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CONSULTATION ON PROSECUTORIAL DISCRETION: STAFF SUMMARY

Date: September 17, 1996

Commissioners Present: Bruce A. Morrison [Acting Chair], Harold Ezell, Robert C. Hill, and Warren R. Leiden

Staff Present: Deputy Director Andrew Schoenholtz, Senior Policy Analysts Carolyn Piccotti, Edward Skerrett, James Halmo, Legislative Analyst LaVita Strickland, and Policy Analyst Brett Endres.

As part of the Commission's examination of the structural management of immigration laws within various federal agencies mandated with the task of enforcing and implementing United States immigration policy, the Commission held consultations with representatives of both the public and private sectors involved in this task. Specifically, the Commission sought to examine the concept of prosecutorial discretion within the context of the exclusion and deportation process.

Government Briefing Participants:

The Honorable Michael J. Creppy, Chief Immigration Judge, EOIR

Anthony C. Moscato, Director, EOIR

George Maugans, District Counsel, Baltimore office, INS

Paul W. Schmidt, Chairman, Board of Immigration Appeals, EOIR

Paul W. Virtue, Deputy General Counsel, INS

The session included participants from those branches of the Department of Justice charged with enforcing the exclusion and deportation process: the Immigration and Naturalization Service and the Executive Office for Immigration Review, which includes the immigration court system and the Board of Immigration Appeals.

The purpose of the consultations was to examine methods of improving the overall efficiency of the removal process. Further, the participants recognized the necessity to adopt measures to enhance the credibility of a system that presently suffers from a growing backlog of unexecuted orders for removal of those aliens who have exhaus-

ted all avenues for relief from deportation and no longer have a legal right to remain in the United States. [More details are in the attached notes.]

Background

The exclusion and deportation process commences with the issuance of a charging document. Exclusion cases, which involve an alien at a point of entry seeking permission to enter the United States, commence with the issuance of Form I-122 (Notice to Alien Detained for Hearing by an Immigration Judge). This document may be issued by the examining immigration officer at the point of entry or by a supervisory asylum officer in the case of an applicant for admission who has requested, and been denied, asylum [see 8 C.F.R. section 235.6 (1996)].

In contrast, deportation cases are begun by the issuance of Form I-221 (Order to Show Cause and Notice of Hearing). Deportation proceedings are initiated against an alien who has made an entry into the United States and is suspected of having violated the immigration laws. Presently, federal regulations grant twenty different INS officials the authority to issue charging documents [see 8 C.F.R. section 242.1 (1996)]. The overwhelming majority of these documents are generated by the program officers at the INS district level, specifically, the offices of investigations, examinations, detention, and deportation, as well as the border patrol agents.

These charging documents are given a cursory review by the district counsel's office legal staff for legal sufficiency. No "gatekeeper" or screening mechanism exists to provide a more substantive review of charging documents. There is no mechanism in place to give close scrutiny to cases at the initiation of the process or as they proceed through the system so as to shunt out from the system those cases where the alien appears to be eligible for some form of relief from deportation, that are improvidently commenced, or that are not likely to result in the actual removal of the alien. Due to the structure of the current system, these determinations are generally made at the time of the actual hearing. As a result, many aliens are placed into removal proceedings, and ultimately, receive an administratively final order of exclusion/deportation—but continue to remain in the United States in unlawful status for a number of years.

Overview of Current Problems

All of the participants agreed that the credibility of the immigration system is seriously jeopardized by the inability of INS to execute fully final orders for removal of illegal aliens. Despite an exponential increase in budgetary resources, the backlog of unexecuted removal orders continues to grow. Consequently, the roundtable discussion centered on possible methods of screening cases prior to commencement of proceedings and efficiently moving cases through the system.

The representatives from EOIR noted that the system is saturated at both the trial and appellate level. Approximately 110,000 administratively final orders of exclusion/deportation have been issued in the most recent fiscal year. Of these, somewhere between 50,000 and 60,000 actual removals are anticipated. A continued expansion of the backlog of unexecuted removal orders is troublesome.

Within this context of ever-increasing numbers of cases, the government participants recognized that immigration law has become increasingly complex, as demonstrated by the historical trend in the immigration court system to formalize the proceedings in keeping with rules and procedures appropriate to the federal civil courts. Current federal regulations allow the immigration judge to compel practitioners to stipulate to facts and evidence, to narrow issues to be litigated, and generally to examine the nature of the case before formal presentation in court.

A second area of concern involves the accessibility of information. INS representatives acknowledged the difficulty that practitioners currently experience in getting information from their client's files. Practitioners often are compelled to file FOIA requests in order to examine the information the government has accumulated on their client, an exceedingly time-consuming process. The shortage of INS clerical resources and support staff compels its trial attorneys to perform their own administrative tasks.

Additionally, because of their extremely heavy case loads, INS trial attorneys spend most of their time in court. Despite the best of intentions, they are thus unable to devote any significant amount of time to pretrial conferences. Unrepresented aliens present special problems. The concepts of pretrial conferences and the use of discovery tools are not

meaningful avenues for aliens who have a limited command of English or who are bewildered in navigating the maze of immigration procedures.

Recommendations

The participants queried whether a shift of resources would alleviate certain problems, for example, whether augmenting the number of INS investigators and deportation officers would increase the actual number of removals. The participants observed that it makes little sense to increase resources dramatically at the front end of the process without equivalent compensation of resources at the back end.

It was also recommended that INS trial attorneys be encouraged to use the discovery tools that are provided in the federal regulations. Sufficient resources should be allocated to allow enough time for the trial attorneys to meet with opposing counsel. It was further recommended that any hiring of additional trial attorneys be in conjunction with hiring adequate support staff. The use of a screening mechanism to review cases and applications for relief from deportation prior to the commencement of proceedings would result in increased efficiency. However, it is essential that guidelines on prosecutorial discretion be promulgated from headquarters and that they be uniformly and consistently applied nationwide. As currently practiced, discretion is haphazardly utilized and standards differ from district to district.

The participants also encouraged an increased use of affirmative incentives for voluntary return and greater discretion in actually placing aliens in removal proceedings. Participants noted that, ultimately, the most beneficial and effective tool for increasing efficiency was representation. Those aliens who begin the process with some advocate or representative are much more likely to understand the proceedings and to make intelligent choices regarding the likelihood of success for their cases. To that extent, efforts to increase the availability of *pro bono* representation, particularly in the more complicated areas such as asylum applications, are recommended.

Meeting Notes

Within the context of removal policies, the Commission held a miniconsultation on prosecutorial discretion. The goal was to gain a greater understanding of the system for placing aliens into removal proceedings and managing the case load through to removal. As this responsibility falls on the Immigration and Naturalization Service [INS] and the Executive Office for Immigration Review [EOIR], representatives of these agencies participated in the first session.

Prior to the meeting, the Commission staff posed a number of written discussion questions to the participants, including the following:

- At what points in the period between apprehension and removal can and does INS exercise discretion in deciding to pursue a case?
- What avenues of relief may INS provide in its exercise of discretion?
- How many cases are diverted from the deportation/exclusion process at each stage at which discretion may be exercised?
- What is, or what should be, the process for determining if a case should be pursued to the next stage of the removal system?
- Should the process involve consultation with other government agencies? With the alien? With the alien's counsel?
- Should INS officials exercise greater discretion in determining which aliens should be prosecuted fully and which should be offered alternate options prior to immigration court?

It is with these concerns in mind that the Commission began its discussions on the issue of prosecutorial discretion.

Commissioner Morrison opened the session by noting that, although INS has primary responsibility for determining which cases are brought forward for prosecution, the insights and observations of EOIR contribute to an understanding of the consequences of the use, or failure to use, some system of prosecutorial discretion. He asked the participants to begin the session by noting the two or three most important issues they would like to bring to the attention of the Commission regarding prosecutorial discretion.

EOIR Director Moscato noted that the caseload of the immigration courts continues to expand. For example, in fiscal year 1994, Immigration Judges across the country heard approximately 140,000 cases. Fiscal year 1996 has seen approximately 164,000 cases wend their way through the immigration court system. This has resulted in the issuance of approximately 110,000 administratively final orders of either exclusion or deportation.

Chief Immigration Judge Creppy offered three recommendations for improvement of the current system:

1. An increase in the use of discovery tools between the INS attorneys and the alien representatives. Federal regulations provide for prehearing statements and a prehearing conference at the discretion of the immigration judge [see 8 C.F.R. section 3.21 (1996)].¹ This tool should enjoy more prominent application. Judge Creppy noted that currently private practitioners are compelled to file a FOIA request in order to obtain government information on their client. This method is extremely time-consuming and serves to delay the process of moving cases through the system in an expeditious manner.
2. The use of prehearing settlement and stipulation of issues also should be increased.
3. Ultimately, the government should provide representation in certain limited categories of cases. For example, asylum cases tend to be both factually and legally

¹ This regulation provides as follows: (a) Prehearing conferences may be scheduled at the discretion of the Immigration Judge. The conference may be held to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, and otherwise to simplify and organize the proceeding. Subsection (b) explains that the stipulations may include, but are not limited to, facts, witnesses, exhibits, estimated time required for the hearing, and unresolved issues. Subsection (c) permits the Immigration Judge to compel the submission of evidentiary objections, without which the admission of all evidence described in the prehearing statement shall be deemed unopposed.

complex. Representation for asylum seekers would save the court's time by eliminating nonmeritorious cases from the system.

In response to these concerns, District Counsel Maugans observed that in recent years there has been a movement in the immigration court system to become more like federal civil litigation, with its attendant local rules of procedure, evidence, and discovery tools. As cases have become more complex, this trend should be encouraged, as it serves to advance the interests of both judicial economy and relief for the alien. Bearing these trends in mind, Mr. Maugans admitted that providing private counsel with access to their client's files was problematic due to the extremely heavy case load of INS trial attorneys. Most spend almost all their time in court and, therefore, have very little administrative time to meet with opposing counsel. An increase in clerical resources would help to alleviate this problem. Further, Mr. Maugans explained that he encourages the alien representatives to file a proposed application for relief from deportation with his office prior to filing it with EOIR. Mr. Maugans also agreed with Judge Creppy that represented aliens move through the system much more quickly; he recommended that increased resources be allocated to encourage greater representation of aliens.

Deputy General Counsel Paul Virtue also added to these observations by explaining that INS currently has several pilot programs in Seattle, Boston, and Houston to examine an information-sharing system between trial attorneys and private counsel and representatives. INS, in cooperation with EOIR, also seeks to expand the Florence, Arizona representation project through the use of federal funds for the nonrepresentational or administrative expenses associated with that project. Mr. Virtue joined the other participants in observing that represented aliens fare better in the system, in that the issues are narrowed, frivolous or nonmeritorious cases are eliminated, potential avenues of relief from exclusion or deportation are explored, fewer continuances are requested, asylum cases are better prepared.

Mr. Moscato indicated that in fiscal year 1995, EOIR issued approximately 115,000 administratively final orders of exclusion/deportation. Mr. Virtue explained that approximately 50,000 aliens were actually removed; this figure includes approximately 32,000 criminal aliens. Further, the removals for fiscal year 1996 currently are approaching 54,000 and, as of July, are projected to reach 62,000.

Chairman Paul Schmidt noted that the current system is saturated at both the trial and appellate levels; however, there is no direct correlation between the INS budget for removal and the number of aliens placed into removal proceedings. Therefore, Mr. Schmidt recommended a policy that includes affirmative incentives for voluntary return and an increased use of discretion in placing aliens into removal proceedings.

Commissioner Leiden noted that the key to an overall viable system is the ability to actually remove those aliens who exhaust all avenues of administrative remedies for relief from deportation and no longer have a legal right to remain in the United States. Towards that end, Mr. Leiden suggested that resources be shifted from one area to another. For example, instead of a continual increase in resources for hiring more immigration judges and trial attorneys, funds should flow into the deportation and investigation programs. Mr. Leiden queried whether it is possible to calculate a formula to determine the most efficient ratio between the number of border patrol agents, deportation and investigation officers, and Immigration Judges or trial attorneys. No one is aware of whether such a calculation has ever been made.

Commissioner Morrison echoed Mr. Virtue's point that INS does not have the resources to keep track of everyone who is placed into the system because it also includes those who affirmatively come forward of their own volition to seek immigration benefits such as adjustment of status or asylum. Presently, the impetus for removal remains with the criminal alien population. INS detention resources are limited to 9,100 spaces and these are almost exclusively utilized for the detention of criminal aliens and, in some jurisdictions, for excludable aliens who seek asylum.

Further, INS does not have sufficient resources to determine the whereabouts of criminal aliens in local and state facilities; efforts are concentrated on the federal prison system and the states with the largest prison systems, such as Texas, California, Florida and New York. Mr. Virtue recommended that the Institutional Hearing Program [IHP] be expanded to more jurisdictions.²

² The IHP program was formally expanded to the Huntsville, Texas state penitentiary on September 23, 1996. Two full-time Immigration Judges hear cases for detained criminal aliens.

On a positive note, Mr. Virtue explained that Florida has a special program that identifies criminal aliens serving sentences in the Florida prison system and returns them to their country of origin prior to the expiration of their sentence. Chief Judge Creppy also noted that current law provides for the entry of administrative orders of deportation for those criminal aliens who are determined to be statutorily ineligible for any relief from deportation [8 U.S.C. section 242A].

Mr. Maugans also reflected that removal often is hampered or significantly delayed by the inability of INS to secure appropriate travel documents for the return of criminal aliens. This problem is alleviated in Maryland by requiring that all criminal aliens eligible for parole present a valid travel document as a prerequisite to release.

Commissioner Ezell questioned whether the responsibility for the actual removal of deportable aliens should be transferred from INS to the courts, as is the case in the federal court system, where, for example, upon sentencing, custody is transferred to the Bureau of Prisons via the U.S. Marshall Service. However, Judge Creppy noted that regardless of who has custody over the alien, the problems remain essentially the same, i.e.: How can deportable aliens be identified? Under what circumstances should such individuals be detained? How and when should removal be effected?

Commissioner Leiden expressed an interest in “dejudicializing” the process at various points along the way to increase efficiency. Judge Creppy again iterated that the parties should be encouraged to stipulate to as many facts and issues as possible before the commencement of a hearing. Commissioner Morrison observed that the concept of stipulating between the parties varies from district to district and is the almost exclusive prerogative of district counsel; there are no national standards. Mr. Virtue observed that time is of the essence in immigration court and a limited number of cases are amenable to stipulation due to the high rate of unrepresented aliens.

Commissioner Morrison observed that resources should be allocated in such a manner as to stop the growth of the backlog of cases with final orders of deportation. For example, reform of the asylum system allowed the INS to remain current with incoming applications and prevented the backlog from growing on a yearly basis. He encouraged implementation in the removal system of reforms of this nature, of which prosecutorial discretion may

play a significant role.

Ultimately, the participants in this discussion agreed that, within the limits of current law, removal priorities need to be established and should be somehow connected to resources. For example, interlocking levels of personnel should be examined, i.e.: If INS hires additional border patrol agents, how many additional investigators, and deportation officers need to be recruited? Further, as an increase in resources requires a sufficient passage of time to make all parts of the system work together in the most efficient manner, the participants discouraged the expectation of immediate results.

CONSULTATION ON PROSECUTORIAL DISCRETION STAFF SUMMARY CONTINUED

Date: September 17, 1996

Commissioners Present: Bruce A. Morrison, Harold Ezell, Robert C. Hill, and Warren R. Leiden

Staff present: Andy Schoenholtz, Carolyn Piccotti, Ed Skerrett, Jim Halmo, LaVita Strickland, and Brett Endres.

Private Attorney Briefing Participants:

Claire Cherkasky
Teresa Donovan
Thomas Elliot
Michael Maggio
Denyse Sabagh
Mark von Sternberg.

This Consultation focused on the current system and process by which aliens are excluded and deported from the U.S., the effectiveness of the system, and possible ways to improve and facilitate the process either by eliminating cases that do not need further prosecution or by removing people with no chance of relief.

Commissioner Morrison chaired the meeting and began by noting that the Commission is interested in the credibility of the removal process from the time before the issuance of the Order to Show Cause [OSC] all the way to the final removal: what is working and what is not.

Most participants overwhelmingly agreed that the system is not working well at all. The attorneys made recommendations on how they would like to see the system function.

Process

Utilize Prosecutorial Discretion More. The participants discerned no INS system for prioritizing the prosecution of cases but said that by and large, INS simply prosecutes every case. Several participants stated that many people in proceedings are eligible for some form of relief and that much of the court's time is wasted on unnecessary cases that become suspensions or adjustments in the end. Their hope was that these cases could be identified in the beginning and sorted out of the system. The attorneys noted that in the present system INS's defense would be that they do not have time to review every case beforehand. They observed, however, that it would be a better use of time if INS did such reviews. It was suggested that rather than the investigator's issuance of an OSC initiate proceedings as is currently done, the District Counsel should decide who is prosecuted (as in a District Attorney's Office).

Issue Central Guidelines. Many of the attorneys suggested that the General Counsel should issue guidelines or a regulation on when and how discretion may be used by the trial attorneys. This would help the trial attorneys and the district counsel to know where they stood. This also would provide uniformity for each district while still leaving room for discretion.

Sanction Lawyers for Frivolous Cases. Participants noted that laws presently in place [8 CFR 292.3(a)] to penalize lawyers who waste the court's time with frivolous cases are never enforced. If lawyers were in danger of facing sanctions, they might encourage their clients to take voluntary departure rather than pursue cases that they know will be denied.

Make Pretrial Conferences Mandatory. A pretrial conference between the trial attorney and counsel for the alien was suggested as a way to force both sides to prepare their cases better. At this point frivolous or credible cases might be eliminated. To ensure meaningful conferences, some participants would like judges to use direct sanctions when attorneys are not prepared, such as limiting the evidence that can be presented at the hearing. This would encourage more preparation and, thus, a more efficient process.

Provide Training for Trial Attorneys. Some participants suggested the need for more significant training for the Trial Attorneys, pointing out that they are the largest group of government lawyers except for U.S. Attorneys, but don't receive the training and resources they need.

Accountability

Commissioners raised the issue of accountability in the system, and most of the participants agreed that in the end no one at the local level or at Headquarters is accountable for the final removal or for the system as a whole. Too many chains of command from Headquarters without one clear enough to hold anyone specifically responsible was a main concern. For example, the Trial Attorney might say that the District Counsel won't let him settle a case, but where that order ultimately comes from at Headquarters is still unclear. Some attorneys noted that they often have no one to turn to at Headquarters to ensure accountability at the District Office. One recommendation was for an ombudsman in the General Counsel's office to hear about "horror story" cases where some injustice is being done.

Removal

During the discussion on the legal process of the removal system, it was noted that, even if resources were adequate for adjudicating the cases, the real issue of deporting those who have no right to be here at the end of the process was still an issue. Many final orders are issued, but only a small percentage of those people are actually deported. In a second discussion on the actual removal of aliens ordered deported the participants reported that poor communication and a lack of resources were reasons for failing to remove aliens with final orders.

Reporting Requirements

Some participants suggested that there be a case manager to follow the cases to completion. They also recommended reporting requirements for the aliens on

where the released aliens are working or living while their case is pending. The Commission has heard previous testimony on a Vera Institute Appearance Assistance Pilot Program where reporting requirements with incentives for the aliens are being tested.

Resources

Questions on how the \$440 million budget for the detention and deportation program is being spent and who is ultimately accountable for the success of the program were raised. Commissioners instructed staff to look into the breakdown of how money is spent on the program. The need for more clerical help for the lawyers was suggested as a means to free up Trial Counsel time. Currently Trial Counsel must do most of their own clerical work because of a lack of available clerks. Another concern was that appropriations figures and success of programs is measured by numbers of apprehensions and not actual removals, Attorneys suggested that the Commission could look into that issue.

A final recommendation was made that under the Commission's guidance, the two groups—government representatives and private attorneys—be brought together to try to work out the problems with one another.

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Divider Title: 6

MILTON D. MORRIS

Immigration— The Beleaguered Bureaucracy

THE BROOKINGS INSTITUTION
Washington, D.C.

1

Controlling Immigration: A Problem of Administration

ON June 20, 1984, the House of Representatives concluded an intense and sometimes dramatic seven-day debate by passing the Immigration Reform and Control Act of 1983, also known as the Simpson-Mazzoli bill.¹ The vote was an extremely close 216–211 in favor, with the outcome in doubt until the final seconds of the tally. The bill's weary, emotion-choked floor manager, Representative Romano L. Mazzoli, Democrat of Kentucky, seemed to reflect the feeling of the entire House as he expressed relief and gratitude that the House had finally acted after years of debate and delays.

Passage by the House was the most difficult and important step in an over a decade-long effort by the federal government to enact immigration reform aimed at reducing illegal immigration. There had been numerous studies by congressional committees, bills introduced in both chambers, studies by the executive branch, and an exhaustive study by a Select Commission on Immigration, all in an effort to deal with the rapidly growing problem of illegal immigration. The Simpson-Mazzoli bill was a product of these efforts, particularly those of the select commission, on which both Representative Mazzoli and

1. See *Congressional Record*, daily edition (June 20, 1984), pp. 6088–6185. On this date H.R. 1540 was incorporated into the Senate bill of the same name (S. 529).

the bill's Senate sponsor, Alan K. Simpson, Republican of Wyoming, had served. While the Senate had passed a version of the Simpson-Mazzoli bill first in 1982 and again in 1983, the House proved reluctant to act. In the final days of the turbulent lame-duck session of the Ninety-seventh Congress, it briefly debated and then shelved one version of the bill, claiming insufficient time to consider it. Again, in the first session of the Ninety-eighth Congress, several House committees considered the bill and proposed changes, but it languished in the Rules Committee, a victim of numerous disagreements among House members and fear by the House leadership about the political implications of acting on so controversial a bill with a presidential election on the horizon. It was therefore a major accomplishment when the bill passed the House on June 20, 1984.

But the House vote did not mean the delays were over. It appeared for a time that a conference committee would iron out the differences between the House and Senate versions, but the fragile compromise that had allowed the bill to squeak through the House began to collapse. Although most Democratic House members and the leadership had supported the bill, two of the three candidates for the Democratic party's presidential nomination expressed mild opposition, reflecting their own uncertainty about the political implications of either position in an election year. When the Democratic national convention convened just weeks after the House vote, Hispanic delegates demonstrated intense opposition to the bill. Democratic nominee Walter F. Mondale stiffened his opposition as well, and President Ronald Reagan, who had supported earlier efforts to pass the bill, suddenly found the House-passed version too expensive and withdrew his support, thereby drastically reducing its chances of becoming law. The bill's supporters worked hard to keep it alive, but as Congress adjourned for the summer, it seemed virtually certain that the bill was dead. However, when Congress reconvened after the summer recess the bill suddenly found a new life. House and Senate conferees worked feverishly to resolve the many conflicts

over the House version. While they succeeded in settling most of them, a few key issues remained as stumbling blocks. Insufficient time and a lack of enthusiasm by most members of Congress for tackling the issue again resulted in the bill's demise when the Ninety-eighth Congress adjourned.

The closeness of the House vote and the subsequent collapse of support for the Simpson-Mazzoli bill are not surprising. The fact that the measure came so close to fruition in an election year is perhaps more surprising. Immigration policy has always been extremely controversial, reflecting at once the public's fears about the effects of immigration, deep commitment to the principle of an open country, and the special interests of many employers and ethnic groups to maintain liberal immigration. Even among those who have been convinced about the need for reform to increase the country's control over immigration, there have been widely divergent views about how this should be done.

The central issues in the past decade's debate about immigration and the ones tackled by the Simpson-Mazzoli bill are: how much immigration the country can prudently allow; what should be done to control illegal immigration, what should be done about the millions of illegal immigrants already residing here; and how the adjudication of immigration disputes and particularly asylum and refugee claims and claimants might be handled. The Senate version of the Simpson-Mazzoli bill addressed all of these issues.² It proposed an annual ceiling of 425,000 on immigrants, imposed penalties on employers who knowingly hire illegal immigrants, and provided for a phased extension of immigrant status to those in the country illegally before January 1980. The House deleted the cap on immigration and modified the provisions affecting employer penalties, legalization of illegal immigrants, and the treatment of refugee issues. In addition, the House acted to significantly strengthen the administration of immigration policy.

