills in immigrant smuggling cases, produced a successful outcome.

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<sup>12</sup> <http://www.ice.gov/graphics/about/index.htm>.

ICE reports a number of major operations that cut across the responsibilities of its constituent parts. Examples include: *Cornerstone*—aimed at identifying vulnerabilities in financial systems that permit money laundering; *Operation ICE Storm*—a multiagency initiative targeting human smuggling and smuggling-related violence in Arizona; and *Operation Predator*—directed at sexual predators, pornographers, and criminal aliens with sex offense histories.

A major focus of DHS has been a registration programs for various groups of non-citizens potentially linked with terrorism. For a number of years before September 11, INS had been pushed by Congress to tighten up the process for admitting foreign students. For years, it was well known that some students never showed up at colleges they were granted visas to attend, and other students dropped out or transferred schools without the required permission from the INS. The Student and Exchange Visitor Information System (SEVIS), brought online in early 2003, requires schools to electronically notify DHS when students arrive and if they drop out or reduce course loads below the required minimum.

More controversial has been the National Security Entry Exit Registration System (NSEERS), which included both a registration program at ports of entry and a call-in process for males from predominantly Muslim and Arab countries who entered the U.S. on nonimmigrant visas (that is, not as permanent resident aliens). The program was initiated by the Department of Justice in the fall of 2002 and taken over by DHS after March 2003. More than 93,000 individuals were registered at ports of entry, and another 83,500 reported under the call-in program. Those efforts led to removal proceedings for more than 13,000 registrants due to immigration violations. At first, the registration system required individuals registered at ports of entry to re-register 30 days later and people registered under the call-in program to re-register annually. In December 2003 DHS rescinded the re-registration requirements, although—contrary to press reports—it did not abandon registration at ports of entry.

Policy experts who had pressed for dividing the enforcement and service functions of INS emphasized that the separation would permit each corps of

officers to do its jobs better. The idea was that each bureau would have a clearer understanding of its purposes and goals and would be guided by a clear chain of command. On the enforcement side, this appears to be happening, but it raises the question of what it means to do one's job "better." What seems to have been lost in the separation of functions is a sense of balance promoted by the combination of tasks within a single agency. At the INS, there was some truth to the claim that the enforcement side of the shop made the services side more knowledgeable about issues related to fraud and illegality; conversely, the services side helped the enforcement side understand the importance of prosecutorial discretion and flexibility with respect to claims involving humanitarian concerns. That kind of synergy appears to have lessened considerably. The officers in the Bureau of Immigration and Customs Enforcement seemed pleased with the hard-edged acronym ICE, which is emblazoned on the back of their jackets. (Other acronyms were obviously available, so the choice of ICE can be seen as significant.) Immigration attorneys report a hardening of attitudes among ICE trial attorneys as well.

Doris Meissner, who was INS Commissioner during the Clinton Administration, had issued guidance to the field on prosecutorial discretion. At the time, she issued a memorandum stating that "Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process. . . ." Furthermore, "INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial."<sup>13</sup> Immigration attorneys report that her memorandum no longer appears to be in effect in the field, though Undersecretary Hutchinson told me that the memo has not been rescinded and that discretion should continue to be exercised in appropriate situations.<sup>14</sup>

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<sup>13</sup> <http://uscis.gov/graphics/lawsregs/handbook/discretion.pdf>.

<sup>14</sup> Interestingly, the prosecutorial discretion memorandum may be found on the USCIS website but not the ICE website.

Perhaps even more important than the new toughness is the reorientation of immigration enforcement priorities. Now located in DHS, immigration officers are asked to support the central mission of the Department: fighting terrorism. Under the old INS, for example, worksite enforcement efforts were targeted at industries that hired large numbers of undocumented migrants. In DHS, investigators now focus on employees at critical infrastructure points, such as nuclear power plants (Operation Glowworm) and airports (Operation Tarmac). INS criminal investigations focused on alien smugglers; ICE is more interested in terrorism-related investigations, such as those involving money laundering and violations of export rules linked to materials that can be used in weapons of mass destruction. Indeed, a Department of Justice official noted a degree of competition between ICE and the FBI, with each bureau seeking to be recognized as the preeminent anti-terrorism enforcement unit in the government. It may well be that in the post-September 11 era it is appropriate for DHS units to be focused primarily on the war against terrorism. But it is worth noting that the relocation of immigration enforcement activities to DHS has diminished the pursuit of comprehensive strategies for addressing such immigration-related issues as identifying smuggling routes, removing undocumented migrants, and imposing sanctions on employers who hire undocumented workers. A high-ranking ICE official put it this way: “ICE will perform its immigration mission to carry out DHS’s homeland security mission.”<sup>15</sup>

*Border Enforcement.* After September 11, significant initiatives have been undertaken at the border. Some are plainly focused on anti-terrorism—most obviously the extensive screening and searching of airline passengers carried out by the Transportation Security Administration, the National Security Entry Exit Registration System, and the new requirement that countries that benefit from the

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<sup>15</sup> This is not to say that all immigration-related policy is dominated by national security concerns, as is made clear in dramatic fashion by the recently unveiled Bush Administration proposals on temporary workers.

visa-waiver program develop machine-readable passports with biometric indicators.