The lengthy deliberations on immigration issues in Congress

2 S. 529, Immigration Reform and Control Act of 1983.

heretofore have been conspicuously inattentive to the need for effective administration of immigration policy. The concern has almost always been how to devise new policies to deal with alleged problems. This inattention is especially noteworthy not only because the inadequacies in policy enforcement have been widely conceded for a long time, but because the policy reforms considered and adopted could be effective only with vastly improved administrative capability. In the deliberations on Simpson-Mazzoli, administration received substantial attention from both the Senate and House.

The Senate-approved version of Simpson-Mazzoli authorized a modest program of reciprocal waiver of the visitors' visa requirement for countries with very low visa refusal rates, changed the structure and procedure for some adjudication including refugee and asylum petitions, and declared the intention of Congress to authorize more funds for enforcement activities by the Immigration and Naturalization Service (INS). Section 111 of that bill declares:

It is the sense of the Congress that an essential element of the program of immigration control and reform established by this Act is an increase in border patrol and other enforcement activities of the Immigration and Naturalization Service in order to prevent and deter the illegal entry of aliens to the United States

In order to do this in the most effective and efficient manner, it is the intent of the Congress to provide, through the annual authorization of appropriations process for the Department of Justice, for a controlled and closely monitored increase in the level of border patrol and of other appropriate enforcement activities of the Immigration and Naturalization Service to achieve an effective level of control of illegal immigration

The House affirmed these Senate actions to strengthen enforcement of immigration policy and went somewhat further. For example, it authorized specific and substantial dollar increases in funds for enforcement activities by the INS and required the attorney general to submit plans for the new activities within two months after passage of the law. It also provided for expedited procedures for stopping and barring

would-be illegal immigrants at the borders and created an adjudicative procedure including a new U.S. Immigration Board in the Justice Department. At the same time, the House seemed to go in the opposite direction by requiring INS investigators to obtain warrants to search open fields and farms for illegal immigrants, an action that would overturn a 6-3 Supreme Court decision to the contrary in *Oliver v. U.S.* and *Mame v. Thornton* and would probably increase the difficulty of apprehending illegal immigrants on farms.¹

Although the net effect of these actions would be to improve the administration of immigration policy, the extent and character of that improvement is not clear. Perhaps more important, the congressional debate reflected a high degree of attention to and concern about a wide range of administrative arrangements aimed at protecting the civil rights of individuals.

Scope of the Study

This study is about the administration of immigration policy. It examines the evolution, character, and performance of the immigration bureaucracy in the context of the development of immigration policy. Analysts and public officials alike have been in agreement that there are serious flaws in the administration of immigration policy. However, there is considerable uncertainty about why this is so. Most analyses stress the inadequate funds available to the agencies responsible for enforcing immigration policy. The Senate version of the Simpson-Mazzoli bill reflected this view; it proposed to support increased appropriations but provided for very little structural or procedural reform. Even though the House version of that bill went somewhat further, its primary emphasis also was on increased funding.

Money clearly is the most important need of the immigration bureaucracy to finance much-needed expansion and improve

¹ 104 S.Ct. 1735 (1984)

ment in enforcement. However, there seem to be several other important problems as well—in the structure of the bureaucracy, enforcement procedures, and confusion over the objectives to be pursued by the immigration bureaucracy. Many of these factors are, in turn, the result of the country's deep and persistent ambivalence about immigration; the virtual inability of policymakers to satisfy the many conflicting demands with respect to immigration; and the failure of policymakers to recognize and respond to profound changes in the character of the enforcement task.

This study begins by reviewing the major forces that have influenced the development of U.S. immigration policy, particularly the country's ambivalence about immigration and the different approaches to immigration adopted by the executive and legislative branches. These factors and the political conflicts they engendered not only influenced the structure of the immigration bureaucracy and the approaches used in enforcing policy, but influenced public opinion about enforcement as well.

Next, the study reviews immigration trends and the forces behind them in order to clarify the changing demands on the immigration bureaucracy and the degree to which immigration really is susceptible to effective control through the approaches now available. Nothing has influenced the character of enforcement more than the rapidly increasing flow of aliens into this country. In evaluating the enforcement effort and measures to improve it, the current and anticipated pressures for entry must be considered.

Much of the debate about immigration reform rests on the assumption that the country is seriously threatened by an unprecedented surge in immigration and that steps must be taken immediately to prevent dire consequences for the country. The Senate version of the Simpson-Mazzoli bill, in fact, assumed this condition and responded to it by imposing a lid on all immigration. The evidence examined in chapter 3 suggests that while illegal immigration is widespread, may be

damaging to the country, and needs to be promptly and effectively controlled, the country is not about to be engulfed by a great alien tide. The forces behind current immigration, it argues, are similar to those behind earlier waves of immigration, and even though the country is more mature now than at the beginning of this century when immigration was similarly high, it has not lost its capacity to absorb immigrants and to benefit from their presence.

Several recent developments now pose special administrative or enforcement challenges for the immigration bureaucracy. One is the very rapid increase in travel to this country by foreign nationals for a number of different reasons—tourism, study, immigration, business. Another is the high incidence of illegal entries, especially overland from nearby countries. Still another is the growing number of emergency entrants seeking refuge, many unexpectedly and without authorization. Perhaps the most important of the recent developments is the movement toward adoption of the Simpson-Mazzoli bill. Not only would the bill have imposed a number of major new responsibilities on the immigration bureaucracy, as several members of Congress noted during the House debates, the effectiveness of the law in reducing illegal immigration would have depended primarily on a dramatic improvement in the capability of the INS to prevent illegal entries.

Chapter 4 reviews the development and performance of the immigration bureaucracy, focusing on flow management, internal control and enforcement, and the provision of routine services. In this connection, it considers the performance of Congress and the executive in allocating the resources needed, the impact of unclear or inadequate immigration policies, the growing prominence of the federal courts in shaping enforcement practices, and the impact of the character of immigration as both a domestic and international phenomenon. All of these factors appear to have greatly influenced the administration of immigration policy historically and will continue to do so. Thus this segment of the study views the current performance of

the immigration bureaucracy not as the result of specific failures on any single front but as the result of a combination of several powerful forces.

This view helps to account for the difficulty in arriving at a consensus among analysts or policymakers about what needs to be done to greatly improve the administration of immigration policy. It also suggests why the steps called for in the Simpson-Mazzoli bill, though important and constructive, are unlikely to go very far in enabling the immigration bureaucracy to gain and maintain effective control of immigration now and in the future. In chapter 5, the study identifies some measures that are essential to an effective enforcement effort and the prospects for their adoption.

In considering remedies for the immigration bureaucracy, the study assumes that effective control of immigration, rather than complete cessation of illegal immigration, is the plausible national objective. It also assumes that a high standard of performance of the service responsibilities of the bureaucracy is indispensable to the effective control that is sought. As in virtually all other areas of public policy, voluntary compliance with the law must be assumed to be the rule, with administrative actions aimed at encouraging and facilitating this compliance and discouraging noncompliance by posing a credible threat of unacceptably high cost to would-be noncompliers.

In carrying out these objectives, the immigration bureaucracy has the added responsibility of walking the tightrope between effective enforcement and observing the civil rights of everyone in this country—citizen and noncitizen alike. As the study shows, this latter responsibility, though not unique to the immigration bureaucracy, is especially challenging for it. One reason is the special character of the enforcement task, especially where it involves actions and decisions at the country's borders or about unauthorized entrants whose claims to residency here are at best murky. Although the courts have noted the special problems in enforcement here, it is still not clear to what extent standards applied in enforcing immigration policy

should be allowed to differ from other domestic law enforcement standards. Meanwhile, the general concern with civil rights since the mid-1960s and the growing political activism of several previously uninvolved groups that feel particularly threatened by civil rights violations are likely to keep this a prominent issue before policymakers for some time.

Even if bold reforms were made in the administration of immigration policy, immigration would still be difficult to control. As this study shows, both the country's experience with immigration and the current situation point to the inescapable conclusion that immigration cannot be fully controlled even with a full array of promising administrative and policy changes. The power of the forces behind immigration and the openness of the society make full control unachievable. What can be achieved, however, is a level of control at which the chances of being detected are high enough to deter most would-be violators of immigration laws. Thus the public will be persuaded that the country's borders and its immigration laws are reasonably intact.

This line of reasoning leads to several strategies for improving the performance of the immigration bureaucracy. The question is, what are the prospects for their adoption? The passage of the Simpson-Mazzoli bill by both houses provided a hopeful sign. For example, Congress displayed an encouraging degree of interest in improving administration and a willingness to authorize substantially increased funds for doing so. It also approved some important procedural and structural changes to speed up and make more fair some aspects of enforcement. But these actions are the relatively easy, noncontroversial ones. At most, they constitute a promising first step. Little evidence of interest in more far-reaching reforms emerged from the congressional deliberations. Moreover, the real test of the government's willingness to finance the immigration bureaucracy is not expressions of intent to increase funding or even generous budget authorizations, but the appropriation of funds earmarked for meeting critical needs. This has not yet occurred

to the extent needed to significantly improve the immigration bureaucracy's performance. Perhaps, as this study concludes, the only changes that can be hoped for are modest incremental improvements in administration, which would at least help the country to maintain the status quo.

Data

Despite the country's long-standing pride in its immigrant tradition and the mounting concern about immigration since the early 1970s, immigration problems remain poorly understood, particularly in the area of administration. One reason for this is that data essential for describing and evaluating immigration trends and the performance of the immigration bureaucracy are scarce and uneven. One difficulty is that the principal sources of data on immigration are the routine compilations by the INS and the State Department's Bureau of Consular Affairs. However, the data they gather are primarily for internal administrative purposes, are often flawed, and often become available years after they are gathered, thus making thorough up-to-date analyses very difficult, if not impossible. Furthermore, the same types of data reported by the different agencies, dealing with immigration often do not agree, creating considerable confusion.

Another difficulty is that reliable data on illegal immigration and illegal immigrants are virtually nonexistent. The very nature of illegal immigration makes it almost impossible to gather data and allows self-serving or misleading guesses. Data on both legal and illegal immigration are used in this study with full recognition of their limitations. The data limitations notwithstanding, this study draws attention to some of the urgent questions for policymakers to consider, and it encourages the search for ways to improve the country's exercise of a basic sovereign right—that of controlling its borders.

4

Administering Immigration Policies

FORMULATING adequate immigration policies is one side of the effort to control immigration; administering those policies is the other. This task is currently shared by six agencies of the federal government, two of which have the primary responsibility for enforcement—the Justice Department's Immigration and Naturalization Service (INS) within the country, and the State Department's Bureau of Consular Affairs outside it.¹ The other agencies that deal with immigration matters are the Office of Labor Certification in the Department of Labor, the Bureau of Public Health and the Office of Refugee Resettlement in the Department of Health and Human Services, and the Office of the U.S. Coordinator for Refugee Affairs in the Executive Office of the President.

The Beleaguered Immigration Bureaucracy

In recent years, few agencies of the federal government have been as vigorously or persistently criticized as those engaged in enforcing immigration policy. The INS in particular has been

1. The principal responsibility of the bureau is the issuance of visas, which is administered by the bureau's visa office.

a target of widespread criticism, even among public officials. Testifying before a House Appropriations Subcommittee in 1977, Representative Joshua Eilberg, Democrat of Pennsylvania, chairman of the Subcommittee on Immigration, Naturalization, and International Law of the House Judiciary Committee, declared that "the INS at the present time is totally incapable of administering and enforcing provisions of the Immigration and Nationality Act."² His successor to the chairmanship of the subcommittee, Representative Elizabeth Holtzman, Democrat of New York, commented in 1979 that the INS "still uses 19th century tools," has "a record-keeping system that is a disaster," and generally lacks professionalism.³ Other members of Congress, journalists, and several General Accounting Office (GAO) reports have all painted a similarly grim picture of the agency—showing it to be inadequately equipped, overwhelmed by its work, deeply demoralized, and in a hopeless state of disarray.⁴

Although the Bureau of Consular Affairs has received considerably less public criticism than the INS, it too is problem-ridden. Several consular posts abroad are inadequately staffed to promptly process requests for U.S. visas. Applicants, therefore, are often forced to wait in long lines in applying for a visa and to wait a long time to have the applications processed. Moreover, many people in this country fear that because too few people spend too little time reviewing visa applications, the incidence of visa abuse is much higher than it would be otherwise.

The inadequacies of the two principal units of the immigra-

² *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1978*. Hearings before the Subcommittee on State, Justice and Commerce, and the Judiciary of the House Appropriations Committee, 95 Cong. 1 sess. (Government Printing Office, 1977), pt. 7, p. 444.

³ Quoted in Bernard Weinraub, "Immigration Bureaucracy Is Overwhelmed by Its Work," *New York Times*, January 17, 1980.

⁴ See General Accounting Office, *Need for Improvement in Management Activities of INS* (GAO, 1977); and *Prospects Dim for Effective Enforcing Immigration Laws* (GAO, 1980). Also see "The Green American Immigration Nightmare," *U.S. News & World Report* (June 22, 1980), pp. 27-32.

tion bureaucracy are reflected in the mounting evidence of large-scale illegal immigration, in the frequent failure of the bureaucracy to provide certain routine services effectively and expeditiously, and in its inability to maintain and provide routine immigration data on demand. Some of these failings are no doubt the result of normal organizational or management problems experienced by virtually all agencies of government. Overall, however, they appear to stem from serious structural problems within the immigration bureaucracy, and from the way it approaches its administrative responsibilities.

This beleaguered immigration bureaucracy is a troubling symbol of the country's vulnerability to the mounting pressures for immigration described in chapter 3 and of its long-standing ambivalence about immigration. The ambivalence has led to serious and sometimes immobilizing conflicts in which the desire to impose firm and, to some, draconian enforcement measures has come up against the desire to preserve the society's cherished values of openness to immigrants and respect for individual rights. This situation has contributed to the government's casual approach to enforcement, the fragmented character of the immigration bureaucracy, and the lack of clear and consistent enforcement objectives.

Inadequate Government Attention to Enforcement

Before 1876 the federal government had little to do with administering immigration laws. The necessary administrative tasks, such as enumerating and admitting immigrants and collecting a head tax from them, were carried out by the governments of states where immigrants disembarked. At the time some people considered this a much more efficient arrangement than having the federal government carry out these tasks because, as one observer argued, assigning this responsibility to

the clumsy machinery of a central board, or . . . a single Commissioner stationed at an inland city, remote from the chief

objective points of foreign immigration, with an unwieldy multitude of subordinates scattered over the land . . . would be worse than unreasonable. The transfer to the national government of the control of the immigrant would lead to quarrels, heart-burnings.⁵

However, in 1876 the Supreme Court invalidated the laws of California, New York, and Louisiana that regulated various aspects of immigration, and thereby placed full responsibility for immigration matters on the federal government.

In response to this judicial action and to the enactment of several immigration laws shortly thereafter, a federal administrative apparatus gradually developed. The nucleus of that apparatus was the Treasury Department's Bureau of Immigration, which had been established in July 1891 pursuant to the Immigration Act of that year. Other immigration laws not only added new responsibilities to that bureau but also shifted it from one department to another until it finally came to reside in the Justice Department as the INS. However, federal policymakers took little notice of whether the INS was able to carry out the tasks assigned to it, despite the complaints of immigration bureau officials themselves, who since the early 1900s have consistently underscored the problems of inadequate staff, funds, and facilities—obviously with little effect. As the number of aliens entering the country and the enforcement responsibilities increased, these problems worsened and in 1919 reached a point where the Commissioner General for Immigration was led to complain:

As immigration laws have been extended more and more into new fields and as their restrictive features have become more stringent, making it more difficult for the inadmissible classes to enter the United States, so there have been added greater responsibilities and a vast amount of labor not before usual in the bureau's administrative work. Thus, the bureau has made recommendations for additions to its legal staff and other sub-

5. Friedrich Kapp, *Immigration and the Commissioners of Emigration* (Arno Press, 1969), p. 155.

divisions, which it considers absolutely necessary to meet the growing business and responsibilities that rest upon it."

Sixty years later almost the same complaint was raised by acting INS Commissioner David Crosland in his 1979 testimony on the service's budget request:

Major changes in the law in 1965 resulted in considerably more paperwork for the Agency, and it was not and has not been equipped to cope with it, either through systems and procedures or through automation. At the same time immigration to this country has been increasing substantially and we now find ourselves in a hole from which it will not be easy to extricate ourselves.⁶

In 1979, as in 1919, federal policymakers acknowledged the problem but did nothing about it. In short, neither Congress nor the executive branch has shown much willingness to tackle the administrative problems that have afflicted the immigration bureaucracy, particularly the INS.

Fragmented Administrative Structure

One of the distinctive features of the immigration bureaucracy is its fragmented structure—it consists of six major units spread across four departments and the Office of the President. The bureaucracy developed in this way because of the manner in which the administrative responsibilities evolved and because immigration affairs have both domestic and international dimensions. From the beginning new administrative tasks were assigned to the existing agency or department that appeared best equipped at the time to carry out the task. The division of responsibilities in this way has impeded the enforcement effort somewhat, because cooperation, communication, and

6. Quoted in *History of the Immigration and Naturalization Service*, prepared for the Select Commission on Immigration and Refugee Policy, 96 Cong. 2 sess. (GPO, 1980), p. 25.

7. *State, Justice, Commerce, the Judiciary, and Related Agencies Appropriations, Fiscal Year 1981*, Hearings before the Senate Committee on Appropriations, 96 Cong. 2 sess. (GPO, 1980), pt. 2, p. 740.

collaboration among the separate enforcement entities have been difficult to achieve. In recent years communication between the INS and the Bureau of Consular Affairs has improved, but that is due mainly to the strong efforts of the principal officials on both sides.

Divided up as it is, the immigration bureaucracy lacks the stature within the federal government that would allow it to compete effectively for the resources it needs to carry out its responsibilities. Both the INS and the Bureau of Consular Affairs are relatively weak agencies of their respective departments. Many observers have noted the relatively low status of the INS, which is headed by a commissioner who does not even report directly to the attorney general, and on its remoteness from the Justice Department's primary activities. The Bureau of Consular Affairs has a similar problem; the consular service, especially visa responsibilities, has not been viewed by foreign service officers as a highly desirable foreign service assignment, and visa issuance is well removed from the State Department's principal activities.

Lack of Clear Objectives

Because the government's objectives with respect to the enforcement of immigration policy are varied and sometimes contradictory, the work of the immigration bureaucracy is considerably more difficult than it might otherwise be. Although this problem was recognized as long ago as 1903 in the annual report of the Bureau of Immigration, little has been done to change the situation.⁸ Instead immigration policy has evolved to reflect a wide array of competing interests, and in consequence enforcement responsibilities have multiplied and central purposes have become blurred.

What has happened can be seen in broad terms in the policy requiring visa applicants to be thoroughly screened. Only those who qualify under existing law are to be admitted; those whose presence would adversely affect the domestic work force are

8. *History of the Immigration and Naturalization Service*, p. 12.

to be excluded; unauthorized or clandestine entry is to be prevented, and aliens who violate immigration laws are to be apprehended and expelled or otherwise penalized. In the management of immigration across the land borders, especially the southern border, however, policy has had to yield to the demographic, geographic, political, and economic realities of the region. As a result, some illegal entries have been allowed and even encouraged at times for many years and often a less than vigorous effort has been made to apprehend and expel those who enter the country illegally across the southern border.

A case of such encouragement or tolerance can be found in the "drying out of wetbacks" that occurred in the Southwest during the 1940s and 1950s. "Drying out" meant conferring legal status on Mexicans working in this country illegally. The practice by INS personnel began in 1926 as a means of placating growers in the Imperial Valley of California, whose supply of Mexican workers was interrupted by the restrictive immigration law of 1924.⁹ Although it was clearly a violation of immigration law, the practice continued into the 1940s even when the bracero or temporary worker program was in effect and allowed Mexicans to contract for work in the United States. In addition, the U.S. Border Patrol sometimes assisted the growers by simply failing to act forcefully to prevent unauthorized entries. Thus, INS enforcement practices at the southern border often were at variance with the country's overall policy.

Such conflicts exist even in the routine screening of foreign nationals wanting to enter the country as tourists. For example, the United States has increasingly emphasized that tourism contributes sizably to its economy. To facilitate tourism, public agencies and private organizations have tried to speed up and simplify the admission process. The immigration bureaucracy, meanwhile, is required to screen all applicants for admission thoroughly, but in doing so it risks slowing down the flow of tourists.

As might be expected from the way in which it operates,

9. Mark Reigler, *By the Sweat of Their Brow: Mexican Immigrant Labor in the United States, 1900-1920* (Greenwood Press, 1976), p. 61.

the beleaguered immigration bureaucracy faces other major problems that affect the country's ability to control immigration. They show up primarily in four types of administrative tasks: (1) managing the flow of aliens into the country, (2) ensuring that aliens within the country comply with immigration laws, (3) providing immigration-related services to the public in this country and abroad, and (4) resettling refugees.

Managing the Flow of Aliens

The immigration bureaucracy's most important responsibility is to manage the flow of aliens into the country. Before 1917 flow management amounted to minimal screening of aliens seeking admission at ports of entry to ensure that they met the health and character qualifications established by law. However, the task became much more laborious when in July 1917 the federal government instituted a requirement that all immigrants would have to be screened and issued visas in their home country before traveling to a U.S. port of entry. Flow management now encompasses some other activities as well: the inspection of aliens at the port of entry (so as to prevent fraudulent or mala fide entry), the prevention of clandestine entries away from official entry points, and the screening and admitting of refugees. Each of these tasks has become increasingly demanding as the overall number of aliens seeking admission to the country has increased.

Visa Issuance

The visa requirement has become the principal means of managing the flow of aliens into the country. All aliens traveling to the United States are required to have an entry visa with the exception of Canadian citizens who are temporary visitors and a few others in that category. This general visa requirement, first established by a joint order of the secretaries of labor and state in July 1917 and enacted into law in May 1918, was

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introduced primarily as a national security measure. With the imposition of annual ceilings on total immigration and quotas for each country in 1921 and the introduction of a preference system in 1952 whereby visas are distributed among several types or categories of immigrants, visa issuance has grown quite complicated.

Numerical limitations apply only to immigrant visas. Individuals may enter the country on nonimmigrant visas for business, pleasure, study, or diplomatic purposes, or they can be here in transit, provided they meet certain standards established by immigration law. The basic conditions are that applicants for nonimmigrant visas must have a bona fide reason for traveling to the United States; be able to support themselves while they are in the country; evidence a clear intention to depart upon expiration of the authorized stay; and meet certain health, character, and national security criteria.

Immigrant visas, on the other hand, are subject to a number of restrictions. First, under current law, only 270,000 immigrant visas can be issued annually, not including 50,000 refugee visas. Spouses, parents, and children of adult U.S. citizens and a few other categories of aliens are also admitted outside this ceiling. Next, each country is allocated no more than 20,000 of the numerically restricted visas annually. Finally, immigration law establishes a system of six preferences under which applicants for immigrant visas are classified, four based on family ties to residents of the United States and two on employment-related expertise or special skills needed in this country (see table 3-1). Immigrants must also meet basic health, character, and national security criteria and they must demonstrate that their resources or those of a sponsor are enough to ensure that they will not become a financial burden to the government, in other words, a public charge, for at least five years after entry.¹⁰

U.S. consular officials stationed abroad are responsible for

10. Immigration and Nationality Act, 8 U.S.C. 1101 et. seq. For the law as amended through September 1, 1980, see *Immigration and Nationality Act with Amendments and Notes on Related Laws*, Committee Print, prepared for the House Committee on the Judiciary, 96 Cong. 2, 888 (CPO 1980).

screening visa applicants and for issuing visas to those who qualify. Although immigration law specifies the qualifications for admission, consular officers are ordinarily the final arbiters of whether an individual meets these qualifications. For example, the consular officer must judge whether an applicant for an immigrant visa who is otherwise eligible is able to be self-supporting in the United States, or whether an applicant for a nonimmigrant visa has a legitimate reason for wanting to travel to the United States but also strong enough ties to his or her home country to ensure return.

The Department of Labor's Office of Labor Certification participates in the screening of one small category of immigrants, those admitted under the sixth preference to accept employment offered by a U.S. employer. That office must find that there are no local workers qualified, willing, and available to take the job the applicant plans to take, whereupon the secretary of labor must grant a labor certification before a visa is issued.

Visa issuance has become increasingly demanding as the number of applications has increased. The increase in the number of immigrant visas issued has been modest, only about 13 percent, between 1972 and 1980—from 293,966 to 331,345 (see table 4-1). (Visas issued in a year often do not equal immigrants admitted for that year.) However, the number of applications has been growing more rapidly, resulting in a mounting backlog that exceeded 1.4 million in January 1983, according to the deputy assistant secretary of state for visa affairs.¹¹ Nonimmigrant visas issued during 1972–80 almost tripled in number, going from 2.29 million to 6.73 million (table 4-1). As a result, consular officials have much less time to examine applications and ferret out fraudulent or otherwise unqualified applicants. (Consular officials are said to spend an

11. U.S. Department of State, speech by the deputy assistant secretary for visa services to the 1983 annual conference of the American Immigration Lawyers Association.

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Table 4-1. *Immigrant and Nonimmigrant Visas Issued by the United States, 1965–80*

Year	Immigrant visas	Nonimmigrant visas	Total
1965	280,212	1,175,140	1,455,352
1966	280,172	1,250,751	1,530,923
1967	294,250	1,311,778	1,606,028
1968	340,668	1,331,107	1,671,775
1969	311,612	1,370,000	1,681,612
1970	301,701	1,430,800	1,732,501
1971	296,504	1,448,001	1,744,505
1972	293,966	1,460,370	1,754,336
1973	304,752	1,531,152	1,835,904
1974	321,136	1,550,297	1,871,433
1975	302,001	1,571,197	1,873,198
1976	310,362	1,681,533	1,991,895
1977	350,192	1,871,006	2,221,198
1978	364,350	1,727,112	2,091,462
1979	315,684	1,861,950	2,177,634
1980	331,345	1,728,732	2,060,077

Sources: For 1965–76, U.S. Department of State, Bureau of Security and Consular Affairs, *Report of the Visa Office*, various years, p. 3. For 1976–80, provided by Bureau of Consular Affairs in "Monthly Workload Reports" and "Semi-Annual Reports of Nonimmigrant Visas Issued and Refused."

average of about two minutes or less per nonimmigrant visa applicant.)¹²

Among nonimmigrants, tourists account for the majority of visas issued and for most of the increase during 1972–80, which no doubt occurred in response to the vigorous promotion of tourism by the U.S. government and the private sector. Reductions in the relative cost of living in this country and readily available and inexpensive transportation have made U.S. vacations attractive to increasing numbers of people. The number of visa issuances for foreign students coming here each year to study also has increased sharply, from 65,750 in fiscal year 1972 to 154,960 in fiscal year 1980.¹³

Beside having to cope with the problem of sheer numbers,

12. Sidney L. Smith, *Nonimmigrant Visa Processing at U.S. Consulate General, Toronto*, Technical Report M78-210 (Bedford, Mass.: MITRE Corp., 1977), p. iii. The time spent per visa applicant varies among consular offices.

13. U.S. Department of State, Bureau of Consular Affairs, 1972 and 1980 *Report of the Visa Office*, table 19.

visa officials must contend with fraud or misrepresentation in visa applications. Although the extent of fraud in visa petitions is unknown, there is some evidence to suggest that it is a substantial problem, but that it is confined to a relatively small number of visa posts, most of them in developing countries where the pressures for emigration are especially strong. Comments by the U.S. consul general in Kingston, Jamaica, in connection with a series of arrests for visa fraud hint at the size of the problem. Consular officers, he noted, "send a lot of people to the U.S.A. who have no right to go there," and there has grown up "a regular 'cottage industry' in the production of fraudulent Jamaican civil documents." He stated that almost every day of the week applicants presented altered or forged Jamaican passports, altered or forged Jamaican birth certificates, altered, forged or counterfeit U.S. birth certificates, and counterfeit Canadian Landed Immigrant Documents.¹⁴ That the Jamaican situation is not unique is suggested by a firsthand account of visa issuance in the Philippines, where visa fraud also appears to be widespread.¹⁵

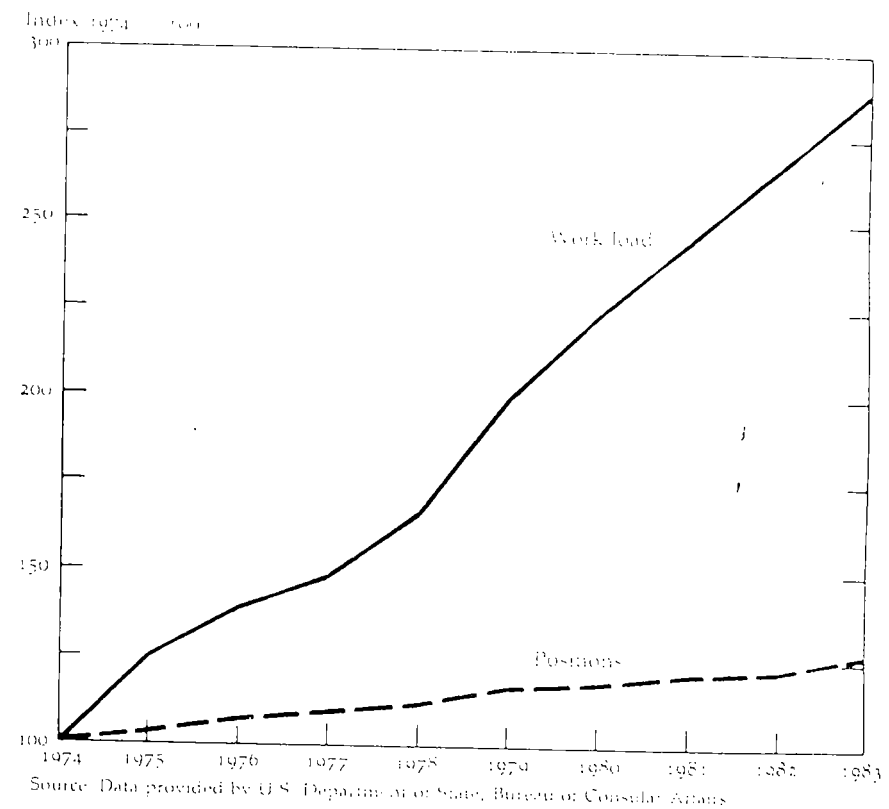
In addition, some fraud originates with individuals in this country who attempt to assist unqualified friends, relatives, or prospective employees to gain admission through sham marriages, false offers of employment, and other such actions. From whatever source, fraudulent applications or the anticipation of fraud impose an added burden on personnel involved in the screening process.

A critical question is whether the visa process in its present form can withstand the pressures arising from the rapidly growing demand for visas and from the widespread and increasingly sophisticated fraud. The answer would seem to be that considerably more personnel are needed to process visas, and new and improved procedures and facilities are needed to increase productivity if the system is to function satisfactorily.

14. *Jamaican Weekly Observer*, October 25, 1982.

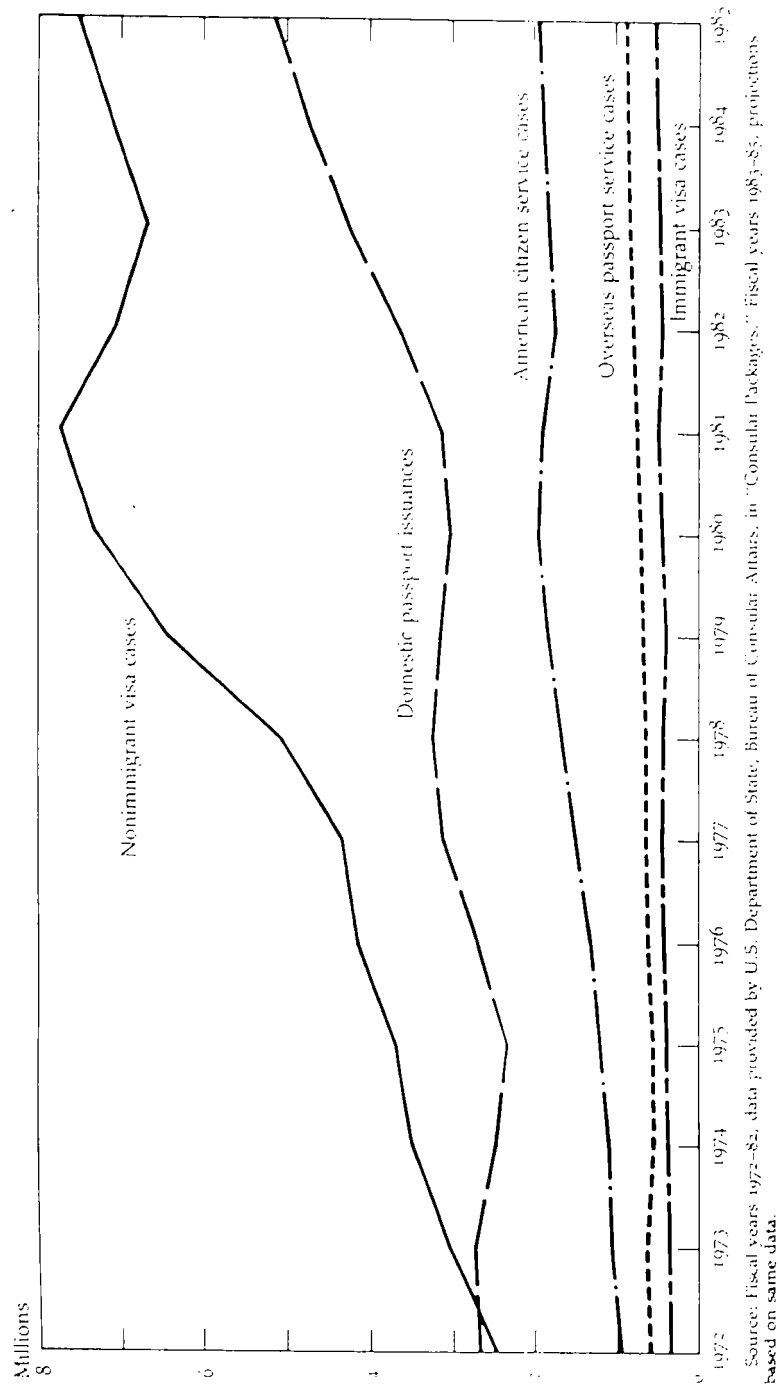
15. Robert L. Lane, "Within the Visa Mill," *Foreign Service Journal*, vol. 17 (November

Figure 4-1 Increases in Work Load and Positions, U.S. Bureau of Consular Affairs, Fiscal Years 1974-82



Because visa work cannot be entirely separated from other consular activities, it is hard to tell exactly how many people are assigned to visa issuance or how the number has changed in recent years. The total number of consular positions abroad (as well as the numbers of foreign nationals assisting in consular work) has shown only modest increases since the early 1970s. According to the Bureau of Consular Affairs, personnel increased by about 22 percent between 1974 and 1982, whereas consular work increased by about 166 percent (figure 4-1), most of which was visa related (see figure 4-2).

Figure 4-2. Work Load, U.S. Bureau of Consular Affairs, by Type of Case, Fiscal Years 1972-85



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procedural changes in the processing of petitions for nonimmigrant visas have helped to improve productivity. The screening procedure has become more flexible, for one thing, and now relies on the perceptions of consular officers and Visa Office personnel to assess the degree of risk of visa abuse at particular posts. A Japanese or British national seeking a tourist visa, for example, is not likely to be required to appear before a consular officer for an interview. The visa can be granted by mail or through a travel agency. But in Jamaica, the Dominican Republic, or the Philippines, applicants are likely to be interviewed and all documents submitted in connection with the application scrutinized carefully. This different treatment reflects the judgment of the Visa Office and consular officials that the incidence of fraud and visa abuse is very low among Japanese and British nationals but that it is very high in the Caribbean countries and the Philippines.

Another procedural change has been an increase in the use of indefinite visas good for the life of the traveler's passport. Used on a large scale, this type of visa could substantially reduce the work load at some posts where traffic is high by sharply reducing the number of visa petitions.

During the last few years the Bureau of Consular Affairs has been trying to improve productivity by using computers to process visa applications. This effort began with the development of an automated nonimmigrant visa issuance system (ANVIS) that was installed at the U.S. Consulate in Toronto for experimental use.¹⁶ ANVIS was designed to reduce the work load, speed up nonimmigrant visa processing, improve recordkeeping, and produce a secure, machine-readable nonimmigrant visa. Although the system has worked well in Toronto, it has not been placed elsewhere, mainly because the INS has not yet been able to develop a machine that could read the visas produced by ANVIS at ports of entry.

¹⁶ See Smith, *Nonimmigrant Visa Processing*.

The processing of applications for immigrant visas has undergone relatively little change. Each applicant must still be interviewed by consular officers before a visa is issued. However, the Bureau of Consular Affairs has developed and is deploying an Immigrant Visa Applicant Control System that will computerize the task to some extent. The purpose here, too, is to reduce the work load by using computers to process much of the information previously handled manually. As yet the system has been deployed in only five visa posts after having been tested in London in 1981.

Finally, to satisfy a legal requirement that a centralized name check be made of all visa applicants, the Bureau of Consular Affairs established a computerized data bank, which is now used to screen more than two-thirds of all visa applicants. Although these developments have helped consular posts cope with the increasing work load and are likely to be of even greater assistance in the future, the computer is clearly not the sole answer to the current problems. Visa issuance is a labor-intensive undertaking and much of the labor can only be done manually.

The most substantial gains in handling the rapidly increasing demand for entry to the United States are likely to come from a combination of expanded computer assistance, increased personnel, and a modification of visa requirements. One proposed modification that has been before the Congress since 1980 and that was included in the Simpson-Mazzoli bill is to waive the nonimmigrant visa requirement on a reciprocal basis for countries with very low visa refusal rates. Such a move would substantially reduce the work load in some consular posts and permit a shift of personnel to posts where the demand for visas is strong and the risk of visa abuse is high. The main point here, however, is that the procedures and technologies available today, if fully exploited, could improve the effectiveness of the visa issuance process as a means of controlling immigration.

Inspections

A visa does not guarantee that the bearer will be admitted to the United States; it merely authorizes travel to a U.S. port of entry where the alien will be inspected by an official of the INS. Only after the inspection has been completed will admission be granted or denied. In general, inspection at the port of entry involves no more than a quick examination of the visa and related travel documents to verify the bearer's eligibility for admission. Occasionally an inspecting official uncovers evidence of fraud or the intention to abuse a properly issued visa and denies admission.

Some analysts view this port-of-entry inspection as an unnecessary duplication of effort since it repeats what was done by a consular officer before the visa was issued.¹⁷ For this reason in 1952 the Truman Immigration Commission urged that the practice be terminated.¹⁸ Despite the duplication of effort and the possible inconvenience to a traveler who might be granted a visa but then be denied entry upon arrival, the procedure still appears to be a valuable tool in safeguarding against fraudulent entries. In the case of multiple entry and indefinite visas, port-of-entry inspection is the only feasible check on the traveler after the initial screening. Furthermore, the process would become indispensable if the proposed visa waiver policy was to be instituted. Some people also contend that the current procedure assures that the State and Justice departments will in fact share the responsibility for admitting aliens that has been designated to them.

Like visa issuance, the inspection process is severely strained by the great number of admissions. Here, too, inspections officials are under constant pressure to speed up the entry of

17. Charles Gordon, "The Need to Modernize Our Immigration Laws," *San Diego Law Review*, vol. 13 (1975), pp. 10-11.

18. *Whom We Shall Welcome: Report of the President's Commission on Immigration and Naturalization* (GPO, 1953), pp. 132-33.

travelers, but they find this difficult to do because inspection remains by and large a manual procedure and personnel increases have been far from adequate to compensate for the tremendous increase in the number of travelers.

Admitting Refugees

Like other aliens entering the country, refugees must be screened, issued appropriate documents, and admitted. But because their flight is usually sudden and because large numbers of people are generally involved—not to mention the fact that most of them do not meet the criteria established for routine immigrants such as the capacity to be self-supporting upon entry—refugees require more attention than other immigrants. Indeed, one of the immigration bureaucracy's most formidable challenges in recent years has been managing the admission of large numbers of refugees coming from several areas of the world under widely differing circumstances.

The procedures for admitting large numbers of refugees evolved over the past several years, but the sources of the refugees, the circumstances producing their flight, and the number of people involved have been so varied that it has been almost impossible for the United States to maintain a consistent and efficient procedure. Conditions were such that the postwar European refugees and the Cuban refugees who arrived during the 1960s could be admitted in a relatively organized manner, whereas other groups—such as the Hungarian refugees of 1956 and the many Indochinese who fled their countries immediately after the collapse of their governments or who took to sea in unseaworthy boats several months later—have had to be processed under much more difficult circumstances. More recently, the arrival without authorization of thousands of Haitians and Cubans claiming refugee status upon arrival has posed new and even more formidable procedural challenges to the immigration bureaucracy.

The screening and admission of large numbers of refugees

Administering Immigration Policies

require the U.S. government to interact with international organizations and domestic voluntary organizations.¹⁹ The broad objectives of the screening process are: to select for admission refugees who were employed by or have other special ties to the U.S. government, who have close relatives in the United States, or who have no practical alternatives to resettlement in this country; to exclude those whose presence might constitute a security risk, and to minimize the direct burden on the government for their support after their arrival.

Ordinarily, the screening process begins with a finding by the secretary of state that the people involved are indeed refugees and that they are of special interest to the United States for humanitarian or foreign policy reasons. Next, each refugee is registered, first with the United Nations High Commissioner for Refugees at their place of first asylum, and then with a recognized voluntary organization engaged in refugee resettlement, which gathers preliminary data essential in arranging resettlement.

Subsequently, all applications are reviewed by U.S. consular officials at or near the sites where the refugees are located and priority rankings are established, starting with those having close relatives residing in the United States, followed in order by former employees of the U.S. government, persons closely associated with the United States or with U.S. firms or organizations in their home country, and finally by other refugees with no other resettlement opportunities. This review is followed by a more detailed examination of each case by INS refugee specialists and it usually includes extensive interviews.

After the refugees' applications have been approved by INS officials, the cases are transferred to a voluntary agency, which tries to contact relatives or to find sponsors in the United States. Once a sponsor has been secured, the Intergovernmental Committee on Migration, a nongovernmental international

19. The principal actors in the handling of refugees are described in Charles B. Keely, *Global Refugee Policy: The Case for a Development-Oriented Strategy* (The Population Council, 1981), pp. 49–52.

refugee relief organization, arranges transportation to the United States. At the U.S. port of entry, the refugees are again examined by INS officials and then are finally admitted.

Because the procedure for screening refugees is itself time-consuming and relatively few INS officials are available to do the work, especially in emergencies, there are often long delays between a decision to admit a specified number of refugees and their arrival in this country. A point in its favor, however, is that this procedure gives the United States control of each refugee decision and allows for an orderly placement of refugees. These conditions do not exist when the United States becomes a place of first asylum, that is, when people in flight come directly to this country. In those circumstances the United States has little choice but to admit such refugees for resettlement. The sorry saga of the Haitian detainees underscores the problem here and the distastefulness of detention as a response.

Controlling the Flow across the Land Borders

Controlling the entry of aliens into the United States across its land borders is probably the immigration bureaucracy's most demanding responsibility in managing the immigrant flow. Although U.S. immigration laws prescribe essentially the same admission procedure for all aliens, the history, culture, and economic characteristics of the southern border region in particular have created special conditions that immigration policies have never been able to effectively handle. The task involves: (1) facilitating the entry of large numbers of aliens at designated entry points; (2) preventing unauthorized entries at places other than official entry points; and (3) responding informally and unofficially to the special needs of the border region for the movement of people.

Managing the routine flow of aliens across the land borders involves many of the same challenges and pressures associated with visa issuance and inspections. The flow here, for example, is also extremely heavy and the personnel insufficient. In 1981

alone, authorized entries across land borders by aliens exceeded 176 million, and that number has risen by more than 10 percent a year since then.²⁰ Although the United States has a strong interest in facilitating this traffic for the benefit of its economy and the relationship with its neighbors, the personnel and facilities needed to screen immigrants at the designated crossing points have been barely sufficient to do much more than a perfunctory screening.

Unauthorized entries are also a problem here, but in this case the special concern is the entries that take place away from designated crossing points. Such entries have been taking place since the mid-1800s and are a deeply entrenched practice, especially at the southern border. As noted earlier, evidence that unauthorized entries have been occurring on a large scale and are increasing rapidly and the continuing friction they create in U.S.-Mexico relations have made them the most prominent and controversial aspect of the flow control problem here.

Surreptitious overland entries are difficult to prevent in part because of the topographical features of the southern border region, which has few natural barriers along the more densely populated areas, and where, in addition, several cities straddle the border. Furthermore, economic forces on both sides have encouraged the clandestine movement of unemployed Mexican workers to this country. Although the United States has long relied on this pool of Mexican workers and has acted at times to attract it, current immigration laws allow few of these workers to enter legally. Illegal entry thus becomes their only alternative.

The Border Patrol—the unit within the INS that is responsible for preventing unauthorized entries and for apprehending those who enter the United States illegally in the border region—has never had the means to carry out this task effectively. Although the Border Patrol has apprehended over a million illegal entrants a year in at least three of the years since

²⁰ Immigration statistics not cited by footnotes are from the Immigration and Naturalization Service, 1981 *Statistical Yearbook*.

1977, another million or more probably succeed in entering illegally each year. Part of the problem is that the Border Patrol is small and has limited resources at its disposal to cope with the border management task. In fiscal year 1981 the daily on-duty force averaged about 2,690 officers on the immediate border, or a maximum of roughly 900 persons per shift (not allowing for leaves, illnesses, and the like) to patrol almost 2,000 miles of Mexican-U.S. border.²¹ And in spite of the growing concern about illegal border crossings, the number of Border Patrol positions authorized for 1983 was only thirty-four more than the number for 1980.²²

Another problem is that the smuggling rings that reportedly bring people into the United States surreptitiously for profit are apparently becoming more numerous and more sophisticated. According to several journalistic accounts and scattered data from the INS, smugglers transport people from all over the hemisphere across the U.S. land borders. Between 1972 and 1981, the number of smugglers apprehended by the INS nearly tripled, going from 4,564 to 12,643, while the number of smuggled aliens apprehended increased from 24,918 to 90,084 (their numbers exceeded 172,000 in 1979).

Although immigration law makes virtually no special concessions to allow movement across the U.S. land borders, some administrative procedures and informal discretionary actions have been used to facilitate relatively easy access to this country across the land borders. Canadian nationals are allowed entry without special entry documents, for example, while Mexicans can take advantage of two types of documents available for short-term entry. Form I-151 (the green card) is used by a small number of commuters (about 60,000) who cross the border daily to work in the United States. Ordinarily green cards are issued only to immigrants who intend to reside in the United States. However, the practice of issuing them to commuters has been upheld by federal courts, and, according to one INS

21. Data provided by the INS.

22. INS, *1980 Statistical Yearbook*, table 10.

general counsel, has been sanctioned by administrative interpretation and practice.²³ The majority of Mexicans use Form I-186 to enter the United States. This is a border-crossing card or special visitor's visa that permits the holder to stay in the United States up to seventy-two hours. It is obtainable from consular officials or INS officials at border-crossing points.

The inadequacies in flow management at the land borders can be viewed as two basic problems. One is the large and steadily rising number of travelers using official crossing points, which has made it difficult to ensure the smooth flow of eligible travelers to this country and prevent mala fide entries. This problem could be alleviated somewhat by developing travel documents that are relatively secure, valid for a long time, and machine readable. The other, more formidable problem, is that of clandestine entries, away from designated crossing points. Many observers think it is virtually impossible to prevent such entries. INS officials maintain, however, that if adequate resources, such as considerably more border personnel and equipment, were available, illegal entries could be drastically reduced.

Flow management problems are of great concern at home and abroad. Within the country, complaints about illegal immigration and about the effects of immigrants on many social programs have stimulated strong pressures to improve control of the flow. At the same time, the tourist and travel industries are eager to have procedures simplified, permitting easier access by foreign nationals. These objectives will not be easy to achieve in the face of the rapidly expanding volume of travelers.