DHS also announced a major new program in January 2004. Called US-VISIT (United States Visitor and Immigrant Status Indicator Technology), the program requires the electronic collection of biometrics—an inkless “fingerscanning” of both index fingers and a digital photograph—of people arriving at airports on non-immigrant visas. Congress first mandated development of an entry/exit system in the mid-1990s, when it was widely recognized that the INS had no accurate records for temporary visitors (including whether and when they had left the U.S. at the end of their authorized stay). Those plans were stalled both for technological reasons and because bordering countries objected to the huge delays that such a system would impose on land border crossings. In 2000, Congress pressed again for an entry/exit system, and the events of September 11th accelerated development plans. US-VISIT is the first installment. Undersecretary Hutchinson reports that US-VISIT was unveiled “on time and under budget.”

US-VISIT represents a substantial step in gathering information about arriving and departing immigrants. In pilot testing of the program at a few airports, the system identified aliens with criminal records based on their biometrics (a name check would not have found them). It is likely that the new system will deter the entry of some inadmissible non-citizens. And, when exit control is brought online, it should produce a database of visa over-stayers.

A number of concerns, however, should be noted. First, US-VISIT covers only a small proportion (perhaps as few as 6 percent) of the nearly half a billion people who cross U.S. borders each year. Excluded from the program are U.S. citizens, permanent resident aliens (“green card” holders), temporary visitors who need no visa to enter the U.S. because they come from one of 27 countries (with visa over-stayer rates<sup>16</sup>) eligible for the visa-waiver program, and residents of Mexico who have border-crossing cards.

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<sup>16</sup> Congress has mandated that all visa-waiver countries certify by October 26, 2004 that they are issuing machine-readable passports that incorporate biometric identifiers. It is unclear whether all

As initially implemented, the program applies only to non-citizens arriving at airports (roughly 10% of the cross-border flow). DHS has stated that it intends to have US-VISIT operational at the 50 busiest land border ports by December 31, 2004. But the operational difficulties of such an extension—e.g., how to take finger-scans of the millions of non-citizens who enter the U.S. by car—appear to be significant.

Exit control presents additional challenges. Currently, visitors leaving the United States are required to give air carriers immigration documents that were stapled into their passports on arrival. These are then supposed to be matched up with arrival information, but that has not taken place for years. A fully operational US-VISIT program would be a significant improvement because an electronic “check out” system could match biometric entry records. DHS has announced that it will launch a trial effort to create a departure system via automated, self-service kiosks where visitors with visas will be asked to scan their travel documents and fingerprints. The challenge will be to implement these systems in all ports of departure and to handle the high volume of travelers (particularly at land borders) without creating long delays.

Once fully operational, US-VISIT will help to fill a major existing gap in immigration enforcement. But its promise is being oversold. While the program will give immigration authorities a far better sense of who is arriving and departing, fully effective enforcement would require a way to locate and remove those whom the system tells us have not departed at the end of their authorized stay. More importantly, despite administration assertions to the contrary, US-VISIT will not fully safeguard against the entry of terrorists into the U.S. if visa-waiver countries remain excluded from the program.<sup>17</sup> Moreover, DHS has taken no significant steps toward combating the entry of hundreds of thousand of undocumented immigrants each year over the southwest border.

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covered countries will be able to meet this deadline and what impact a failure to do so will have on their nationals traveling to the United States after that date.

<sup>17</sup> Both Richard Reid (born in the United Kingdom) and Zacarias Moussaoui (born in France) entered the U.S. under the visa-waiver program.

Undersecretary Hutchinson appears justified in describing the integration of enforcement units from different federal departments as a major accomplishment of BTS's first year. The missions, skills, and cultures of these units were deeply ingrained, and the realignment of the agencies in the new department posed a significant challenge.