Abroad, the screening process brings officials of the U.S. government into contact with foreign nationals in their own countries and at times arouses the concern of their governments about the treatment they receive. In this sense screening is a

23. Roger A. LaBracherie, "Aliens in the Fields: The 'Green-Card Commuter' Under the Immigration and Naturalization Laws," *Stanford Law Review*, vol. 21 (1969), pp. 170-76.

quasi-diplomatic activity, and thus much U.S. goodwill abroad may hinge on the efficiency of the operation. The long lines and extremely uncomfortable or inadequate waiting facilities typical of some consular posts almost certainly contribute to ill will toward the United States. An adequately staffed, equipped, and directed flow management effort, particularly with respect to the southern border, is obviously less likely to trigger conflict with other countries or ill will toward the United States than an inadequate and ineffective one.

Internal Supervision and Control

Once aliens arrive in the United States the INS has the responsibility to ensure that they comply with the conditions of their entry and depart upon the expiration of their authorized stay. Although most nonimmigrants or temporary visitors voluntarily comply with the law, many do not. Some enter the country legally with the intention of violating the conditions of their visas, others decide to do so after entry, and still others slip in surreptitiously across the land borders. The INS is responsible for the apprehension and expulsion of all those who fail to comply with the terms of their admission or who enter surreptitiously. These tasks—which, for the sake of convenience, can be called the “control” functions of the INS—are the means by which the country maintains the integrity of its immigration laws. However, they are now performed so poorly as to represent the most glaring failure of the immigration bureaucracy.

The poor performance is not difficult to explain. One problem is that the INS has simply failed to develop adequate facilities and procedures to carry out its control responsibilities effectively. Another is that many of the procedures employed by the INS are outdated and of dubious legality. Although many of these procedures have been challenged in recent years, the INS has not seriously evaluated and modified them. Still

another problem is the public’s continuing ambivalence about and distaste for closely monitoring, apprehending, and expelling aliens who violate immigration laws.

Lack of Enforcement Capabilities

The INS is not unique among government agencies in having more to do than the resources with which to do it. What is striking about this agency, however, is the extent of the discrepancy between its resources and its responsibilities. That the INS lacks the capability to enforce U.S. immigration laws is evident in virtually every area of its performance, particularly in its handling of data. Journalistic accounts of INS data-handling problems are sometimes accompanied by pictures of stacks of aging cardboard boxes, bulging and faded manila folders and envelopes, and rooms full of documents in disarray—this in an era of incredible achievement in data storage and data-handling technology.

The agency obviously cannot perform its mission effectively under these circumstances. It must be able to handle a multitude of data. At a minimum the INS should be able to gather and analyze data for internal management purposes and for fulfilling routine services, including current information on the number of aliens admitted to the country, the number who depart, and those who fail to depart at the required time. Because it has not been able to do this, demands for such information by the government have at times created major crises for the agency.

The INS has two basic systems for obtaining this kind of information. One is the nonimmigrant document control system (NIDC), which is supposed to collect: (1) routine information on each alien admitted and the alien’s address in the United States (derived from the arrival segment of Form I-94, which is submitted to INS inspectors by the alien upon admission); (2) change-of-status data for nonresident aliens who change their status (from one visa category to another) while in the

United States; and (3) data on departures (derived from the appropriate segment of Form I-94 submitted to the carrier by the alien upon departure). The NIDC system should allow the INS to determine at any time the number of nonimmigrant aliens in the country and their status. However, this is not possible at the present time because the INS has not been able to keep the data in the NIDC system current. Nor has it been able to ensure that the data are reliable. In September 1981 the INS conceded that it had a backlog of about 30 million I-94 forms and more than 600,000 extensions of temporary stay to be processed.²⁴ In addition, the number of keypunch errors in the processed data was extremely high and the system contained only a portion of the required data on departures.²⁵

The second data system, which was abandoned by Congress in 1981 to save money, was based on information from alien registration cards that all aliens were required to fill out with their address and certain other basic information and submit to the INS in January of each year. Although the INS administered the annual reporting system, the agency did not know the level of compliance and made minimal use of the data. The individual files on the cases handled by the INS should be another major source of data, but the agency's antiquated manual storage system and the fact that some of its files are held in its field offices make them of limited value.

The inability of the INS to supervise or maintain data on nonresident aliens was vividly demonstrated by the agency's efforts in November 1979 to determine the number and whereabouts of Iranian students in the country and to expel those who had violated the terms of their admission. Since foreign students constitute a relatively small segment of the nonresident alien population, they should not be very difficult to track down. However, the INS was unable to determine how many Iranian students were in the country or where they were studying. In an effort to comply with the attorney general's

24. "Backlog Grows on Alien Files," *New York Times*, November 22, 1981.

25. GAO, *Prospects Dim for Effectively Enforcing Immigration Laws*, pp. 20-21.

directive that their status be reviewed so that violators could be expelled, the INS shifted about 1,200 employees from their usual tasks to that of verifying the status of an estimated 73,600 Iranian students. Almost a year and \$3.3 million later, the agency still was unable to determine the exact size of this student population or the whereabouts of many of its members.²⁶

Educational institutions authorized by the INS to admit foreign students might have been an alternative source of information, but the INS has failed to remain informed about the status and activities of these institutions. A GAO report found, for example, that of 1,009 schools in the Los Angeles area authorized to admit foreign students, the INS was unable to contact 300, and of 500 in the Washington, D.C., area it was unable to contact 200.²⁷ Lack of supervision or contact with approved schools has also created opportunities for abuses. Since educational institutions have a direct financial interest in admitting foreign students, many have been aggressively recruiting students abroad, and some are alleged to have allowed the I-20 forms, the document required for entry as a foreign student, to be sold abroad to individuals seeking to migrate to this country.

Understandably, the problems in remaining informed about the much larger population of other nonresident aliens are considerably greater since the government in this country does not routinely monitor the movement of individuals. There is a large and growing gap between the reported number of aliens who enter the country and the number of departures documented annually. In 1979 the INS conducted an experiment to determine the status of aliens whose departure had not been verified by selecting at random from the NIDC system the names of 3,734 aliens who had apparently overstayed. The

26. General Accounting Office, *Controls over Nonimmigrant Aliens Remain Ineffective* (GAO, 1980), pp. 4-6. Also see Bernard Weinraub, "U.S. Immigration Bureaucracy," *New York Times*, January 17, 1980.

27. GAO, *Controls over Nonimmigrant Aliens Remain Ineffective*, p. 5.

study established that one-third of the sample had indeed left the country, but the other two-thirds could not be accounted for.²⁸

Experiences like these illustrate the inadequacy of the most basic element in the administration of immigration policy—the INS data-gathering system. Undoubtedly the INS problem is partly a result of the rapidly rising number of aliens entering the country, but it also reflects the long-standing inattention to these needs by both the executive branch and Congress. Other units within the government that must maintain current information on large numbers of individuals, such as the Social Security Administration and the Federal Bureau of Investigation, have been able to maintain reasonably effective and reliable data systems.

The lack of institutional capacity at the INS is equally evident in the way the agency investigates fraud and misrepresentation by aliens, ascertains violations by aliens of the terms of their admission, and apprehends and expels those found to be in the country illegally. These are difficult and laborious tasks. They are performed primarily by the Investigations and the Detention and Deportation divisions of the INS, both of which have unrealistically small staffs and support facilities. In 1980, just over 1,000 INS officials, about a tenth of total INS personnel, were responsible for apprehending illegal immigrants and for investigating a wide range of suspected immigration law violations nationwide. Since then that number may have declined along with the overall decline in the agency's total authorized strength. The Detention and Deportation Division, equally understaffed, has a total of about 1,100 individuals for all detention-related activities. Moreover, the INS has had a chronic shortage of detention facilities, sometimes so severe as to force curtailment of some investigative activities because the agency was unable to house the aliens being apprehended.

28. GAO, *Prospects Dim for Effectively Enforcing Immigration Law*, pp. 20-21.

Outdated Enforcement Procedures

The INS has been severely handicapped in carrying out its investigative activities by some ineffective and highly controversial procedures. There is really no entirely effective and pleasant way to identify, apprehend, and expel illegal aliens. Not only do these activities frequently evoke public criticism, some have been challenged in federal courts as violations of civil rights, with the result that the INS has been forced to modify some of its procedures. Even where the procedures have withstood these challenges, lengthy litigation has been disruptive and costly for the INS.

INS investigative procedures have included random searches of vehicles in the vicinity of the land borders thought likely to contain illegal immigrants and interrogation of the occupants about their immigration status; random questioning of individuals in the interior of the country who appear or sound foreign-born to determine their status; "sweeps" through neighborhoods or gathering places believed to be occupied by illegal aliens; and raids on workplaces where they are believed to be employed. (The last two methods are called "area control operations.") These practices are based on very broad legislative authorizations to INS investigators, such as section 287a(1) and (3) of the amended Immigration and Nationality Act, which states:

Any officer or employee of the service authorized under regulations prescribed by the Attorney General shall have the power without warrant to interrogate *any alien or person believed to be an alien* as to his right to be or to remain in the United States, and within a reasonable distance from any external boundary of the United States, to *board and search* for aliens any vessel within the territorial waters of the United States and any railway or aircraft, conveyance, or vehicle. (Emphasis added.)

The attorney general, incidentally, has interpreted "reasonable distance" to mean within 100 air miles of the border.

Starting in about 1968, the courts began to subject INS activities to increasing scrutiny under the Fourth Amendment's protection of individuals against arbitrary searches and seizures. For one thing, they required INS investigators to show reasonable cause for searches and seizures. In addition, they attempted to distinguish between rules governing searches and seizures at the country's borders or their functional equivalent and such actions away from the borders. These court actions demonstrate the difficulty of balancing the national interest in the effective control of immigration against the protection of individual rights. The results of their decisions thus far have complicated the control effort, increased somewhat the protection of individuals from arbitrary INS actions, and demonstrated the need for drastically different strategies by the INS.

In 1968 the Supreme Court ruled that when an individual is restrained through physical force or show of authority, a "seizure" has occurred, and the individual must be granted Fourth Amendment protection.²⁹ The reasonableness of a seizure, the Court suggested, depends on a balance between the public interest and the individual's right to be free of arbitrary interference by law enforcement officers. If a seizure was to be justified, the Court said, the law enforcement agent had to be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant that intrusion.

The Court subsequently invalidated some INS control methods that it found to impinge unreasonably on the individual's right to protection from unreasonable searches and seizures. In 1973, for example, it ruled that the search of vehicles by roving INS investigators without a warrant away from the border was a violation of the Fourth Amendment.³⁰ However, in 1975 the Court upheld brief vehicular stops by roving patrols based on "reasonable suspicion." In such cases, it ruled, "The officer may question the driver and passengers about citizenship

29. *Terry v. Ohio*, 392 U.S. 1 (1968).

30. *Almeida-Sanchez v. U.S.*, 413 U.S. 266 (1973).

and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause . . . We are unwilling," the Court declared, "to dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving patrol stops."³¹

The requirement of the courts that INS investigators show probable cause in undertaking searches and seizures as part of their enforcement responsibility has led to some changes in long-standing INS investigative practices. These changes, although not drastic, undoubtedly have increased the difficulty of conducting investigations. Even though the court requires investigators to have reasonable cause for stopping a vehicle and interrogating its occupants, the court has been neither rigid nor definitive about this requirement. On the contrary, it has recognized the difficulty of conducting an essential law enforcement task under especially challenging circumstances and has exhibited substantial flexibility in the kind of factors it considers acceptable as a showing of probable cause. Moreover, it has continued to allow brief checks of all vehicles by the INS at fixed, reasonably located checkpoints without a showing of probable cause.

The Court's flexibility in handling the probable cause requirement is further reflected in one of the most recent of the search and seizure decisions, in which it held that INS investigators acted within the Constitution when a roving patrol stopped a vehicle carrying deportable aliens in the Arizona desert. The Court asserted that "in determining what cause is sufficient to authorize police to stop a vehicle, the totality of the circumstances—the whole picture—must be taken into account."³² From that picture, the Court suggested, a trained officer may draw inferences and make deductions. The effect of these decisions, however, has been to make INS investigators

31. *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975).

32. *U.S. v. Cortez*, 416 U.S. 642 (1974).

more sensitive to Fourth Amendment issues in planning their investigative activities.

The legal situation is more murky with respect to INS investigative activities in the interior of the country, particularly its area control operations. Court decisions have required INS compliance with Fourth Amendment standards that have more far-reaching effects on INS investigative practices than the border cases. Two issues are especially noteworthy. One is the INS practice of interrogating individuals in the interior of the country who are suspected of being in the country illegally. The other involves unannounced inspections or raids of workplaces where such aliens are believed to be employed.

The first issue was considered in a 1975 case in which a federal district court ruled that any detention of an individual for questioning must be based on "reasonable suspicion" of unlawful presence. The court decided that a detention did not occur, however, if the individual being questioned was free to walk away from the investigator.³³ In 1977 a New York district court discarded the view that an individual is not detained if free to leave and suggested that any questioning at all is intrusive and detentive.³⁴ The effect of this decision is that the once widely used practice of randomly interrogating individuals on a street corner or other public place can no longer be routinely used by the INS. Another court had also enjoined the INS from approaching people in their homes, businesses, or workplaces without reasonable suspicion that their presence in the United States is illegal.³⁵ Such evidence, the court further ruled, cannot be only language or nationality.

The trend toward the imposition of stricter constitutional standards on INS investigators by the courts also has affected one of the most widely known and controversial INS investigative procedures—raiding a workplace where deportable aliens are believed to be employed. For years, INS investigators

33. *Illinois Migrant Council v. Pilliod*, 398 F. Supp. 882 (N.D. Ill. 1975).

34. *Marquez v. Kilcy*, 436 F. Supp. 882 (S.D.N.Y. 1977).

35. *Illinois Migrant Council v. Pilliod*.

conducted these raids or area control activities on the basis of tips, hunches, or rumors, and without warrants of any kind. Gradually, the courts have come to insist that INS investigators obtain warrants for these raids.

The degree of specificity required in these warrants became an issue in a case resulting from a raid by INS investigators on a Washington, D.C., restaurant in November 1978. The INS raid was conducted pursuant to a warrant issued by a federal judge on the basis of a showing by the INS of probable cause that deportable aliens were on the premises. In a suit by the restaurant seeking injunctive, declaratory, and compensatory relief, the U.S. District Court for the District of Columbia found the warrant invalid because it failed to name each alien sought and was thus a violation of the Fourth Amendment rights of the aliens. The U.S. Court of Appeals reversed this decision, finding the warrant as descriptive as was reasonably possible and reflecting a reasonable balance between the individual's right to privacy and the public interest in effective enforcement of immigration laws.³⁶ Thus, while continuing to hold the INS to the basic Fourth Amendment principle in its investigative activities, the court exhibited a willingness to consider the special enforcement problems that the INS faces.

Expelling aliens who have been apprehended has also become an increasingly difficult undertaking for the INS since these actions have been subjected to increased judicial scrutiny and public opposition in recent years. Ordinarily, the INS takes one of three courses upon apprehending aliens found to be deportable. If the individuals have family or other ties in this country that provide a legal basis for acquiring immigrant status, they may be allowed to adjust their status while remaining in the country under an indefinite order from the INS to depart. (In other words, the INS orders the aliens to

36. *Blackie's House of Beef, Inc. v. Castillo*, 480 F. Supp. 1078 (D.D.C. 1979), 659 F.2d 1211 (D.C. Cir. 1981). For a discussion of the issues in the case, see Stephen J. Anaya, "Constitutional Law: Protection against Illegal Search and Seizure," *Harvard International Law Journal*, vol. 22 (Fall 1981), pp. 670-76.

leave, but then says the aliens can remain and have their status legalized.) Other apprehended aliens are permitted to depart voluntarily and, depending on the circumstances, to do so with or without INS supervision. Finally, others who either refuse to leave voluntarily, are believed likely to abscond if released, or have been repeated violators are deported. Only a very small fraction of those apprehended each year are deported. The rest depart voluntarily, adjust their status, or abscond.

Voluntary departure is often advantageous to both the INS and the apprehended aliens. Deportation proceedings generally take a long time, often require detention of the alien at public expense, and require legal counsel to represent the INS. Deportation proceedings can also be unpleasant and costly for the alien, and if deportation occurs, the alien is prohibited from reentering the country. Voluntary departure eliminates these costs to both the INS and the alien. Some people argue, however, that the INS abuses the option of voluntary departure by forcing aliens to opt for it when they may have a legal basis for staying and that it often fails to notify the aliens of their right to obtain legal assistance in contesting their expulsion.³⁷ Moreover, an increasing number of aliens refuse to depart voluntarily, thereby extending their stay for the several months or even years that may be required to complete deportation proceedings. For others, fighting expulsion is simply one more means of further burdening and perhaps undermining an already seriously overburdened INS.

Confronted with court decisions outlawing or restricting some of its basic investigative procedures, the INS often has attempted to conform by discontinuing the offending practices. More significantly, these legal developments, as well as the high cost and labor-intensive nature of the investigative activities in the interior of the country, have prompted the INS to reduce its emphasis on apprehending and expelling deportable

aliens already in the country and to stress instead increased efforts to prevent illegal entries. They have also prompted INS officials to try to focus more on combating organized illegal schemes like smuggling, sham marriages, and the production of fraudulent documents than on apprehending individual deportable aliens within the country.

These are rational decisions, given the demands on the INS and the resources at its disposal, but they signify a partial abandonment of a vital part of the enforcement responsibility. Moreover, the diminishing effectiveness of the internal control efforts of the INS—especially the declining likelihood that a deportable alien in the country will be apprehended and expelled—makes the immigrant flow more difficult to manage because illegal residence comes to be perceived as almost risk free and therefore a good investment by those abroad who seek employment here.

Public Attitudes toward Internal Control

Although the public is overwhelmingly opposed to illegal immigration and would like to see it ended or at least sharply curtailed (see table 2-2), many who are concerned with immigration matters tend to ignore the enforcement problems that the INS is facing or appear to be ambivalent about current enforcement policies. There are no reliable measures of public opinion on this subject, and thus there are no firm indications of exactly how the public feels about apprehending and expelling aliens. However, public reaction to specific, widely publicized cases of apprehension or expulsion by the INS reveals sharply divergent views. For example, in April 1982 when the INS undertook a brief nationwide effort to apprehend and expel deportable aliens in well-paying jobs, the effort was greeted by widespread protests, especially from activists and the leaders of national and local organizations. The Roman Catholic archbishop and the Episcopal bishop in Denver, Colorado, reportedly signed statements protesting the actions.

³⁷ U.S. Commission on Civil Rights, *The Turnished Golden Door: Civil Rights Issues in Immigration* (GPO, 1980), pp. 100-101.

Other church officials offered to provide food and shelter to deportable aliens who sought to hide from the INS,³⁸ while Senator Alan Cranston, Democrat of California, complained that the raids "are sowing dangerous seeds of racial and ethnic conflict in California"; and Tony Bonilla, executive director of the League of United Latin American Citizens (LULAC), called the effort "a grandstand play by the INS to cover up the inadequacies of the Reagan economic policies."³⁹

Procedural indiscretions by INS investigators sometimes trigger public opposition to INS investigations, but this reaction often masks a complex array of public attitudes toward immigration, individual rights, and the responsibilities of government, and of course toward the special interests some people have at stake. Many people, for example, seem to view INS efforts to apprehend and expel illegal aliens as part of a struggle (between the all-powerful state and the individual at his most vulnerable) in which they cannot perceive the alien as a villain, even though they might be opposed to illegal immigration in general.

Many others, such as some employers, merchants, real estate investors, and even many local public officials, tend to think that the aliens provide more benefits than disadvantages and are unsympathetic with efforts to expel them. Meanwhile, many religious and humanitarian organizations focus on the human predicament involved in illegal immigration, believing that their mission is to assist the immigrants involved. Finally, some ethnic groups see today's illegal aliens as products of the same forces that brought them or their ancestors to this country and are reluctant to deny them the opportunities they experienced. These public attitudes almost certainly have a chilling effect on the INS and deprive investigators of the cooperation of the public that would make the task easier. They might also

38 "Roundup of Aliens Meeting Problems," *New York Times*, May 30, 1982, and "Nearly 1,000 Are Seized in a Job Sweep of Aliens," *New York Times*, April 27, 1982.

39 "250 Illegal Aliens Seized in Job Sweep," *Chicago Tribune*, April 28, 1982.

account for some of Congress's inattentiveness to the needs of the immigration bureaucracy.

Meeting Service Responsibilities

In addition to performing its management and control functions, the immigration bureaucracy is expected to disseminate information on the immigration process to the public, provide immigration-related administrative or adjudicatory services, and manage the process of naturalization. Much of the recent criticism of the immigration bureaucracy centers on the serious delays or other shortcomings in the performance of these routine services.⁴⁰

Information Services

Although most of the immigration bureaucracy's services are rendered to aliens already in the country, the demand for these services is global. Often the first contact a prospective traveler has with the United States comes about as the result of a request for information from a U. S. consular officer in the traveler's home country. Adequate and timely information helps the individual determine how to apply for a visa and whether he or she is likely to qualify for admission to the United States. Screening is thus made more efficient and less traumatic for the individuals involved.

Within the United States, information needs are many and varied. Citizens and aliens alike may want to know how to help a relative enter the country, how to bring a foreign worker into the country, and how an alien already here obtains an extension of a temporary stay or an adjustment of status. Public officials and analysts, meanwhile, may need information about levels, trends, and problems in immigration. A prompt response to these requests for information is beneficial not only

40 U. S. Commission on Civil Rights, *Furnished Callers Don't Wait* (pp. 31-33).

to those who seek the information but also to the immigration bureaucracy, since it helps the public use the information services intelligently. Moreover, many of the individuals and organizations that seek information from the immigration bureaucracy in turn assist others with their immigration problems. Indeed, the several private voluntary organizations that help individuals deal with immigration problems play a vital role by reducing the demands on the immigration bureaucracy.

Requests for information from within the United States are handled primarily by the INS. Although there is no way to measure the demand precisely, the range of information requested and the many sources from which the demands come point to a considerable load for the INS, one which it has not been handling well. Testifying before a subcommittee of the House Appropriations Committee, Representative Eilberg complained:

The public is required to wait a minimum of two hours in line at the major offices to obtain an answer to a simple question. To reach an INS office by telephone requires persistency and an enormous amount of patience, and then once through, one is never sure if the relevant reply will be forthcoming, or for that matter accurate.⁴¹

INS Commissioner Leonel Castillo painted a similar picture in testimony before the House Subcommittee on Appropriations in 1978, reporting that upon taking office at the Los Angeles district office, he observed that lines of people seeking service the next day began to form at midnight, telephone calls went unanswered, and it took a long wait in line simply to obtain routine forms.⁴² There have been substantial improvements at Los Angeles and some other district offices since these comments were made, but similar conditions continue in other areas (for example, Miami). The long lines, crowded conditions, and unanswered telephones in turn reflect severe deficiencies

in the organization and management of district offices, especially with respect to the handling of case records.⁴³

Adjudicative Services

The INS also adjudicates or otherwise responds administratively to petitions such as requests for an extension of stay by nonresident aliens, requests for adjustment of status from nonimmigrant or provisional entrants (refugees) to immigrant status, or requests for a review of an adverse decision affecting an alien's continued stay in the country. That the INS has been unable to respond adequately to these service demands is reflected in the massive backlogs and long delays that have persisted in its adjudicatory work.

In conceding that routine requests for adjudicatory actions take an inordinately long time, INS Commissioner Castillo explained in testimony to the U.S. Civil Rights Commission that the resources needed to do the job were far from adequate to meet the sharp increase in the requests for these actions.⁴⁴ Under his leadership the INS undertook a crash program to clear up the backlog of cases and ensure a quick response to such requests. That effort reduced the backlog only temporarily, however, and was insufficient to improve the situation over the long term. Furthermore, it compelled the agency to reduce its activities in other areas and so merely shifted the inadequate performance to other locations. According to a study by the House Committee on Government Operations, the situation had not improved much by 1980. There were still massive backlogs and no systematic procedure for adjudications.⁴⁵

Since that report, the INS has acted to improve its adjudicative service. It has established two "remote processing centers" where applications not requiring interviews with the

41. *Departments of State, Justice, and Commerce . . . Appropriations, 1978. Hearings*, pt. 7, p. 446.

42. Quoted in *Commission on Civil Rights, Turnished Golden Door*, p. 31.

43. *Immigration and Naturalization Service Records Management Problems*, H. Rept. 96-1439, House Committee on Government Operations, 96 Cong. 2 sess. (GPO, 1980), pp. 10-11.

44. *Commission on Civil Rights, Turnished Golden Door*, p. 35.

45. *INS Records Management Problems*, H. Rept. 96-1439, pp. 32-34.

applicants can be processed speedily without the distractions of other activities in the district offices. It has also begun to grant a standard six-month stay to visitors (B-2 visa holders), thereby reducing the number of requests for extension of stay.

Naturalization Services

After five years of continuous residence in the United States, an immigrant is entitled to apply for citizenship by naturalization. Up to 1906 the process of naturalization was administered by the states, but inconsistencies and abuses were common. When the Bureau of Immigration and Naturalization was created in June of that year, the federal government assumed the responsibility.

Naturalization proceedings are conducted by federal district courts or by qualified state courts upon the recommendation of the INS. Before making that recommendation, the INS must ensure that each applicant for naturalization is qualified under the existing laws specifying the conditions for naturalization. With few exceptions, a recommendation by the INS to grant or deny naturalization is accepted by the courts. The naturalization process is therefore primarily administrative, and the courts merely perform the final legal and symbolic rites.

Less than a third of the eligible lawful immigrants seek naturalization, but as overall immigration increases so does the demand for naturalization. For example, during the 1970s the number of persons naturalized annually increased by more than 46 percent, from 108,000 in 1971 to 157,938 in 1980 after reaching a high of 173,535 in 1978.⁴⁶ Here, too, the INS has been extremely slow (in 1981 the average waiting time for naturalization after the initial filing with the INS was about fourteen months), again because limited resources are allocated to such service activities.

Throughout the history of the immigration bureaucracy, service responsibilities have received much less emphasis than enforcement responsibilities. To some extent, this situation is

46. INS, 1980 *Statistical Yearbook*, table 23.

understandable. Aliens, the principal constituency being served, are generally patient, politically powerless, and unwilling or reluctant to complain. Given the perennial scarcity of resources to support government activities, the INS has concentrated whatever resources are available on its urgent enforcement responsibilities. Toward the end of the 1970s the INS changed its focus somewhat in an effort to cope with the rapidly growing service demands and in order to improve the agency's image.

Refugee Resettlement

Unlike immigrants who deliberately decide to relocate, refugees usually are forced to flee their homelands without preparation and often without money or the skills necessary to become immediately self-supporting in this country. They have therefore needed special assistance. At first a number of private voluntary organizations assumed responsibility for refugee resettlement, but the federal government gradually became involved, first by providing small amounts of money to defray the initial cost of relocation and resettlement.⁴⁷ Later, with the beginning of a large-scale flow of refugees from Cuba, the Congress created a Cuban Refugee Program to fund their resettlement in 1964. It responded similarly to the Indochinese refugees in 1975 by creating an Indochinese Refugee Assistance Program. It also provided small sums of money on a one-for-one matching basis to voluntary organizations for the initial expenses associated with the resettlement of Soviet Jews and other refugees. These programs were then replaced by the Refugee Act of 1980, which for the first time established a comprehensive refugee resettlement program funded almost entirely by the federal government.

As a single program under the jurisdiction of a newly created Office of Refugee Resettlement, the new program has brought increased federal funds and a new order to refugee resettlement.

47. *Review of U.S. Refugee Resettlement Programs and Policies*, prepared for the Senate Committee on the Judiciary, 96 Cong. 2 sess. (GPO, 1980), pp. 10-26.

It has also placed direct responsibility for actual resettlement activities on state governments and has gone a long way toward standardizing approaches to resettlement by requiring that, as a condition for receiving federal reimbursement of expenses for refugee assistance, each state submit a state plan for managing refugee assistance that meets certain criteria. Specifically, the states are required to designate an agency for developing and administering the plan, describe how cash and other assistance will be used to promote economic self-sufficiency among refugees, identify a state official responsible for coordinating public and private resources for refugee resettlement, and prepare detailed plans for caring for unaccompanied refugee children and for identifying and treating refugees needing medical care. Although this new approach to refugee resettlement makes the states the principal agent in refugee resettlement, localities—cities or counties—provide most of the actual services directly or under contracts to voluntary organizations, which continue to provide many of the services necessary to facilitate speedy resettlement.

The goal of the resettlement effort is to make the refugee self-sufficient as quickly as possible after entry. Toward this end, attempts are made to provide each refugee family with the basic necessities for a comfortable existence by this society's standards, with language and other training essential to obtain employment, and with financial assistance until economic self-sufficiency is achieved. Federal monetary assistance now lasts for eighteen months, by which time it is assumed that refugees will have achieved self-sufficiency. (Refugee children are provided financial assistance indefinitely.) Most refugees are able to find jobs and become self-sufficient within the specified period, but many remain dependent long after that time and become beneficiaries of whatever public assistance programs they qualify for. Because many of these programs are partly funded by states and localities, large numbers of dependent refugees can become a major financial burden on states and localities once federal support is discontinued.

Several other problems have come in the way of the refugee resettlement effort, some of which became apparent with the unauthorized influx of Mariel Bay Cubans and the Haitian boat people. The current laws and administrative procedures proved inadequate for processing aliens coming directly to this country without prior approval and claiming to be refugees. Not only did they severely tax the resources of the south Florida jurisdictions in which they arrived, but the circumstances of their arrival meant that they did not fit into the scheme established in the 1980 law and thus makeshift arrangements had to be made for processing them, detaining those deemed inadmissible, and funding the resettlement of those who were not detained.

Another problem has been the continuing cost of assisting those refugees who do not quickly become self-sufficient, as the law anticipates. As federal refugee assistance funds run out, much of that responsibility falls on state and local governments, who have become increasingly concerned about the growing burden such assistance imposes on them. Still another problem is that in some localities resettlement assistance has generated concern and hostility among some segments of the low-income population who believe that refugees are drawing away resources and opportunities that they have been seeking without success. This dissatisfaction has remained an undercurrent in some localities, while in others it has erupted into major controversies and even violence in a few cases. These problems have imposed strains on the immigration bureaucracy, on several other federal government agencies, and on localities. However, the country's overall handling of refugee resettlement is one of the most improved areas of immigration policy enforcement.

The Character of the Enforcement Problem

One of the few points about which almost everyone knowledgeable about immigration seems to agree is that the admin-

stration of immigration policy is inadequate and that the situation is growing worse. When it comes to identifying the problems and deciding what should be done about them, however, there is no such consensus. Not only do the problems vary from one segment of the immigration bureaucracy to another, they are perceived differently in different segments of the federal government.

The INS, the Office of Management and Budget (OMB), and Congress tend to emphasize different causes of these problems. INS officials have long thought that insufficient funds and the resulting lack of personnel are the primary causes, and that more money would help considerably to turn things around. The OMB, which controls INS budget requests to Congress and ostensibly reflects the administration's thinking, has tended to stress instead that flaws in enforcement strategies and priorities are the principal causes, and thus it has consistently slashed INS requests for increased funds, arguing that administrative and policy changes were required before any significant infusion of new funds. After drastically reducing Justice Department budget recommendations to increase the INS budget and personnel in fiscal year 1980, an OMB budget examiner said as much to a study team of the House Government Operations Committee: some of the INS's problems in handling sources result from a long-standing conflict between enforcement and service responsibilities. He complained that the agency put too much emphasis on enforcement and too little on service and pledged that "in the future, OMB is going to place more attention onto the service aspects of INS and place INS enforcement responsibilities in a holding pattern."⁴⁸

The OMB's assessment and its plan to place support for enforcement on hold are remarkable in view of the overwhelming evidence of across-the-board administrative failures. What even more remarkable is that after urging the INS to request

supplemental appropriations for improving service activities, the OMB turned down the request.

Congress has also been reluctant to approve large new allocations for the INS, mainly because of what it perceives to be major administrative problems at the INS. Several hearings by a number of committees have focused on a wide range of such problems. Indeed, after appropriating \$3.7 million in fiscal year 1980 to automate the INS district offices, Congress halted the effort because INS officials had failed to plan the undertaking properly. The Senate Appropriations Committee cut the fiscal year 1981 appropriation by \$2 million, noting that "although the Committee is vigorously supportive of the automation of the INS, it would be irresponsible to appropriate more funds in the absence of an approved plan."⁴⁹ The committee also noted that it was difficult to appropriate increased funds for the INS to enforce immigration policy in the absence of a clear, discernible policy, and in effect decided to hold the line on new funding until the administration's enforcement policy was clarified. In so doing, it joined several other congressional committees in urging the development of plausible immigration policies and enforcement procedures and improved management by the INS before committing substantial new resources to the enforcement effort.

Congress gave considerable attention to the needs of the immigration bureaucracy in its consideration of the Simpson-Mazzoli bill. Both houses voted to suspend the visitor's visa requirement on a reciprocal basis for some countries, and the House authorized substantially increased funding for enforcement, stressing the addition of personnel and equipment to prevent illegal immigration.

These differing views about the reasons for the poor performance of the INS, along with the lack of public support for increased funding of administrative activities, help to explain

48. *INS Records Management Problems*, H. Rept. 96-1459, pp. 80-81.

49. *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Bill, 1981*, S. Rept. 96-939, 96 Cong. 2 sess. (GPO, 1980), p. 20.

Table 4-2. Immigration and Naturalization Service Budget Requests, Appropriations, and Rates of Change, Fiscal Years 1969-84
Figures in millions of dollars

Fiscal year	INS request	Congressional appropriation ^a	Percentage change over previous year's appropriation ^b
1969	87.8	87.3	
1970	94.9	94.6	2.5
1971	112.9	112.4	14.5
1972	130.6	130.6	12.9
1973	135.1	135.1	2.8
1974	143.3	143.3	4.9
1975	184.1	175.9	13.6
1976	209.7	208.0	12.5
1977	221.6	234.0	6.0
1978	256.3	266.5	6.2
1979	298.0	309.3	4.8
1980	304.4	318.5	10.5
1981	347.7	351.0	0.2
1982	363.4	446.5	21.1
1983	524.6	488.9	6.3
1984	512.6	501.3	n.a.

Source: Congressional Quarterly Almanac, annual volumes, 1968-83
n.a. Not available.
a. Total fiscal year appropriation (includes supplemental appropriation)
b. Adjusted for inflation, based on the consumer price index in U.S. Bureau of the Census, Statistical Abstract of the United States, 1984 (Government Printing Office, 1983), p. 485

why there have been only modest increases in the INS budget for most of the past decade, even though its problems are widely acknowledged. The growth of the budget, from \$87.3 million in 1969 to \$501.3 million in 1984 (see table 4-2), is due in large part to inflation and the overall increase in government spending during this period. The real budget increases have been modest increments that have allowed the INS to improve only slightly the routine conduct of enforcement responsibilities.

Inadequate funding is unquestionably a major impediment to the improvement of INS administration, but it is certainly not the only one. Closely related to the funding problem are the major changes that have occurred in the character of the enforcement effort as a result of the rapid rise in the number

of aliens entering or seeking to enter the country and particularly the sharp increases in illegal immigration. These developments require a reevaluation of the entire immigration bureaucracy, the level of resources it requires, and the procedures that are most appropriate to carry out current and emerging administrative responsibilities. Such a rethinking is especially essential in light of the failure of the Simpson-Mazzoli bill since the immigration bureaucracy will have the sole burden of curtailing illegal immigration without the deterrence that the law would have provided.

5

Addressing the Administrative Problem

SUBSTANTIAL improvements in the administration of immigration policy could yield several important benefits. Greatly improved flow management, increased detection and expulsion of illegal immigration, and improved service to aliens who might otherwise slip into violation of immigration laws could substantially reduce illegal immigration and serve as a deterrent to those who might otherwise try to violate immigration laws. Such accomplishments could, in turn, alleviate the public's fears that the country is threatened by uncontrolled immigration and reduce the pressures for policies many consider onerous and detrimental to their civil rights. Finally, such improvements would appropriately reflect the continued importance of immigration to the society and constitute recognition that in an era of unprecedented mobility and unrelenting pressures for admission to this country, immigration will continue to be immensely important.

In some respects the time is propitious for the federal government to substantially improve the administration of immigration policy. The severe problems that exist in every phase of the administration are now widely recognized by the public and policymakers. Failure by Congress to enact the Simpson-Mazzoli bill into law adds considerable urgency to

the need for such improvements since that measure might be the only course open for curbing illegal immigration for a long time.

Yet there are major obstacles to any decisive action on administration. One is continued uncertainty about the kinds of changes in immigration that are desired. Another is the cost of making the needed improvements. A third is the failure of policymakers and analysts to examine the full character and dimensions of the changes that are required. Finally, it is by no means clear how much can be achieved through improved administration in view of the character of the migration phenomenon.

The Problem of Objectives and Priorities

Chapter 4 noted that the immigration bureaucracy is handicapped by the absence of clear, specific policy objectives and that what appear to be administrative failures often are the result of the failure of policymakers to make critical policy choices. This problem complicates efforts to strengthen the immigration bureaucracy. For example, although most people want to curtail illegal immigration and would support improvements in the bureaucracy to accomplish this, other influential groups want the labor force that illegal immigration provides and are less eager for across-the-board improvements. Furthermore, the desire for improved administration often conflicts with the public's strong humanitarian sentiments and with a growing concern about impinging on the constitutional rights of individuals, regardless of their status.

The lengthy debate about the Simpson-Mazzoli bill exhibited these conflicts. Most notable was the debate over the proposed use of a reliable system for identifying all those eligible to work as a component of the employer sanctions provision of the law. The identification requirement was opposed on several

grounds, but most effectively on the ground that it would threaten individual freedom. It was dropped from the bill even though it clearly would have simplified enforcement of the employer sanctions. Similarly, the House voted to require that Immigration and Naturalization Service (INS) investigators obtain search warrants for open-field "raids" on illegal immigrants, thereby reversing a Supreme Court decision that such warrants were not essential. Here, too, proponents of the action invoked protection of individual rights in substantially adding to the difficulties INS investigators operate under. It is probably not coincidental that southwestern farmers found the increased difficulty for the INS highly beneficial.

Humanitarian concerns have been an equally strong constraint on administrative reforms. Much of that constraint was reflected in the attempts to deal with cases of "first asylum" claimants like the Mariel Bay Cubans, the Haitians, and even some Salvadorans and Nicaraguans. The arrival of these groups immediately created tensions between the sympathies of much of the public and the enforcement of existing laws. The tensions soon grew to embarrassment and anger as hundreds of these arrivals were detained in jail while the government tried to expel them or to adjudicate their claims. This problem is further complicated by the difficulties in determining who meets the qualifications for refugee status and by the very limited choices administrators have once such arrivals are judged ineligible for refugee status.

These problems indicate that the performance of the immigration bureaucracy and the prospects for improvement cannot be isolated from major policy reforms. Such reforms are needed to clarify the murky areas in current policies and practices and to provide new incentives for compliance, thereby easing the administrative burden. On the other hand, where such clarity and force are absent from public policy, a strong bureaucracy can help greatly in bringing order where chaos might otherwise prevail.

Paying for Improved Administration

There is widespread agreement among policymakers that inadequate funding is one of the most severe problems hampering effective administration of immigration policy. The need has been especially pronounced for the INS, where too few people with much too meager resources must cope with an increasingly demanding task of enforcing immigration laws in this country. Because the need for added resources has been so pronounced and so widely conceded by policymakers, it should be relatively easy to correct; increased appropriations need not raise the complex issues discussed earlier. In fact, both the House and Senate versions of the Simpson-Mazzoli bill addressed this need: the House bill authorized INS budget appropriations of \$700 million and \$715 million for fiscal years 1985 and 1986, substantial increases over 1984.¹

This generous authorization by the House died with the Simpson-Mazzoli bill. Moreover, even though the House authorized the sharp increases in that bill, two weeks earlier it deleted a \$20 million special increase in the INS budget recommended by the House Judiciary Committee to improve investigative and service operations. Thus, while Congress has readily acknowledged the need for added funds, it has been more reluctant to appropriate those funds.

Failure by Congress to appropriate the needed funds to strengthen administration of immigration policies appears to have been the result of (1) indecision about exactly what kinds of changes should be made; (2) the relatively low priority policymakers assign to immigration matters; and (3) ambivalence about curtailing illegal immigration. Although congressional committees have conducted extensive hearings on administrative problems and both Congress and the General Accounting Office have at various times urged substantially

1. *Congressional Record*, daily edition (June 13, 1984), pp. H5718-19.

Addressing the Administrative Problem

increased expenditures for the INS, it is noteworthy that no comprehensive plans exist for improving the performance of the INS or the larger immigration bureaucracy.

Representative Edward R. Roybal, Democrat of California, offered an amendment to the Simpson-Mazzoli bill that is easily one of the most extensive proposals for administrative reform considered by the House.² That amendment called for the attorney general to develop within two months of enactment of the law specific plans for adequate Border Patrol activities, improved immigration and naturalization services, and enhanced community outreach activities. Moreover, that amendment, like most other proposed administrative reforms, seemed aimed at coping with the immediate burdens that would flow from enactment of the Simpson-Mazzoli bill.

Although Congress has seemed willing to support increased spending for administering immigration policy, there are real questions about how such sentiments would fare in the extremely difficult and competitive environment of an alarming budget deficit and intensive pressures for major reductions in federal government spending. Congressional action in slashing the INS appropriation for fiscal year 1985 as part of an across-the-board reduction in appropriations for the Departments of State and Justice suggests that even now such spending is not a very high priority. Moreover, a long-standing practice in Congress for undermining noble objectives has been to support the objectives but withhold or restrict the funds. That may very well have been at work in connection with improved administration of immigration policy.

The Scope of Reform

The measures contained in the unsuccessful Simpson-Mazzoli bill amount to an impressive array of actions to improve administration, yet it is unlikely that they would have been

2. *Ibid.*, pp. H5716-17.

enough to ensure major improvements, especially if the requirements of the Simpson-Mazzoli bill are taken into account. Although the added funds would have allowed for substantially increased personnel and equipment, these additions would probably not have been adequate to cope with the massive new demands the bill would have imposed had it become law. The proposed amnesty, employer sanctions, and new adjudicative machinery all would have demanded considerable personnel and resources. Moreover, the amnesty might have stimulated others to attempt illegal entry in anticipation of another amnesty, thereby increasing the demands on Border Patrol and investigations personnel. The improvements might have done little more than to preserve the existing level and quality of administration.

Even putting aside the demands the bill would have imposed, the changes proposed would not have fundamentally altered the character of the bureaucracy or the quality of its performance, because they reflected too narrow a view of what reforms are needed. Congress gave virtually no attention to the structural and procedural problems that impair the performance of the bureaucracy, although approval of the limited reciprocal visa waiver was one significant change in procedure. Another was a proposal that surfaced in early Senate deliberations that called for local law enforcement officials to assist in some phases of enforcing immigration law. However, this idea, dubbed the "redneck special," was quickly abandoned, partly out of fear that local police, unfamiliar with immigration matters, might abuse this responsibility to the detriment of immigrants and some ethnic minorities.

Reform of the immigration bureaucracy must be comprehensive if it is to bring about significant improvement in the administration of immigration policy. It should go beyond the addition of personnel and equipment to the most severely trained areas of operation and should consider as well the need for changes in the structure of the bureaucracy and the allocation of responsibilities within it and changes in some procedures. Changes in bureaucratic structure and in the

distribution of responsibilities appear promising, albeit controversial, ways to improve administration. Although they have not received a great deal of attention, a few studies have proposed changes worthy of consideration.

The boldest, and in many respects the most attractive, reorganization option that has been proposed is to combine the several agencies having enforcement responsibilities into a single new independent agency with complete responsibility for administering immigration policy. That step would do away with, or at least greatly reduce, the fragmented structure that now exists, improve communication and cooperation within the bureaucracy, and create a more prominent and presumably stronger entity capable of competing effectively for resources in the highly competitive federal budgetary process. Furthermore, it would dramatically underscore the importance of the enforcement responsibility within the federal government.

Such consolidation has been used successfully in other areas of government to improve the quality of policy enforcement. The Environmental Protection Agency (EPA), established in December 1970, is a case in point.³ It was created by consolidating the tasks of eleven agencies that had environmental responsibilities. The objectives then were similar to those under consideration here, and some of them were achieved fairly quickly. With the creation of the EPA came a greatly increased federal commitment to environmental protection and a desire to increase the enforcement capacity of government. Of course, the reorganization has not solved all the problems encountered in enforcing environmental policy; some might argue that it merely created new problems. One difference between that case and the one being considered here, however, is that environmental problems generated considerable public support for stronger enforcement, something that is unlikely to emerge in the case of immigration.

Despite the likely benefits of consolidating all immigration enforcement responsibilities into a single agency, there are also

³ See Lynton K. Caldwell, *Man and His Environment: Policy and Administration* (Harper and Row, 1975), pp. 100-101.

strong arguments against it. Perhaps the most compelling is that the current distribution of responsibilities for enforcing immigration policy accurately reflects the character of immigration and the diverse interests it affects. Most noteworthy in this regard are the important foreign policy interests at stake that justify the extensive involvement of the State Department. Moreover, as a practical matter, some aspects of enforcement, such as visa issuance, clearly are more conveniently handled by the State Department than by any other agency. This is now the principal task of consular offices throughout the world and little would be gained by shifting responsibility for that activity elsewhere.

There have been occasional suggestions that responsibility for managing traffic across the land borders might be shifted from the INS to the Customs Bureau, which already is responsible for monitoring the flow of goods into the country. Some analysts have speculated that by combining those duties with those of the Border Patrol both might be performed better. However, it is not clear that a mere shift of the Border Patrol task elsewhere would ensure better performance of that task even if it improved the performance of the INS in other areas. The character of the land borders and the pattern of the traffic across them, especially the surreptitious crossings, would make the task equally demanding for another agency.

It appears that relatively modest structural adjustments might be more promising paths to improvement. For example, the status of the INS within the Justice Department might be elevated to enhance its visibility and voice in the federal bureaucracy. A permanent interagency unit linking the several agencies whose activities are closely connected to immigration might be mandated to better facilitate cooperation in administering immigration policy. Such a unit might include the Internal Security Administration, the Bureau of Labor Standards, the Occupational Safety and Health Administration, and the Immigration Bureau, along with the agencies already having direct immigration responsibilities.

Finally, consideration might be given to increased cooperation between the INS and state and local law enforcement and social service agencies in enforcing immigration policies. Although the involvement of law enforcement officials unfamiliar with immigration laws poses risks of abuse and confusion, carefully delineated areas of collaboration could be an effective means of extending the reach of what will always be a small INS investigative force. Furthermore, such cooperation exists in virtually every other area of law enforcement. If violations of immigration laws are to be discouraged, such a broadened involvement across levels of government will be essential.

The changes in procedure are perhaps the most difficult to deal with. It is clear that INS investigative procedures like raids on gathering places and workplaces create considerable public ill will and raise difficult constitutional issues. Over the past decade some of these procedures have been modified in response to court decisions, thereby reducing the adverse reactions and the threats to individual rights. In other cases change is likely to come slowly in response to an evolving interpretation of what defines constitutionally protected rights. However, there are areas in which the INS can be urged to begin considering change.

One such area is the highly disruptive, sometimes dangerous practice of ad hoc raids on workplaces. Even though lawful when conducted with appropriate search warrants, it appears so inconsistent with the character of the U.S. society that it is almost certain to continue to arouse public antagonism and controversy. The alternatives to this procedure are not readily apparent and might be difficult to devise. However, they are worth pursuing. Moreover, with major improvements in other areas of enforcement the practice might become gradually unnecessary.

Prospects for Improving Administration

Many of the problems facing the immigration bureaucracy are common to all bureaucracies: demands far exceed the

capacity to respond effectively; needs far exceed the financial resources provided to meet them; indecision or deliberate nondecisions create ambiguities with which bureaucrats must cope; and while the changing environment demands long-range planning, day-to-day challenges tend to make such planning very difficult, if not impossible.

In some respects, these widespread problems of bureaucracy are exaggerated in the immigration bureaucracy. Moreover, its own actions and capabilities are only part of the picture. Powerful forces beyond its control determine in large measure the degree and character of demands on it. Given these realities, it is unlikely that the immigration bureaucracy will be drastically improved in the near term. What is more likely is that persistent efforts will yield gradual improvements in the status quo or that a major development might force sweeping changes. After all, two massive waves of refugees, the Cubans and the Vietnamese, forced the federal government to make extensive changes in the resettlement of refugees. A dangerous prospect is that such sweeping changes could reflect the country's fears rather than its generosity and thus lead to regressive reforms. Barring such major developments, several relatively modest steps might now be taken in search of significant, though not dramatic, improvements. Those might well begin with actions that strengthen the INS and the Bureau of Consular Affairs and then proceed to broader reforms.