A great deal of sorting out still needs to be done with respect to priorities, potential conflicts with the FBI, and integration of databases. BTS reports some progress on information sharing among its units, and it recognizes the need for a comprehensive integration of databases. But it is clear that far more work needs to be done on this front, particularly regarding access to databases maintained by the Departments of Justice and State, the CIA, and other intelligence organizations. The success of US-VISIT and other entry and exit controls depends on a reliable information base that can accurately screen out inadmissible applicants and screen in admissible applicants.

The Border and Transportation Safety's enforcement priorities will be dominated by national security goals, although day-to-day border patrol operations and removal of undocumented immigrants will continue. Indeed, the new high-tech entry and exit systems will be far more likely to detect immigration violators (e.g., those not entitled to enter the U.S. because of a criminal conviction, fraud, or prior unlawful residence) than potential terrorists who will be knowledgeable about how to avoid setting off the system's alarms.

## **COORDINATION**

As noted, the Homeland Security Act created an asymmetric structure for immigration-related functions at DHS. The service and enforcement sides report to different people at different levels: the U.S. Citizenship and Immigration Services' Director reports to the Deputy Secretary (the number two person in the Department) while the heads of the enforcements bureaus report to the Undersecretary for Border and Transportation Safety (there are five

undersecretaries at DHS). This structure might be sustainable if the units performed wholly unrelated tasks. But they do not. Consider the following examples:

- Under immigration statutes, some non-citizens illegally in the United States may file applications for legal status. Filing an application does not automatically prevent their deportation. But under traditional practice, the INS did not seek to remove someone who had pending a valid claim to remain. The reorganization and USCIS's large and growing backlog of applications now mean that people remain vulnerable to removal far longer; and because of the separation of the service and enforcement functions, ICE may proceed with removal without consulting with USCIS. Individuals seeking asylum here can enter the system in three ways: 1) those arriving at the border may indicate to an inspector (a Customs and Border Protection official) that he or she intends to ask for asylum; 2) non-citizens unlawfully inside the U.S. and placed in removal proceedings by ICE may file a claim for asylum with an immigration judge; and 3) non-citizens inside the United States not subject to removal proceedings may file an asylum claim with the asylum corps of USCIS. Without coordination, DHS units may be operating under differing understandings of asylum law and policy (and additional interpretations may be injected by immigration judges and the Board of Immigration Appeals, located within the Department of Justice).
- Various units in the department make determinations regarding inadmissibility grounds. Border agents evaluate admissibility at time of entry; ICE attorneys may charge someone in the U.S. with having been "inadmissible at time of entry" (perhaps for entry with fraudulent papers); asylum officers consider some inadmissibility grounds when deciding applications for asylum; USCIS officials evaluate inadmissibility grounds in deciding applications for adjustment of status. The applicability and

scope of these grounds can raise difficult and important questions of law, as does the granting of waivers of inadmissibility.

The establishment of the separate bureaus has also made locating and contacting the appropriate office to handle a particular policy question far more difficult. Outside groups and even officials at other government departments report frustration in matching issues with offices. In some cases, no DHS office will take responsibility. These kinds of problems are the inevitable result of a very complex bureaucratic reorganization, and over time responsibilities will be sorted out to a greater extent. But the current frustration suggests that some kind of coordination and contact process needs to be organized within the Department to help those on the outside navigate its complicated corridors.

Some steps have been taken within the Department to achieve consistency regarding matters of law. ICE and USCIS have a legal staff, each headed by a legal advisor, and lawyers within these offices consult with one another on issues of mutual interest. Importantly, the legal advisors report to the DHS General Counsel, who frequently convenes meetings with the top lawyers in the Department. To be effective, this process needs to be formalized, with clear authority placed in the General Counsel's office to resolve differing legal interpretations reached by the various units. The General Counsel's office should also ensure consistency in regulation writing—either by serving as a clearinghouse for regulations written by the bureaus or by establishing a regulation-writing unit in the office.<sup>18</sup>

Formal structures also need to be put in place on the policy side. The statute creating the department established separate policy units for the service and enforcement bureaus. The Border and Transportation Safety directorate has an Assistant Secretary for Policy, which can oversee policy development at

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<sup>18</sup> See David Martin's recommendation for a General Counsel for Immigration, reporting to the Department's General Counsel. Martin, note 4, at 12. It might be advisable for the General Counsel to appoint a Deputy General Counsel for Immigration, Refugee and Citizenship who could manage an intra-agency process and regulation writing on these topics.

Customs and Border Protection and Immigration and Customs Enforcement; but coordination between Border and Transportation Safety and USCIS appears ad hoc and episodic. It would probably be best to locate a comprehensive immigration policy program in the Deputy Secretary's office, headed by a Counsel to the Deputy Secretary.