1. Drastically increase the size of the INS budget, not to carry out new responsibilities but to secure the people and equipment needed to much more effectively control illegal entries, apprehend and expel illegal immigrants, and improve immigration-related services.
2. Speed up the planning and installation of automated data processing and storage systems to facilitate internal management, provide prompt and reliable service, and make reliable data available for public use.
3. Create a strong planning and research unit within the INS to help strengthen internal operations, respond effectively

to new developments, and play a more prominent role in developing immigration policies.

4. Examine the possibility of greatly increasing the presence of the Border Patrol in both fixed and mobile stations along the borders to reduce the incidence of surreptitious entries.

5. Establish a community outreach program along the lines proposed by Representative Roybal that would have as a principal mission educating the public about the activities of the INS and related immigration matters and serving as liaison between the public and the agency to better sensitize it to public attitudes toward various aspects of immigration law enforcement.

6. Build on the work already begun by the Office of Consular Affairs to develop and implement computer-assisted screening of visa applicants and machine-readable visas.

7. Establish a high-level task force to recommend improvements in the structure of the immigration bureaucracy and in the distribution of responsibility to facilitate increased communication, improve overall performance, and strengthen the profile of the immigration bureaucracy.

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**Tenth Anniversary Special Symposium Edition: Reforming the Administrative
Naturalization Process: Reducing Delays While Increasing Fairness**

***109 THE FEDERAL IMMIGRATION BUREAUCRACY: THE ACHILLES HEEL OF
IMMIGRATION
REFORM**

Daniel W. Sutherland [FNa1]

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Sutherland

I. EXECUTIVE SUMMARY

Despite all the talk in Washington about balanced budgets and smaller government, one federal agency has seen its funding increase seventy-one percent over the last two years: the Immigration and Naturalization Service (INS). In addition, Congress appears likely to give the INS substantial new powers and responsibilities when it considers several immigration bills this spring.

Yet these reforms are doomed to fail and added resources are doomed to be wasted because they ignore a fundamental problem: the inherently flawed federal immigration bureaucracy. Immigration reforms will not work if they assume that the INS can effectively handle large new assignments.

Efforts to reduce illegal immigration are especially problematic, as proposals in Congress would vastly increase the INS's responsibilities. They would require employers to clear all hiring decisions through a computerized worker registry and give the agency thousands of new investigators and Border Patrol agents. These proposals will fail to work because the legislation does not address INS mismanagement, the root cause of the agency's spectacular failure to control illegal immigration over the past two decades.

Short-term reforms would significantly improve the performance of the immigration bureaucracy. Several specific duties that the INS currently mishandles could be privatized, and structural changes in INS enforcement programs and its organization chart would help improve performance.

But only comprehensive reforms can truly fix the immigration bureaucracy. Lawmakers should abolish the INS and separate its two basic functions. Legal immigration and naturalization should be administered by a newly-created Federal Immigration Agency. Law enforcement functions, *110 including the Border Patrol, should be turned over to a new Border Management Agency.

II. INTRODUCTION

The United States has entered an era of smaller government. Recent budget negotiations reflect a consensus across political lines that the budgets and the responsibilities of federal agencies should be scaled back.

One federal agency is a notable exception to this general rule. The Clinton Administration, with the support of Congress, has increased this agency's budget by seventy-one percent in two years. The agency is experiencing "almost an embarrassment of riches." [FN1] Moreover, legislation expected to reach the floor in both the Senate and the House this spring would give this agency dramatic new powers. It would be logical to assume that this agency is one of the government's most effective and trusted bureaucracies.

But Washington has a way of turning logic on its head. The agency which is about to receive unprecedented increases in funding and responsibility is one of the least effective and most ridiculed bureaucracies in the nation's history: the Immigration and Naturalization Service. Since the 1930s, over twenty-five commissions and congressional oversight committees have proposed major reforms in the federal immigration bureaucracy. [FN2] In 1981, the Select Commission on Immigration and Refugee Policy described the INS as "among the most beleaguered agencies in the federal government." [FN3] In 1986, the House Judiciary Committee characterized the INS as "under-manned, ill-equipped, and generally overwhelmed." [FN4] In 1990, a Congressional commission concluded that "[r]eorganization of the current structure ... is urgently needed." [FN5] In 1994, an investigative series in The New York Times concluded that the INS is "perhaps the most troubled major agency in the federal government," and "broadly dysfunctional." [FN6] In March 1995, Congressman Harold Rogers (R-KY) charged that the INS is "the most inept, badly managed federal agency that we have." Rogers concluded that the INS "needs [deep reform] more than any agency I've ever seen." [FN7] Warren Leiden, Executive Director of the American Immigration Lawyers Association, laments, "[t]he INS needs elementary strategic management. It is so *111 lacking, it is overwhelming." [FN8] Frank Sharry of the National Immigration Forum says that the INS has "traditionally been one of the most demoralized and least effective federal bureaucracies--and that's saying a lot." [FN9]

Years of mismanagement have resulted in mind-boggling failures in the following areas:

Deportation

Several million immigrants currently living in this country should be deported (having entered the United States illegally or violated the terms of their visas). Of these, an estimated 200,000 have been convicted of criminal acts while in this country. Yet the INS deports only about 40,000 people every year. The New York Times reports that "the Immigration and Naturalization Service conducts most deportations on an honor system. It mails deportees notices asking them to turn themselves in on a given day. But so few surrender that deportation officers sarcastically refer to the notice as a 'run letter.' In New York, about ninety-six percent of those receiving the letter run." [FN10]

Asylum policies

Because of a weak review process, by 1995 there was a backlog of 450,000 asylum applications. Statistics show that, if the applications were ever reviewed, the vast majority would be dismissed as frivolous. Rather than dealing with these applications, the INS grants hundreds of thousands of work permits to the applicants while the agency sits on the paperwork. The Clinton Administration created new regulations and recently congratulated itself for "dramatic success" in streamlining the system. The Administration's definition of "dramatic success," however, is questionable: the backlog has actually increased by over 10,000 applications. In effect, the INS is satisfied to give a free pass to hundreds of thousands of people who have no right to be in the U.S. [FN11]

Information systems

In 1993, several states asked the INS to verify the legal status of 3.6 million people who had applied for various welfare benefits. About eighteen percent of the people, approximately 650,000, appeared to be illegal aliens because they were not listed in INS computer records. But the states pushed *112 for more information and ultimately discovered that almost every one of them was here legally. [FN12]

Illegal immigration

The INS is responsible for enforcing employer sanctions, which prohibit companies from hiring illegal immigrants. By September, 1994, 36,000 leads on possible violations had yet to be investigated. [FN13]

The chronic ineffectiveness of the federal immigration bureaucracy is a primary cause of the nation's loss of confidence in its immigration laws. Yet all of the major immigration reform proposals ignore the overwhelming case for bureaucratic reform. Although management strategies and organization charts do not usually grab headlines, no piece of immigration reform is more needed. Without comprehensive structural reform of the federal immigration bureaucracy, billions of dollars in new spending on immigration will be wasted and new responsibilities will go unfulfilled.

This Article describes the federal immigration bureaucracy and the major immigration

reform proposals, identifies the structural problems in the INS and other federal agencies responsible for administering the nation's immigration laws, exposes the Clinton Administration's "reinventing government" sham, and proposes comprehensive reforms of the federal immigration bureaucracy.

III. THE IMMIGRATION BUREAUCRACY

The first federal immigration authority was created in 1891--the Superintendent of Immigration, under the Treasury Department. From 1913 to 1940 the agency was a part of the Labor Department, but since then the INS has been a division of the Department of Justice. [FN14] The INS now has over 21,000 employees, approximately twenty percent of all people employed by the Justice Department and 10,000 more people than it employed in 1986. [FN15] The INS operates sixty-two offices in the United States and three offices overseas. [FN16] In Fiscal Year 1995, the INS budget was \$2.1 billion--twice its budget in FY 1990. [FN17] Fiscal Year 1996 has brought the INS another twenty-five *113 percent increase in its budget, to \$2.6 billion, and by FY 1997 the INS's workforce will have exploded to 25,000 people. [FN18]

The INS serves two functions. It is an enforcement agency: the Border Patrol's 4,800 agents are primarily responsible for preventing illegal immigrants from entering the country, while the Investigations Division, a separate INS enforcement division, is primarily responsible for tracking down illegal immigrants who are already in the country. [FN19] The Detention and Deportation Division is responsible for deporting illegal immigrants. The INS is also a service agency, responsible for facilitating legal immigration and naturalization. INS examiners handle applications from U.S. companies that want to import foreign workers, or from U.S. citizens and permanent residents who want to bring in a family member. In FY 1994, the INS handled applications from over four million people or companies applying for some type of immigration benefit. [FN20]

The federal immigration bureaucracy is not limited to the INS; thousands of other federal workers are dedicated solely to immigration-related functions. Foreign Service officers in the State Department issue visas at all embassies and consulates around the world, and the Bureau of Consular Affairs directs their efforts from Washington. Before many employment-based visas are issued, Department of Labor (DOL) employees must study the labor market and certify that a foreign worker is necessary for the position. The Department of Health and Human Services distributes funds for refugee programs.

IV. CURRENT REFORM PROPOSALS

The country's current political sentiment has prompted dozens of immigration reform proposals, at both the state and federal levels. All of these reform proposals assume an effective and efficient federal immigration bureaucracy. Reform proposals invariably give the INS more tasks, more authority, and a bigger budget, as if the INS could deal with immigration-related problems if it were only given more resources. Several

examples are illustrative:

. The Clinton Administration, with the support of Congress, has given the INS a \$500 million increase in its budget. In the last two years, the Administration has increased the INS budget by seventy-one percent. [FN21] The assumption is that the INS will be able to effectively use these vast increases in its budget.

. The primary House legislation, H.R.2022, would require the Border Patrol to have 10,000 agents in place by the year 2000, more than doubling its *114 size. [FN22] The primary Senate legislation, S.1394, would require the Border Patrol to have 8,500 agents on the payroll by the turn of the century. [FN23] These requirements assume that the INS will be able to effectively recruit, train, and deploy these legions of new agents without major problems.

. California's Proposition 187 and similar referenda now being placed on state ballots around the country would require hospitals, social workers, and law enforcement officers to report to the INS any person who appears to be an illegal immigrant. These referenda assume that the INS will be able to use these tens of thousands of new leads to catch and deport illegal immigrants.

. The Clinton Administration, H.R.2022, and S.1394 all would make the INS responsible for administering a vast computer network which would verify the employment eligibility of all workers. The House and Senate bills would require the INS to link its computer systems with the Social Security Administration and approve every hiring decision made in the United States by private employers. Americans change jobs or enter the workforce sixty-five million times each year, and this new computer network would have to approve each one of these changes. Proponents assume that the INS computer systems are accurate and sophisticated enough to handle this task. They also assume that the INS would be able to quickly perform "secondary verification," which occurs when the information in a computer file is not sufficient to resolve the question. According to one study, the initial computer response is ambiguous twenty-eight percent of the time. Yet the bills assume that within ten days of each initial inquiry, INS headquarters could locate, retrieve, and analyze a hard copy of each file which needs secondary verification. [FN24]

. H.R.2202 and S.1394 would require the INS and the DOL to hire several hundred additional investigators to scrutinize whether employers are hiring illegal immigrants. [FN25] These requirements assume that the INS and DOL have a plan to deploy these investigators effectively.

. On the assumption that immigrant workers come to this country under false pretenses and often displace American workers, S.1394 would require that certain categories of immigrant workers report to a local INS office after they have been in the country for two years so that they can be scrutinized a second time and the INS can examine payroll documents to ensure that they are being paid the proper salary. The bill would also expand the use of "labor certification," the process by which the Labor

Department certifies that no U.S. worker is available for a particular job. S.1394 assumes that INS and *115 DOL offices can handle tens of thousands of additional interviews each year. [FN26]

. In his 1996 State of the Union message, President Clinton unveiled his latest proposal for controlling illegal immigration: an executive order prohibiting companies found liable for knowingly hiring illegal immigrants from ever bidding on government contracts. The executive order assumes that the INS will effectively investigate federal contractors and report the results of its investigations to other government agencies.

None of the major immigration reform proposals call for any reform in the federal immigration bureaucracy. Indeed, all proceed on the assumption that the INS can handle vast new responsibilities with no significant changes. Ignoring the need for bureaucratic reform ensures the failure of any immigration policy. As Warren Leiden of the American Immigration Lawyers Association says, "Congress passes these laws but it doesn't make any difference if you have an agency that isn't successful. Conversely, if you have a successful agency, you wouldn't need many of these new laws." [FN27]

V. THE FLAWS IN THE SYSTEM

It is important to recognize that the INS has thousands of dedicated and talented employees. For example, its Forensic Document Laboratory is state-of-the-art—it even helped identify the bones of Nazi doctor Joseph Mengele several years ago. The INS also has many talented law enforcement officers, experts in business immigration issues, and trial lawyers who work to deport criminal aliens. Some district offices are led by innovative managers. The INS has a model "service center" process, under which certain types of common applications are handled by regional service centers so that district offices can be freed up for other work.

However, the inherent deficiencies in the federal immigration bureaucracy ensure that current immigration laws cannot be administered effectively—to say nothing of new ones. The agency's leadership and the structure of the federal bureaucracy unintentionally create a haven for poor performance, and even the best employees are eventually dragged down by the institution's culture of failure.

The INS, as well as other federal agencies that administer our immigration laws, suffers from crippling fragmentation, abysmal service, chaotic enforcement, negligent financial management, counterproductive duplication at the border, and costly duplication in admitting immigrants. Cumulatively, these problems have created a devastating culture of failure.

A. Crippling Fragmentation

The most visible INS official is the commissioner. The Clinton Administration appointed Doris Meissner, a noted immigration expert who is polished in *116 dealing with Congress and the media. The importance of the commissioner, however, can be

overstated; the nuts-and-bolts work of the agency takes place in thirty-three district offices and four service centers. In these thirty-seven offices, decisions are made each day on tens of thousands of applications for immigration benefits.

Unfortunately, the INS performs more like thirty-seven separate bureaucracies than an integrated agency. Former INS General Counsel Raymond Momboisse complained in an internal memorandum that the INS is "a feudal state with each region, district, and sector acting independently to give its own interpretation to the law." [FN28] The New York Times concluded that "the agency's thirty-three district directors run fiefs. They make their own rules, often quite different from one place to the next, and set the tone." [FN29]

Three examples illustrate that even on the most basic issues, the INS is not an integrated unit. First, although ruling on petitions for immigration benefits is the bread and butter of the agency, immigration examiners have very limited direction from INS headquarters on interpreting the law. Immigration examiners are supposed to have other sources to help them interpret the often arcane and confusing language in immigration laws, including implementing regulations, the "Examinations Handbook" and "Operating Instructions" written by INS headquarters, and administrative and court decisions that interpret the law. However, the INS admits that its regulations are so out of date that some "simply don't make sense or need revising," according to a senior INS official. [FN30] The Examinations Handbook and the Operating Instructions are so far out of date that examiners rarely bother to consult them. And the INS has no index of the thousands of court decisions interpreting immigration law, so examiners only rely on the cases they recall from memory. Naturally, it is not unusual for identical forms filed in two different locations to receive two different responses. Immigrants are well aware that if they are unsuccessful in crossing a U.S. border today, they are likely to get a different answer tomorrow when a new INS inspector is on duty. In many situations, U.S. immigration policy depends more on the person you ask than on the rule of law. It is difficult to argue with the U.S. citizen who compared the INS to third-world governments he had encountered. The INS procedures he confronted were "no less repulsive than the various forms of unofficial corruption I witnessed for years in Africa and the Middle East," he said. [FN31]

A second example is the enforcement wing of the INS. In certain parts of the country, INS enforcement teams focus their investigations on companies notorious for hiring illegal immigrants, while in other regions the goal is to *117 penalize as many companies as possible. In the West and South particularly, the INS offices have a significant number of cases involving only technical paperwork violations rather than deliberate efforts to employ illegal immigrants. An Alabama company that negligently filled out employment eligibility verification forms on new employees might be fined tens of thousands of dollars, while an Ohio company that made the same mistakes might just be given a warning. One study showed that in Miami, San Antonio, and Houston, Border Patrol agents and other INS investigators deliberately did not coordinate their activities. Even when the situation only called for people sitting in the same building to talk to one another, "there was no rational division of the territory and no systematic

referral process for leads, much less common targeting, fine or settlement standards." [FN32] The authors of the study, Paul Hill and Michael Fix, concluded that "[e]xtreme levels of variation across regions and districts give rise to abiding questions of consistency and fairness." [FN33]

Management practices also vary widely from district to district. Outstanding ideas implemented in one district are rarely adopted by other districts, and outstanding failures are rarely flagged so that others will avoid the same problems. Discussing a serious case of corruption in one INS office, The New York Times reported, "[e]ven the agency's senior managers were largely unaware of the case and its lessons. And the immigration service has still done almost nothing to avert similar problems in other offices." [FN34]

Why do the district offices operate as disconnected fiefdoms? One reason is that the INS's organization structure cripples effective communication. Instead of having a direct line between Washington and the field offices, the INS has inserted "regional offices" into the organization chart. District offices do not report to Washington; they report to one of three regional offices, which report to Washington. The INS is the only agency in the Department of Justice that has regional offices between its Washington headquarters and its field offices. [FN35] With a significant bureaucracy between Washington and the people who actually carry out the work, communication naturally breaks down. It takes exceptional effort to ensure that a policy decision in Washington is communicated to employees in district offices, and a herculean effort for employees in a district office to get Washington's ear.

The INS's culture is also a barrier to uniform policy. Over the decades, Washington managers have developed their own culture, divorced from the realities of life in the field. Chronic mismanagement from Washington has left many INS employees openly hostile to the agency's headquarters, and *118 most of the rest simply neglect to maintain contact. This breakdown in communication worsens almost every one of the INS's other problems. A.D. Moyers, district director of the important Chicago office, said that at one point he had not spoken to his supervisor in Washington for two and a half years. Patrick Kane, recently the acting district director of the Phoenix office, said, "[y]ou feel like the Lone Ranger out here, you're so out of touch." [FN36]

One commentator, Bennett Lee, concluded that the INS has declined "into a series of segmented, autonomous units." [FN37] Congress simply cannot assume that when it passes a new law, the INS will implement it in a consistent and rational manner. The agency must overcome its fragmented organizational structure and culture before it can effectively enforce the nation's immigration laws.

B. Abysmal Service

The INS was created, in large part, to rule on applications for visas and to administer an effective naturalization process. Over four million applications are filed with the INS each year, and each applicant must pay a fee. For example, when an American

company wants to hire a foreign scientist who has a wife and two children, the INS charges it \$535. [FN38] In 1995, the INS earned \$685 million from these fees.

Operating a significant part of the agency on user fees is a good idea, and the \$685 million in revenue makes the INS comparable to a very substantial corporation. However, a private company that treated its customers as the INS does would soon be bankrupt. The New York Times reported that "at INS offices throughout the country, telephones go unanswered, mail goes unopened, and immigrants stand in day long lines that often lead them to surly, untrained workers who cannot answer their questions." [FN39] The District Director of the San Francisco office said, "[i]t's crazy. People are paying good money to get service from the government, and we're not giving it." [FN40]

A Soviet refugee complained:

[t]he INS is completely like a Soviet bureaucracy.... Every sign starts with the word 'no': No smoking. No standing. No sitting. No asking questions. You cannot reach a human being by phone. And when you go, you stand for many humiliating hours in line only to reach a *119 semi-human who answers your measly question by talking in a cabalistic language: 'I-95, dash, point 6, dash, B-52.' " [FN41] Chicago District Director A.D. Moyer lamented, "[a] lot of people have gone out of their way to make this a cold, rude, insensitive and inefficient agency.... [FN42]

Inadequate resources cannot explain the shoddy service. INS expenditures doubled between 1986 and 1989, but processing times for applications did not move an inch. [FN43] Abysmal service is better explained by two factors: first, the INS leaves most contact with the public to untrained and poorly paid clerks. The New York Times concluded that "[t]he INS mishandles far more cases than its share because the agency is organized in a way that allows some barely trained employees to bark at the clients, turn a deaf ear to their complaints or mishandle their requests." [FN44]

The second factor behind abysmal service is the law enforcement mentality adopted throughout the agency. The INS is supposed to provide a "service"— processing the paperwork for qualified immigrants so that they can get into the country to work or to be reunited with their families, and to help naturalize immigrants. It is also supposed to be a law enforcement agency, arresting and deporting illegal immigrants. In practice, these two missions are "quite different, almost opposite, organizational objectives," according to the General Accounting Office. [FN45]

In the daily battle between these "opposite organizational objectives," the enforcement mentality almost always wins. Grover Joseph Rees, INS General Counsel during the Bush Administration, writes,

[f]or too many INS officials, the answer is easy: we are the Anti- Immigration and Naturalization Service, and we are about keeping people out. Although critics of the INS frequently characterize it as a "schizophrenic agency," torn between contradictory

missions of "service" and "enforcement," from the inside it seldom looked like a tough choice. [FN46]

Westin Kosova, writing in The New Republic, argues that "in its zeal to catch every illegal, the INS regards everyone on the other side with suspicion. To the service, a legal immigrant is merely an illegal alien with papers." [FN47]

The enforcement mentality is taught at the INS's training centers. Moreover, INS gives high regard to experience with enforcement, so many *120 management positions on the service side of INS are filled by people with enforcement backgrounds. Warren Leiden said, "[t]he reward for being really good at enforcement is a promotion to examinations management, where the majority of the job is administering benefits. Excellence in one is very different from excellence in the other." [FN48]

The tension between the service and enforcement functions of the INS is not only seen in the miserable experiences of immigrants and American companies who have to deal with the agency's rudeness and inefficiency. The Ascencio Commission, a blue-ribbon panel established by Congress, issued a report in 1990 that listed five other problems resulting from the service/enforcement conflict:

- . Competition for resources within the agency;
- . Lack of coordination and cooperation between enforcement and service programs;
- . Conflict between district offices and Border Patrol sectors;
- . Personnel practices that encourage employees to move between enforcement and service jobs; and
- . Confusion among employees regarding their mission and which responsibilities should be given highest priority. [FN49]

The Ascencio Commission concluded: "[s]ome attribute INS'[s] management and operations problems directly to its dual responsibilities." [FN50]

Bennett Lee's conclusion should be heeded: "[i]f immigrants cannot be effectively served by the INS, the entire viability of the agency must be questioned." [FN51] Until more motivated people are responsible for contact with the public, and until the INS's service and law enforcement functions are separated, abysmal service will continue.

C. Chaotic Enforcement

Although the INS's original purpose was to administer the legal immigration process, controlling illegal immigration has emerged as an important responsibility over the past two decades. Nonetheless, the INS has been spectacularly ineffective in controlling illegal immigration. By the middle of the 1980s, so many illegal immigrants were living

and working in this country that Congress unilaterally declared approximately three million undocumented people to be legal residents. The "amnesty" was only a temporary "solution," however. The most reliable estimates indicate that between three and four million illegal immigrants live in the United States, and two to three hundred thousand people join them each year.

There are many reasons why people immigrate to this country without legal permission. The best long-term solution is for the United States to *121 aggressively export democratic capitalism to Latin America and Asia. Because this goal raises issues that governments generally prefer to avoid, the focus will remain on the immigration service's ability to control U.S. borders. The INS has been a spectacular failure in this regard for three reasons.

1. Reason #1: Lack of coordination

The agency's enforcement unit has two primary branches: the Border Patrol and the Investigations Division. Theoretically, the Border Patrol intercepts illegal entrants at or near the border while the Investigations Division carries out the INS's enforcement work in the interior of the country (searching for undocumented immigrants at their places of work, participating in drug smuggling investigations, and investigating alien smuggling rings, among other things). [FN52] Both border control and interior enforcement are necessary because about one-half of illegal immigrants enter the country by crossing the border illegally and the other half by entering the country legally and staying longer than their visas allow.

Unfortunately, the Investigations Division and the Border Patrol do not run on the same track. INS district offices have jurisdiction over "districts," and the Investigations Division operates its law enforcement functions in those districts. Border Patrol agents, on the other hand, work in "sectors." The twenty-one sectors, however, have no relationship to the thirty-three districts—sectors often overlap two or more districts. While investigators report to a district director, Border Patrol agents report to a sector chief. One researcher concluded,

[t]he task of coordinating district offices and sectors is made inherently difficult by overlapping boundaries; for example, the San Antonio district includes parts of the Del Rio, Laredo, and McAllen sectors. The involvement of two separate units in sanctions created confusion, competition, and uneven enforcement policies, despite the signing of memoranda of understanding between district offices and Border Patrol sectors to divide the country. [FN53]

Perhaps these structural problems could be overcome through diligent cooperation. However, the investigators and the Border Patrol agents are quite antagonistic toward one another. [FN54] The lack of communication is so poor that in one case Border Patrol agents stumbled into an Investigations Division covert operation. [FN55]

*122 Moreover, the neat division of responsibilities between the two units has eroded.

In the mid-1980s, Border Patrol management decided that it wanted a hand in more high-profile work and began to divert its agents to help with cases involving, for example, drug smuggling. The Border Patrol became so involved in narcotics trafficking and other work that it opened offices in places like Grand Rapids, Michigan, which is over three hundred miles from the Canadian border, and Miami, Oklahoma, which is closer to Kansas City than Mexico. A General Accounting Office study found that between 1986 and 1990, although the Border Patrol received substantial increases in resources, the amount of time Border Patrol agents spent patrolling the border actually dropped by eleven percent. [FN56] Moreover, the expansion of the Border Patrol has crippled the Investigations Division. With the Border Patrol doing its work, many investigators have been reduced to shuffling paper. One study concluded that fifty-seven percent of an INS investigator's work does not require any enforcement skills. [FN57]

The Clinton Administration recently released a plan confirming that the Border Patrol will be diverted to duties other than controlling the border, including drug smuggling investigations. [FN58] Therefore, the enforcement divisions at INS will continue to be fragmented.

2. Reason #2: Lack of strategy at the border

A good general would analyze the impending battle and develop a strategy. Then he would request resources—an ample supply of troops outfitted with the best equipment—to make that strategy work. Once the troops were approved, he would begin to deploy them according to his battle strategy. Controlling the border operates in reverse. The INS and Congress are sending an historic number of troops to the border, and hoping that a strategy will somehow materialize.

The most basic issue—the number of troops necessary to accomplish the mission—has never been determined. When representatives in Congress say that they want to give 10,000 Border Patrol agents to the INS, they are simply pulling a number out of the air. Congress has never received a report which says that the INS could adequately guard the border if it had 5,000 agents, 7,500 agents, 10,000 agents, or any other number. INS Commissioner Meissner admitted this in an interview with the Los Angeles Times: "[d]espite all the new resources, Meissner acknowledged that she did not know how much more it might take to tackle such a wide-spread problem. 'We're well along the road, but I wouldn't want to make any guesses,' she said." [FN59]

***123** Moreover, the strategy for deploying the troops is being developed on the run. Two examples illustrate the fact that the INS does not have a clear roadmap for its border control efforts. First, in early 1996 the Administration announced a major buildup of Border Patrol agents in California. White House official Rahm Emmanuel said at the time, "[a]fter years of neglect, we are finally restoring the rule of law, locking down the Southwest border." [FN60] However, the planning did not match the press statements. In November, "Border Czar" Alan Bersin had assured Washington reporters that there were "absolutely no plans" to use the military to control illegal immigration. Two months

later, however, the Administration proudly announced that it would be sending hundreds of soldiers to work with the INS. [FN61] Either the INS developed the policy quite suddenly or the "Border Czar" was not informed of the developments. Mr. Bersin was not the only official caught off-guard by the military's involvement. A spokesman for the Border Patrol's San Diego office told the San Diego Union-Tribune that he "was surprised to hear that additional Guardsmen were coming." The paper concluded, "[i]t's unclear where the National Guard fits in with the Clinton Administration's border initiative." [FN62]

Perhaps most seriously, the INS did not coordinate with other federal law enforcement agencies. With the buildup of Border Patrol agents came many more arrests, leaving the United States Marshall in San Diego with the responsibility of finding jail facilities for these hundreds of new inmates. U.S. Marshall Steve Gregg was not pleased: "I agree with stepped-up enforcement at the border. What I'm saying is ... when it came to planning this thing, the Marshall's Service got left out in the cold," said. [FN63] Without advanced notice or planning, Mr. Gregg has had to dramatically re-shuffle his law enforcement officers. The problem was so severe that he even received instructions from his headquarters to divert officers from an award-winning task force operation that has returned thousands of fugitives to prison. [FN64]

A second illustration is the development of "Operation Hold the Line." In the absence of a thoughtful, comprehensive strategy, the agency just fumbles along. In 1993, a new sector chief took over in El Paso, Texas. For years, the Border Patrol had emphasized apprehensions—meaning that agents patrolled the city's streets and surrounding rural areas in order to catch illegal immigrants after they crossed the border. The new chief, Silvestre Reyes, decided to implement a strategy emphasizing prevention rather than apprehensions. "Operation Hold the Line" saturated the border with agents, had them stand shoulder to shoulder, and hoped to convince illegal immigrants that it *124 would be futile to attempt to cross. Reyes received substantial opposition from INS headquarters, but when he eventually implemented the new strategy illegal immigration plunged and the operation was celebrated in the media and Congress.

Once the El Paso strategy began to prevent illegal immigration, one would expect the Border Patrol to have immediately implemented it in Southern California as well. However, it took the Clinton Administration almost two years to implement a similar prevention strategy in the San Diego area, and the Border Patrol still had no plans in place at that time to deal with high-traffic areas in Arizona, New Mexico, and Southern Texas.

The flow of illegal immigration is like a balloon; if you press it in one area it expands in another. "The news got around pretty quickly that we were a weak spot on the border," Arizona Border Patrol Officer Kevin Oaks told the Washington Post. "It should have been no big surprise when they started coming across here." [FN65] The Houston Chronicle reported in late February, "[w]hen you clamp down on one end of the 2,000-mile border, bulges appear elsewhere. Eagle Pass [Texas] is where the balloon popped." [FN66] Apprehensions skyrocketed all along the border—in Nogales, Arizona,

Douglas, Arizona, Laredo, Texas, and McAllen, Texas. The most eastern counties of California have also been complaining: "[i]f the goal of Gatekeeper [the code name for the San Diego operation] was to simply shift the problem to the east, it has been a success," an East County, California, Board of Supervisors member told the San Diego Union-Tribune. [FN67] "The movement eastward has occurred faster than I had predicted," INS planning official Robert Bach admitted. [FN68]

Now the problem has come full circle. "For all its touted success," the Dallas Morning News reported, "one big drawback of Hold the Line is discontent among Border Patrol Agents." "[S]pending the day sitting behind a fence on the river bank" is mind-numbing work, making the agents anxious to return to the old strategy emphasizing arrests. [FN69] The agents also feel they are trapped because without a significant number of arrests on their records, the operation is "a career killer." [FN70] Because the Border Patrol is such a narrow agency, its officers do not have diverse professional opportunities. Agents in El Paso see nothing but years of sitting on a chair in the sun. "[B]oredom and frustration" is how the El Paso Times summarizes the attitudes of many agents. [FN71]

***125** The El Paso story shows that Border Patrol management did not develop the strategy, opposed it when it was proposed, failed to implement it when it was successful, negligently refused to address other border areas, and now has no idea how to make the strategy work on a long-term basis. It is no wonder that the Border Patrol attrition rate has been as high as thirty percent per year. [FN72]

Deploying thousands of new agents before developing a comprehensive border control strategy is unwise. First, it will waste hundreds of millions of dollars. Second, it will magnify the current defects in INS's law enforcement organization chart, and make it much more difficult to ever correct these structural problems. Bennett Lee argues, "[i]n time, adding personnel to a malformed system will only aggravate and accentuate the existing problems." [FN73] Most seriously, the buildup will have human costs. According to the Los Angeles Times, "Critics said they fear that such an aggressive hiring effort will fill the Border Patrol with inexperienced rookies and result in a dramatic increase in abuses at the border—a recurrent problem with past hiring pushes by the Border Patrol and other law enforcement agencies." [FN74] Concrete examples are easy to locate. A Border Patrol agent was recently killed by sophisticated drug smugglers in Eagle Pass, Texas. The recent beating of two illegal immigrants by deputy sheriffs in Southern California demonstrates that officers who are unprepared for the unique border law enforcement environment can erupt in hostility and frustration. Pouring thousands of inexperienced agents onto the border is likely to significantly increase violence and civil rights abuses.

It is clear that the root problem has been mismanagement, not a shortage of Border Patrol agents. Currently pending legislation only addresses the secondary problem—the number of agents—without addressing the root cause of our failure to control the border.

3. Reason #3: Disastrous workplace enforcement strategies

In 1986, Congress passed the Immigration Reform and Control Act (IRCA), [FN75] requiring companies to complete government forms on all new hires. The theory is that by completing the forms companies will be able to identify illegal immigrants. The Clinton Administration is pursuing employer sanctions with vigor, arguing that well-paying jobs are the primary magnet drawing illegal immigrants.

However, the INS has long left its regional offices and district offices to implement their own strategies for enforcing employer sanctions. As noted *126 earlier, researchers Michael Fix and Paul Hill discovered that enforcement strategies were completely different, even contradictory, in different areas of the country. Another study reported, "[i]n many of the sites in this study, district office enforcement priorities seemed to be shaped by the preferences of individual managers instead of by a large agency strategy." [FN76]

The Clinton Administration has put its imprint on employer sanctions by adding an enforcement tool it claims will help fight illegal immigration. Everyone concedes that employer sanctions have been undermined by the easy availability of fake employment eligibility documents, such as Social Security cards and birth certificates. The Clinton Administration has therefore decided to add "telephone verification" to the employer sanctions regime. The Administration plans to offer companies the opportunity to access INS databases; every time a company wants to hire a person who identifies himself as an immigrant, it can call the INS for verification that the person is included in the agency's database of authorized workers.

The problem is obvious: the plan will only catch illegal immigrants who, although they know that their identification numbers will be checked against government computer databases, will admit that they are immigrants. Because false birth certificates and Social Security cards are available in abundance, illegal immigrants can avoid the entire system by purchasing these cards and claiming to be U.S. citizens. Thus, hundreds of millions of dollars and countless man-hours will be wasted on a system that is guaranteed to fail.

The primary House and Senate reform bills deal with this problem by requiring that all new employees, citizen and non-citizen alike, be verified as eligible to work. The bills require the INS and the Social Security Administration (SSA) to tie their computer databases together, and compel companies to contact these agencies to obtain an authorization code from the new computer database before they hire any new employee.

All efforts to make employer sanctions work are colossal wastes of taxpayer money, even with a compulsory nationwide computer registry program. Assuming that the new computer database helps employers identify illegal immigrants, it still will not slow illegal immigration because of the absence of a deportation program. The INS deports only a tiny fraction of people who are eligible for deportation, and almost all of these are illegal immigrants who are already in prison for committing other crimes. [FN77] So an

undocumented worker who loses a job will merely move on to another company, which may or may not discover he has fraudulent papers. If he fools the computer, he has a job; if he doesn't, he at least has a job for a month or so. In a month, a farm worker can complete the current harvest and then *127 move on to another farm to harvest another crop. The revolving door never stops because illegal immigrants are rarely removed from this country.

Moreover, the computer databases are so flawed that millions of people will be falsely identified as illegal immigrants when in fact they are U.S. citizens or authorized immigrants. According to a 1989 Justice Department audit, the information in the INS database is incorrect or missing seventeen percent of the time. Because the INS will soon have files on approximately fifty million people, the files on between five and ten million people will contain serious errors. The SSA's database is plagued by similar inaccuracies, meaning that millions of Americans will be wrongly tagged as illegal immigrants, causing them to lose their jobs. Proponents argue this will not happen because the INS and SSA can retrieve a person's file and double-check computer results. But the INS cannot even find millions of files, let alone locate, retrieve, and analyze them quickly. The Reagan and Bush Administrations rejected proposals to establish a national computer database, arguing that the federal government is already too intrusive on both companies and individuals. [FN78]

In 1989, the INS devoted twenty-eight percent of its resources to enforce the employer sanctions law. [FN79] Its efforts have failed because the strategy has too many holes to fill: fraudulent documents, inaccurate INS computer records, and no deportation program. If the agency would divert that portion of its resources to beefing up its deportations program, there would be a dramatic improvement in the war against illegal immigration. In addition to increasing the number of illegal immigrants who are removed from this country, a stronger deportations program would deter others from entering the country in the first place.

The enforcement chaos demonstrates that the current bureaucracy is inherently incapable of performing one of its chief functions. As Bennett Lee concluded, "[i]f these programs cannot operate effectively and in an efficient manner, then the INS becomes an operation of questionable utility." [FN80]

D. Negligent Financial Management

Approximately one-third of the INS budget comes from fees. Although the agency assumes large fee accounts when making its budget projections, it often fails to actually collect the fees. Reports show that the agency negligently allows tens of millions of dollars to slip through its hands.

For example, people who travel into the country by air or sea are required to pay a fee of approximately \$6. Airlines and cruise ships add the charge to each ticket and are then supposed to send the money to the INS. However, the *128 agency rarely contacts the airlines or cruise lines to recover the money. The net loss to the agency is

staggering: \$23 million per year, according to an internal Department of Justice report. Kenneth Rath, the INS's senior financial official, said, "I can't say that's wrong because I don't know. But there are only two people down there monitoring this in accounting." [FN81]

Bail bonds for deportation hearings are another source of uncollected income. Many immigrants who are arrested and placed in deportation proceedings post a bond so that they can be released while waiting for a hearing. Because over ninety percent of illegal immigrants fail to appear for deportation hearings, hundreds of thousands of bail bonds are forfeited. [FN82] All the agency needs to do is contact the bonding agent to collect the fees. However, those simple calls are rarely made and collection letters are rarely sent. Net loss to the agency: \$38 million over six years, according to the Justice Department. "We don't have anybody assigned to that," the director of the San Francisco office admitted. [FN83]

How can an agency that operates under chronic budget crises fail to make simple collection efforts? "This kind of thing goes on year after year, but nobody's ever held accountable," the former director of the Phoenix office has said. [FN84] If the INS were a private business, managers would be held responsible for bottom-line issues like collecting revenue. Moreover, employees would be given profit-sharing incentives to make sure the accounts receivable are kept low.

Of course, the Clinton Administration claims to have solved these problems through its "reinventing government" initiative. Kenneth Rath, the senior official responsible for financial matters, told The New York Times that he had carefully studied each critical audit and implemented procedures to solve the problems. "But around the country other INS officials laughed at that. They noted that about the time Mr. Rath made the remark this summer [1994], his office announced that the agency was once again \$60 million short. That led to the annual rite of midyear budget cuts in every office." [FN85] Two years into the Clinton Administration, the Office of Management and Budget classified the INS's financial controls as "high risk." [FN86] Until basic free market principles are applied to the INS, financial mismanagement will continue to cost the agency millions.

E. Counterproductive Duplication at the Border

Customs and INS inspectors work at each major port of entry into the United States. Customs inspectors, employees of the Treasury Department, *129 are generally responsible for examining goods entering the country, while INS inspectors are responsible for examining people entering the country. When an inspector approaches a car, however, the neat distinctions are difficult to maintain. For example, a customs inspector will ask for identification and may check the person's name against the national criminal computer files, as well as questioning the driver about any goods he is carrying. INS inspectors may also question a driver about agricultural products he is carrying, as well as his immigration status. Inspectors from these two agencies work side-by-side, interpreting and applying each other's laws.

Unfortunately, "Customs and INS have a long history of interagency rivalry," according to a 1993 General Accounting Office report. [FN87] "[T]hese unproductive conditions are deeply ingrained in the management cultures of these agencies." [FN88] The GAO documented remarkable examples of this hostility, including an incident in 1992 when INS officials at the Laredo port decided to use drug-sniffing dogs to help their inspectors make narcotics arrests. When Customs officials learned of the INS initiative, the officials hustled their own drug-sniffing dogs in order to "minimize opportunities for the INS special operation to make drug seizures," according to the GAO. [FN89] Mexican border guards must have been puzzled as they watched teams of Customs and INS dogs flood the small bridge into Laredo, competing with one another for the opportunity to sniff at cars sitting in the lines. At some point it must have been clear that the dogs and inspectors were snarling more at one another than at potential drug smugglers. When the GAO confronted Customs officials, they protested that drug-sniffing dogs are "the sole prerogative of Customs;" the INS should have left its dogs in the kennels.

This is not an isolated incident. "The operational problems along the southwestern border are real, have persisted for many years, and are deeply rooted in the culture of the two agencies," the GAO concluded. [FN90] Among the GAO's findings:

- . There is no cross-training between Customs and INS officers;
- . Planning by the two agencies is separate;
- . The agencies compete through commission reports showing which agency's inspectors are working harder;
- . There are no joint staff meetings; and,
- . There are two separate hierarchies—each port of entry has two conflicting leaders. Ports do not have one official who is in charge of port operations. [FN91]

***130** This duplication costs the government tens of millions of dollars. [FN92] "There is a terrible waste of resources between the INS and Customs," former Customs Service Director William Von Raab says. [FN93] A Carter Administration report concluded, "[t]he effect of such a narrow, program- oriented system for performing identical border functions, including inspection and patrol, has been waste and inefficiency, not only in the need to acquire separate systems and facilities to support these functions, such as telecommunications and computer hardware." [FN94] Perhaps most distressing is the effect on narcotics interdiction. The Carter report found that, "[n] arcotics slip through ports of entry because of the confusion and delay inherent in the duplicate inspection process carried out by INS and Customs at international airports." [FN95] The GAO's conclusion was that INS and Customs cannot co-exist: "[a]ll past studies indicate that a lasting solution to inspection coordination problems at land border crossings will not be reached until the current dual management structure is eliminated." [FN96]

F. Costly Duplication in Admitting Immigrants

To be granted permission to enter this country, most immigrants must satisfy two federal agencies. First, a person or company must file forms with the INS proving that the immigrant is qualified under the immigration laws. If the INS grants the petition, it sends a cable to the United States embassy where the immigrant lives. However, the embassy does more than just complete the paperwork—it reviews the entire process all over again. The "consular officer," an employee of the State Department's Foreign Service, has the authority to veto the INS's action, and his decision cannot be appealed.

Both the INS and the consular officers work from the same basic text—the Immigration and Nationality Act. However, the State Department has its own regulations interpreting the Act, called the Foreign Affairs Manual. Therefore, when an immigrant seeks permission to enter the country, he must convince two different agencies operating on two different sets of regulations to let him in. The results are often arbitrary. The Carter report stated, "[t]here is substantial duplication and inconsistency in the visa application and approval activities of the State Department and the INS border admissions process.... The result is an often inconsistent application of the immigration laws." [FN97]

Naturally, the State Department has also created a bureaucracy to oversee its programs. The Bureau of Consular Affairs gives training to consular *131 officers, writes the Foreign Affairs Manual, and represents the State Department in Washington's immigration policy debates.

The INS/State Department duplication creates a double bureaucracy where one would be more than enough. President Truman established a commission to study immigration in the early 1950s, and it concluded, "[t]he best available information indicates that this costly, unwieldy and unbusiness-like duplication serves no reasonable purpose. It is hardly more than historical accident which has become, to some, a principle." [FN98]

Because the State Department is so powerful and the INS so inept, reform has never been taken seriously. The irony is that this duplication could easily be avoided. Canada and Australia both have their immigration agencies make all immigration decisions. Canadian and Australian immigration agencies have offices in all of their countries' embassies, working with the foreign service but as employees of the immigration agency.

The last forty years of wasteful spending only go to prove the Truman Commission's 1953 conclusion: "[i]n the Commission's opinion, the duplication in visa issuance and immigration examinations is wasteful and unjustifiable." [FN99]

G. A Culture of Failure

In September, 1995, an official of the Carnegie Endowment testified before Congress that "the INS institutional culture ... has developed an unenviable record for

arbitrariness, intrusiveness, and resistance to change." [FN100]

In light of the problems with the federal immigration bureaucracy, it is no surprise that the INS has developed a negative "institutional culture." INS employees daily confront obstacles that even the most talented individual hesitates to scale. Missing files, uncollected fees, in-fighting with other INS offices and federal agencies, constant demands for information, and confused instructions from headquarters are a daily reality. One agent from San Francisco said, "[t]here's overwhelming apathy from top to bottom." A former auditor said, "I tell [sic] you, ninety days over there, and you don't know whether to laugh or to cry." [FN101] Perhaps this institutional culture is the single most difficult obstacle to serious improvements in the INS.

VI. CLINTON ADMINISTRATION REFORMS HAVE FAILED

"President Clinton is starting a revolution in government.... It will fundamentally change the way government works," Vice President Al Gore announced in September 1993. [FN102] Judging from press releases, the Administration *132 plans to use the INS as a poster child for its "National Performance Review," better known as the "reinventing government" initiative. In a 1994 report, the Administration declared, "[f]ollowing the precepts of the National Performance Review, INS recently initiated sweeping organizational reform to address these longstanding problems and reinvent the agency." [FN103] The Administration's "sweeping organizational reform" consisted of:

- . Appointing an immigration expert, Doris Meissner, to occupy the agency's most visible position;
- . Rearranging the top dozen or so jobs;
- . Issuing a "Strategic Plan" that consisted of "a rehash of ideas that have been floated around the agency for at least a decade;" [FN104] and,
- . Declaring victory.

Deputy INS Commissioner Chris Sale told a House subcommittee that "the INS is no longer a poorly funded, understaffed, relatively unknown agency with an uncertain mission ... [but] a well-managed agency able to provide the leadership required to curb illegal immigration while maintaining our nation's proud heritage of legal immigration." [FN105]

Outside observers are not as enthusiastic about the Administration's success. In a March, 1995 hearing before a House appropriations subcommittee, Representative Harold Rogers (R-KY) stated that he was "just not satisfied that [the INS is] capable of spending [the projected new funds] wisely. I think you're making some improvement. That's not saying a hell of a lot." According to the trade journal Interpreter Releases, Representative Rogers "complained of his years of frustration, and said that even though there appears to be progress, he is 'very pessimistic and cynical' because the

INS says things about making improvements, but 'nothing ever happens.' " [FN106] Interpreter Releases also noted that others in the House are concerned that "the agency is forever on the brink of positive change, but never quite achieves the goal." [FN107] According to Warren Leiden, the INS under Meissner "has improved, but they really, really need a total overhaul." [FN108] Frank Sharry of the National Immigration Forum says that the reinventing government initiative has hardly scratched the surface: "The Service has a talented management team, on top of a bubble filled with demoralized, poorly trained and badly managed staff." He characterizes the reforms as "baby steps in a marathon." [FN109]

INS employees know better than anyone that the Administration's press releases are nonsense. According to The New York Times:

***133** [m]any of the agency's own employees, interviewed in roundtable discussions at district offices across the country, openly ridiculed some of the agency's efforts to service its clients. And almost without exception, the employees said nothing had improved for them since Bill Clinton took office—in client service or any of the agency's other fields of responsibility. [FN110]

The Administration has in fact changed very little about the INS, other than improving its public relations effort. Employee morale is as low as ever. Immigrants are still treated shabbily. Customs inspectors and INS officers continue to view each other with suspicion. Other federal agencies are wasting millions by duplicating INS's jobs. A fragmented, disjointed enforcement division continues to allow hundreds of thousands of illegal immigrants into the country. Tens of millions of dollars in fees remain uncollected. The inescapable fact is that the federal immigration bureaucracy's problems are inherent—middling reforms will not reverse the course.

VII. PROPOSALS FOR REFORM

The Clinton Administration views incrementalism as the answer to the INS's long-standing problems. However, incremental reforms have been and will be insufficient to correct an inherently flawed agency. Milton Morris, a Brookings Institution scholar who studied the immigration bureaucracy in the 1980s, wrote, "[r]eform of the immigration bureaucracy must be comprehensive if it is to bring about significant improvement in the administration of immigration policy." [FN111]

A. Service: The Federal Immigration Agency

The Immigration and Naturalization Service must be divided into two agencies, one devoted to administering immigration services and one devoted to law enforcement. The service agency could be called the Federal Immigration Agency (FIA) and be given authority to reverse decades of costly and counterproductive duplication. The FIA would:

- . Assume all of INS's current service functions, including adjudicating petitions for

immigration benefits and processing naturalization applications. All petitions to enter the country permanently or temporarily would be filed with the FIA, including petitions for refugee status and asylum.