### **THE ROLE OF THE ATTORNEY GENERAL**

The Homeland Security Act placed most immigration functions in DHS, but it also kept the Executive Office for Immigration Review at the Department of Justice.<sup>19</sup> The Executive Office for Immigration Review includes several hundred immigration judges who make decisions about entry, removal, and asylum cases. It also includes the Board of Immigration Appeals and other administrative law judges who rule on cases brought against employers for hiring undocumented workers or for discriminating against lawful workers. Under Justice Department regulations, the Attorney General reserves the power to review Executive Office for Immigration Review decisions. Because the Board of Immigration Appeals considers important questions of immigration law—e.g., the scope of removal grounds, asylum law issues, and bond determinations—the Attorney General's authority ensures that major legal (and policy) decisions will continue to be made at the Department of Justice.

This adds another level of complexity to the already complicated state of immigration law and policy-making. Suppose, for example, that the asylum branch of USCIS has issued a regulation regarding a particular class of asylum claims. Suppose further that the Attorney General has, in a particular case, adopted a different interpretation of the law. The Immigration and Nationality Act states that rulings by the Attorney General “with respect to questions of law shall

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<sup>19</sup> The Board was previously established by a regulation of the Attorney General.

be controlling.”<sup>20</sup> But while that power applies to particular cases, it is not clear whether DHS retains authority to issue interpretive regulations that adopt a different view of the law. Furthermore, the Department of Justice and DHS may disagree on matters of policy that are not strictly legal issues. For example, because immigration judges make bond determinations, the Justice Department considers it within its authority to make policy on bond-related issues. So despite the wholesale transferring of most immigration functions to DHS, with the intent that the Secretary of DHS would be the Executive Branch’s lead executive on immigration policy, the Homeland Security Act establishes a structure likely to produce conflict over immigration policy and uncertainty. Of course, this is not a new phenomenon for Executive Branch agencies, many of which have duties that overlap and conflict with each other. But it does mean that an interagency process will need to be developed to resolve the disputes that will arise among the Departments.<sup>21</sup>

## CONCLUSION

Because the September 11 hijackers were non-citizens who had entered the United States through the immigration system, it is perhaps not surprising that most immigration functions were transferred to the new Department of Homeland Security. But the result is nonetheless anomalous because the vast majority of immigration regulation and control activities have nothing to do with terrorism. About one million people are granted green cards each year, half a million are naturalized, more than a million are stopped while trying to enter the United States illegally, and tens of thousands of aliens convicted of criminal offenses are

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<sup>20</sup> INA § 103(a)(1).

<sup>21</sup> A process must also be put in place that establishes which department has the lead in drafting immigration-related regulations that have an impact both on DHS and EOIR (examples might include detention, parole, and asylum regulations). David Martin has suggested that DHS have sole responsibility for drafting substantive regulations, with DOJ participating via the inter-agency review process run by OMB. See Martin, note 4, at 21.

deported from the U.S. each year. No more than a handful of these people are ever linked with terrorist activities.

Has the transfer of immigration functions to DHS aided in the nation's fight against terrorism? It is hard to say that it has. None of the non-citizens registered under the National Security Entry Exit Registration System has been prosecuted for links to terrorism; US-VISIT is highly unlikely to identify terrorists seeking entry on tourist visas; and ICE enforcement actions against sexual predators and alien smugglers are not directed at likely terrorists. The administration has asserted that US-VISIT and its proposal to legalize undocumented workers will enhance national security, but these claims are not persuasive.

What these innovations may accomplish, however, is an immigration system with better information and more integrity. Improved exit/entry control, better customer service, and complete criminal and security checks on applicants for immigration benefits are worthy goals; and the division of enforcement and service functions is, on balance, a beneficial reform. But these goals and the reorganization will not succeed without: 1) a substantial increase in resources to reduce backlogs and to apprehend visa over-stayers; 2) a realistic plan for introducing entry and exit control at land borders; 3) accurate information in databases; and 4) technology that integrates databases. Furthermore, no new steps have been taken by DHS to stop the large and continuous flow of undocumented migrants across America's land borders.

With almost half a billion people crossing the U.S. border each year, establishing a well-regulated border—one that keeps out those not entitled to enter and admits those whose entry is lawful—is a tall order. To the extent that DHS seeks to craft immigration regulation primarily through the lens of anti-terrorism policies, there will be little improvement in the overall functioning of our immigration system. And while such policies may make Americans feel safer, there is also little reason to believe that they materially advance the war against terrorism.

### APPENDIX

#### Immigration Functions in the Department of Homeland Security—as Established in the Act of Nov. 25, 2002