. Assume all of the State Department's immigration functions—the Bureau of Consular Affairs would be eliminated. In Australia and Canada, the foreign service leaves immigration matters to the immigration agencies. Australian and Canadian embassies have no role in immigration matters, *134 other than ensuring that immigration agencies are provided with offices. [FN112] Following those models, the FIA would be responsible for decisions on immigration petitions from beginning to end, and would conduct its affairs from an office in each U.S. embassy.

. Assume all of the Labor Department's immigration functions. American companies must now ask the DOL to certify that no U.S. worker is available to perform a job before a foreign worker can be imported, and then file another petition with the INS. Warren Leiden has said that the Labor Department "is an extremely flawed agency that doesn't know what it's about. DOL's understanding of the labor market and employment practices seems frozen in time—from the 1950s." [FN113] The FIA would handle immigration petitions from beginning to end.

Giving all immigration duties to one agency would present significant advantages. First, the FIA would save the taxpayers tens of millions of dollars. Under the FIA, hundreds of Department of Labor and Department of State jobs would be eliminated. Duplicative regulations, including the Foreign Affairs Manual, would be eliminated. An integrated service agency will "permit the elimination of costly, overlapping and redundant operations," according to the Ascencio Commission, a Congressionally-mandated study group that recommended in 1990 that the INS be divided into two agencies. [FN114] The 1953 Truman Commission also argued that the State Department's role in admitting immigrants be eliminated, replaced by immigration service officers working out of offices in all embassies. The Commission's recommendations over forty years ago still resonate:

[t]he time has come to terminate the unnecessary and costly obstructions established by the duplication of visa and immigration examinations. This could be accomplished by eliminating overlapping and duplication through unifying these functions in a single process. The result will be a more effective administration of the law, a saving of Government expenditures and a better location of administrative responsibility. [FN115]

Second, the FIA would also produce a more fair and consistent immigration policy. With both the State Department and the INS evaluating immigration applications, and with both the Labor Department and INS involved in employment-based immigration, decisions are fragmented and often made according to completely different standards. Putting these functions under one agency, with employees trained according to one set of rules, will produce a more cohesive policy. As the Ascencio Commission noted, *135 unifying all service functions in one agency would "provide the basis for developing a more professional corps of officers and policymakers." [FN116]

Third, service to immigrants, U.S. citizens, and American companies would improve under the FIA. Because the FIA's employees would be divorced from enforcement activities, they would not be inculcated with the deep suspicion of immigrants that now prevails at the INS.

Fourth, dramatically reorganizing the federal immigration bureaucracy would eliminate the "fiefdoms" that have developed in various INS districts throughout the country. Dramatic reforms would instill an entirely new institutional culture as innovative programs were adopted. The reorganization would spur communications as INS employees are drawn into the effort. Moreover, a new, more effective organizational chart would be developed, eliminating the regional offices.

Finally, the FIA could give the country more effective long-term planning on immigration policy. The INS "lurches from one immigration emergency to the next," according to The New York Times. [FN117] The Ascencio Commission argued that a lack of long-term planning invites crises: "The continued absence of an effective policymaking (and emergency response) mechanism will increase the likelihood that the United States will not be prepared for the equivalent of another boatlift or another similarly significant migration emergency." [FN118] The new Federal Immigration Agency should put into place a credible policy analysis team with the mission of flagging potential immigration crises and outlining possible solutions.

B. Enforcement: The Border Management Agency

All INS enforcement functions—the Border Patrol, Investigations, Deportations, and inspections—along with the Customs Service's inspections duties, must be unified under a single agency. A Border Management Agency, operated by the Customs Service, was first proposed by a presidential commission almost twenty years ago. [FN119] Some have proposed creating an entirely new law enforcement agency. [FN120] However, the most practical solution would be for the Border Management Agency (BMA) to be created *136 under the Customs Service, making Customs responsible for monitoring the flow of people as well as goods. The BMA would be responsible for all law enforcement issues that immigration raises, including controlling the border, locating illegal immigrants who have settled in the United States, and deporting illegal immigrants. The BMA would also include all Customs Service law enforcement functions. A similar proposal has been endorsed by the Customs Service, as well as the National Treasury Employees Union. [FN121] If these reorganization proposals were adopted, the FIA would administer all programs providing immigration and naturalization benefits, while the Customs Service would operate the BMA, including all immigration and customs law enforcement functions.

Making the BMA a division of the Customs Service is wise for two reasons. First, the Customs Service is intimately familiar with the border, and its inspectors already have some basic understanding of immigration laws. Second, it is one of the most diverse law enforcement agencies in the government, responsible for enforcing laws

administered by forty other government agencies, including the Food and Drug Administration, the Department of Agriculture, and the Fish and Wildlife Service. [FN122] It also plays a significant role in narcotics interdiction, which is one of this country's top priorities.

Integrating all immigration and customs enforcement under the BMA would present significant advantages. First, it would save taxpayers tens of millions of dollars. Customs currently employs 6,000 inspectors, and INS another 4,000 inspectors. [FN123] If even 2,000 positions could be eliminated, taxpayers would save at least \$100 million. And that is only the beginning. "There would be enormous savings from any rational consolidation," says William Von Raab, director of the Customs Service under President Reagan. "Savings will just fall off the shelves, whether it is computers, supplies, resources, everything." [FN124] Second, performance along the border would dramatically improve, in part because debilitating hostility between Customs and INS inspectors would be eliminated. The Carter Administration report concluded, "[a] merger of the principal border enforcement agencies would significantly reduce overlap and duplication of effort and greatly enhance the overall effectiveness of border operations." [FN125] Third, integrating immigration enforcement into the BMA would eliminate the crippling fragmentation in the INS's current enforcement efforts. The fragmentation between the Investigations Division and the Border Patrol is clear, not only because they operate in conflicting geographical areas ("sectors" versus "districts") but *137 also because they report to different bosses. This fragmentation naturally results in a lack of coordination, seriously undermining the agency's efforts to control unwanted immigration.

Fourth, turning enforcement over to the BMA would present immigration officers with diverse opportunities for service. Police departments have different divisions (narcotics, homicide, property crimes, and street patrols, among others) that all report to a chief of police. This organizational system is wise because beat cops can be promoted and transferred to specialties of their choices, and detectives can be promoted or transferred to other areas of interest. Conversely, Border Patrol agents in El Paso are grumbling because the prevention strategy that has proven so effective is also miserable duty. If all immigration and customs law enforcement functions were integrated into a single agency, officers would have greater opportunity for diverse and challenging duties.

Finally, creating a new law enforcement agency would be a catalyst for producing a comprehensive strategy to control illegal immigration. The current structure will never produce such a strategy because the competing INS divisions cannot agree and other federal agencies with responsibilities along the border, especially the Customs Service, are not included in the discussions.

VIII. SHORT TERM REFORMS

These comprehensive reforms would take at least two years to develop. Moreover, powerful unions, special interests, and congressional oversight committees may prevent

these reforms from ever being implemented. Therefore, a series of short term reforms should be implemented.

A. Privatizing Experiments

John O'Leary and Bill Eggers argue in their 1995 book, *REVOLUTION AT THE ROOTS*, "[c]ompetition isn't foolproof. Political pitfalls, corruption, poor communication and other problems can occur.... But the track record of privatization has shown that it successfully boosts productivity like no other public-sector management tool." [FN126] The INS is an ideal laboratory for experimenting with privatization. With thirty-three district offices operating largely independent of each other, the INS can field-test dramatic new approaches. Four privatizing experiments should be implemented:

. To improve the collection of millions of dollars in fees that are currently forfeited, the INS should order eleven districts to privatize their fee collections. The offices should give private contractors authority to collect fees, perhaps awarding the companies a certain percentage of fees they collect. Another eleven districts should be instructed to implement profit sharing, *138 allowing employees to share a percentage of new revenues that they can collect. The final eleven districts would maintain the status quo to serve as a control group.

. Privatization could serve as a catalyst to improve communications with members of the public. Eleven district offices should contract with companies that would prescreen applicants, ensuring that their forms are properly completed and the applicants have all the necessary paperwork. The contractors would be judged on their ability to deliver more prepared applicants, which would save the INS a tremendous number of man-hours. Another eleven districts could contract with companies that would operate the waiting areas at the district office. The contractors would be judged on their ability to improve gate-keeping functions: providing basic immigration information to walk-in customers, minimizing waiting times and providing more humane service. The other eleven districts would again serve as a control group.

. Private companies should be invited to submit proposals to develop a national telephone system which would dispense information to members of the public. The INS could save millions by eliminating its notorious 800 number, "Ask Immigration," along with the hundreds of bureaucrats who work on that failed system.

. To improve communications within the INS, a contractor should be hired to develop and maintain an accurate internal phone list of all INS employees, and to develop programs to spur internal communications.

B. Enforcement

The INS's ability to minimize illegal immigration could be significantly improved in three ways:

. Eliminate Border Patrol sectors in order to make the Border Patrol work in the same districts that govern the rest of the INS. There would be immediate improvements in communication and coordination between the Border Patrol and the rest of the agency.

. A comprehensive enforcement strategy should be presented to Congress within six months, including a specific explanation of the number of Border Patrol agents needed to adequately patrol each district.

. All resources currently invested in enforcing employer sanctions, including the development of a massive national computer database, should be diverted to improving the deportation system. Locating illegal immigrants through employer sanctions enforcement is useless because the people are simply released back into the community. By diverting the hundreds of millions of dollars and man- hours invested in employer sanctions, the deportation system could be dramatically improved.

C. Consistency

Regional offices should be eliminated so that INS headquarters can communicate directly with its field offices. By eliminating regional offices, *139 the INS would be adopting the organization chart used by the FBI, the DEA and all other Justice Department agencies. The INS should also make it a top priority to update its Operating Instructions and Examinations Handbook so that the agency develops a consistent national position on the most important issues in immigration policy.

D. Culture

To confront the INS's culture of apathy and failure, all INS employees should be given a financial incentive in the agency's success. Just as in many private companies, the Commissioner should immediately institute a program that welcomes suggestions for improvement, and employees should receive bonuses for any suggestions that are adopted. While a culture of failure inbred in 20,000 people cannot be reversed overnight, seeking their meaningful involvement in making improvements would demonstrate a new attitude from the headquarters.

IX. CONCLUSION

In every decade since the 1930s, dramatic structural reforms in the federal immigration bureaucracy have been proposed. Reform efforts have been stymied because unions and bureaucrats oppose reforms, and because Congress has not been willing to invest the time to see the project through. Recently, however, Washington has been occupied by reformists who have shown a willingness to undertake innovative new projects. It is finally time to dramatically reform the bureaucracy and restore public confidence in our nation's immigration laws.

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Immigration Reform, published by the Center for Equal Opportunity. Nothing written here is to be construed as necessarily reflecting the views of the Center for Equal Opportunity or as an attempt to aid or hinder the passage of any bill before Congress. The author wishes to acknowledge the contributions, both to this report and to government service, of his father, a retired INS and Customs Service employee. From first-hand experience, the author knows that the INS employs thousands of dedicated people who want nothing more than to rid the agency of the mismanagement that hinders them.

FN1. Bill Branigin, INS Grows in Time of Downsizing, WASH. POST, Dec. 11, 1995, at A21.

FN2. Border Management Reorganization and Drug Interdiction, S.Prt. No. 111, 100th Cong., 2d Sess. vii-x (1988)[hereinafter Border Management Reorganization].

FN3. JASON JUFFRAS, IMPACT OF THE IMMIGRATION REFORM AND CONTROL ACT ON THE IMMIGRATION AND NATURALIZATION SERVICE 5 (1991).

FN4. Id.

FN5. Unauthorized Migration: An Economic Development Response, COMM'N FOR THE STUDY OF INT'L MIGRATION AND CO-OP. ECONOMIC DEV. 29 (1990) [hereinafter Ascencio Comm'n.]

FN6. Joel Brinkley, Chaos at the Gates: At Immigration, Disarray and Defeat, N.Y. TIMES, Sept. 11, 1994, at A1.

FN7. INS Takes It on the Chin at Wide-Ranging House Subcommittee Hearing, 72 INTERPRETER RELEASES 495 (1995).

FN8. Interview with Warren Leiden, Executive Dir., American Immigration Lawyers Ass'n (Jan. 5, 1996).

FN9. Interview with Frank Sharry, Nat'l Immigration Forum (Jan. 5, 1995).

FN10. Deborah Sontag, Chaos at the Gates: Porous Deportation System Gives Criminals Little to Fear, N.Y. TIMES, Sept. 13, 1994, at B9.

FN11. Bill Branigin, INS Chief Highlights Reform in Political Asylum System, WASH. POST, Jan. 5, 1996, at A2.

FN12. Deborah Sontag with Stephen Engelberg, Chaos at the Gates: An Insider's View of the INS: 'Cold, Rude and Insensitive,' N.Y. TIMES, Sept. 15, 1994, at A1.

- FN13. INS 'Enforcement Deficit' Tied to Law, WASH. POST, Feb. 2, 1995, at A3.
- FN14. Whom Shall We Welcome, Report of the President's Commission on Immigration and Naturalization 127-128 (1953).
- FN15. Brinkley, *supra* note 6, at A24; Branigin, *supra* note 1.
- FN16. Implementation of Field Office Structure Within the Immigration and Naturalization Service, 60 Fed.Reg. 57,165 (1995).
- FN17. Congress Clears Appropriations Bill Boosting Immigration Enforcement, 71 INTERPRETER RELEASES 1141 (1994); Congress Approves Funding for INS, State Department, 67 INTERPRETER RELEASES 1215 (1990).
- FN18. FY 1996 Immigration Budget Update, IMM.L.R.(2D) 63 (1995); William Branigin, Pork-Barrel Politics Clouds INS Outlook, WASH. POST, Jan. 2, 1996, at A13; Kim Cobb, Supervisor Training May Suffer in Hiring Push, INS Panel Says, HOUS.CHRON., Oct. 27, 1995, at 12A.
- FN19. *Id.*
- FN20. INS Workload Statistics FY 1994, IMM.L.R.(2D) 64 (1995).
- FN21. FY 1996 Immigration Budget Update, IMM.L.R.(2D) 63 (1995).
- FN22. H.R.2202, 102d Cong., 1st Sess., § 101 (1992).
- FN23. S.1394, 102d Cong., 1st Sess., § 101 (1991).
- FN24. H.R.2202, § 403; S.1394, §§ 111-120A. See J. Miller & S. Moore, A National ID System: Big Brother's Solution to Illegal Immigration, CATO INST. (Sept. 7, 1995); D. Sutherland, Computer Registry to Fight Illegal Immigration: Bad News for Employers and Employees, ALEXIS DE TOCQUEVILLE INST. (Apr. 1995).
- FN25. H.R.2202, §§ 121, 401, 402; S.1394, §§ 101, 102.
- FN26. S.1394, § 303.
- FN27. Interview with Warren Leiden, *supra* note 8.
- FN28. Weston Kosova, The INS Mess: How Immigration Became a Nightmare, NEW REPUBLIC, Apr. 13, 1992, at 21.
- FN29. Sontag & Engelberg, *supra* note 12, at A18.

FN30. INS Begins Project to Revise Regulations, Requests Public Comments, 72 INTERPRETER RELEASES 1572 (1995).

FN31. Robert D. Kaplan, Frontier Justice, NEW REPUBLIC, Apr. 13, 1992, at 24.

FN32. MICHAEL FIX & PAUL HILL, ENFORCING EMPLOYER SANCTIONS: CHALLENGES AND STRATEGIES 103 (1990).

FN33. *Id.* at 145.

FN34. Stephen Engelberg, Chaos at the Gates: In Immigration Labyrinth, Corruption Comes Easily, N.Y. TIMES, Sept. 12, 1994, at B10.

FN35. JUFFRAS, *supra* note 3, at 2.

FN36. Brinkley, *supra* note 6, at A24.

FN37. Bennet J. Lee, The Immigration and Naturalization Service: In Search of the Necessary Efficiency, 6 GEO.IMMIGR.L.J. 519 (1992).

FN38. The \$535 figure assumes the following: An I-140, petitioning for permanent residence for a skilled worker, \$75; I-485, petitioning for the scientist to "adjust status" from a student to a permanent resident, \$130; petitioning for his wife, \$130; petitioning for his children, \$100 apiece. If the scientist needs a temporary work permit because the INS is backlogged, he must pay an additional \$70. If he needs to travel overseas during the several months that the process takes, he must pay another \$70.

FN39. Brinkley, *supra* note 6, at A24.

FN40. Sontag & Engelberg, *supra* note 12, at A1.

FN41. *Id.* at A18.

FN42. *Id.*

FN43. Statement of Henry R. Wray, Director, Administration of Justice Issues, Making Needed Policy and Management Decisions on Immigration Issues, GENERAL ACCOUNTING OFFICE 1, 6 (Mar. 30, 1993) [hereinafter Wray Statement].

FN44. Sontag & Engelberg, *supra* note 12, at A18.

FN45. Wray Statement, *supra* note 43, at 1.

- FN46. Grover Joseph Rees, III, Advice for the New INS Commissioner, 70 INTERPRETER RELEASES 1534 (1993).
- FN47. Kaplan, *supra* note 31, at 23.
- FN48. Interview with Warren Leiden, *supra* note 8.
- FN49. Ascencio Comm'n, *supra* note 5, at 30.
- FN50. *Id.*
- FN51. Lee, *supra* note 37, at 543.
- FN52. *Id.* at 533.
- FN53. JUFFRAS, *supra* note 3, at 29.
- FN54. FIX & HILL, *supra* note 32, at 103.
- FN55. Lee, *supra* note 37, at 529.
- FN56. *Id.* at 524 n. 27.
- FN57. *Id.* at 524.
- FN58. Implementation of Field Office Structure Within the Immigration and Naturalization Service, 60 Fed.Reg. 57,165 (1995).
- FN59. Mark Lacey & Patrick J. McDonnell, INS Plans to Beef Up Ranks in California, L.A. TIMES, Feb. 9, 1996, at A1.
- FN60. U.S. Strengthening Patrols Along the Mexican Border, N.Y. TIMES, Jan. 13, 1995, at A8.
- FN61. I.N.S. to Beef Up Southwest Border ... and Will Use U.S. Military Forces, HISPANIC LINK WEEKLY REP., Jan. 22, 1996, at 2.
- FN62. Presence of Guard on Border to Expand, SAN DIEGO UNION-TRIB., Jan. 27, 1996, at B1, B4.
- FN63. Border Arrests Strain Jailers, Jail, SAN DIEGO UNION-TRIB., Jan. 28, 1996, at B3.
- FN64. *Id.*

FN65. William Claibourne, A Moving Challenge on the Border, WASH. POST, May 26, 1995, at A3.

FN66. Border Patrol Agents Await Front-Line Reinforcements, HOUST. CHRON., Feb. 18, 1996, at 18A.

FN67. It's 'Gate Opener' in East County, SAN DIEGO UNION-TRIB., Oct. 3, 1995, at B1.

FN68. Intensive U.S. Border Effort Called a Success, But Some Disagree, DALLAS MORNING NEWS, Sept. 29, 1995, at 43A.

FN69. *Id.*

FN70. *Id.*

FN71. New Agents Would Reinforce Border, EL PASO TIMES, Mar. 23, 1996.

FN72. GAO-Border Patrol, 68 INTERPRETER RELEASES 535 (1991).

FN73. Lee, *supra* note 37, at 527, n. 40.

FN74. Lacey & McDonnell, *supra* note 59, at A1.

FN75. Pub.L. No. 99-603, 100 Stat. 3359 (1986).

FN76. JUFFRAS, *supra* note 3, at 91.

FN77. Branigin, *supra* note 11, at A2.

FN78. See Sutherland, *supra* note 24; see also Miller, *supra* note 24.

FN79. Enforcement Deficit, *supra* note 13.

FN80. Lee, *supra* note 37, at 527.

FN81. Brinkley, *supra* note 6, at A24.

FN82. Sontag, *supra* note 10, at B9.

FN83. Brinkley, *supra* note 6, at A24.

FN84. *Id.*

FN85. *Id.*

FN86. Id.

FN87. Customs Service and INS: Dual Management Structure for Border Inspections Should Be Ended, GENERAL ACCOUNTING OFFICE 1 (June 1, 1993) [hereinafter GAO, Customs Service and INS].

FN88. Id. at 2.

FN89. Id. at 7.

FN90. Id. at 9.

FN91. Id. at 4-5, 8.

FN92. Id. at 9.

FN93. Interview with William Van Raab, former Dir., U.S. Customs Service (Jan. 17, 1996).

FN94. Border Management Reorganization, *supra* note 2, at 492.

FN95. Id. at 500.

FN96. GAO, Customs Service and INS, *supra* note 87, at 17-18.

FN97. Border Management Reorganization, *supra* note 2, at 496, 521.

FN98. Whom Shall We Welcome, *supra* note 14, at 134.

FN99. Id.

FN100. Commentary: Putting Immigration Reform in Context, IMM.L.R.(2D) 248 (1995).

FN101. Disarray and Defeat, *supra* note 6, at A24.

FN102. William D. Eggers & John O'Leary, REGO No Go, REASON, Apr. 1994, at 52.

FN103. Accepting the Immigration Challenge: The President's Report on Immigration, The White House, at VII (1994).

FN104. James H. Walsh, Less Than Meets the Eye at INS, SOCIAL CONTRACT, Summer 1995, at 301.

FN105. House Subcommittee Holds INS Oversight Hearing, IMMIGR.L.R.(2D) 62

(1995).

FN106. INS Takes it on the Chin at Wide-Ranging House Subcommittee Hearing, *supra* note 7, at 495.

FN107. *Id.*

FN108. Interview with Warren Leiden, *supra* note 8.

FN109. Interview with Frank Sharry, *supra* note 9.

FN110. An Insider's View, *supra* note 12, at A18.

FN111. MILTON D. MORRIS, IMMIGRATION--THE BELEAGUERED BUREAUCRACY 140 (1985).

FN112. Ascencio Comm'n, *supra* note 5, at 31.

FN113. Interview with Warren Leiden, *supra* note 8.

FN114. Ascencio Comm'n, *supra* note 5, at 31.

FN115. Whom Shall We Welcome, *supra* note 14, at 135.

FN116. Ascencio Comm'n, *supra* note 5, at 30.

FN117. Brinkley, *supra* note 6.

FN118. Ascencio Comm'n, *supra* note 5, at 2.

FN119. Border Management Reorganization, *supra* note 2, at 489, 504.

FN120. Policy-makers should take note of several alternatives to this proposal. In 1993, the General Accounting Office recommended that although there were several viable proposals for reform, it favored merging all of the INS and all of the Customs Service into a single agency. See GAO, Customs Service and INS, *supra* note 87, at 12-16. The new Border Management Agency would be responsible for all immigration and customs issues. A "former senior customs official" recently recommended an even more dramatic approach: "[T]o stop turf wars, says one former senior customs official, the branches of the agencies that police the border--customs, INS, DEA, FBI and even Agriculture--should be merged into a single department that deals exclusively with border security." Trevor Armbrister, Our Drug-Plagued Mexican Border, *READER'S DIGEST*, Jan. 1996, at 58. A final alternative is less comprehensive but perhaps more politically feasible: Merge all of INS's enforcement functions

and house it as a subdivision of the Justice Department (similar to the Executive Office for Immigration Review).

FN121. Letter from Michael Lane, Acting Commissioner of the Customs Service, to the General Accounting Office 27 (Feb. 16, 1993); Letter from Robert M. Tobias, National President of the National Treasury Employees Union, to the General Accounting Office 40-46 (Mar. 29, 1993).

FN122. *Id.* at 45.

FN123. *Id.* at 44.

FN124. Interview with William Von Raab, *supra* note 93.

FN125. Border Management Reorganization, *supra* note 2, at 499.

FN126. JOHN O'LEARY & WILLIAM EGGERS, *REVOLUTION AT THE ROOTS* 99 (1995).

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