

MEMORANDUM OF UNDERSTANDING

Between the

Immigration and Naturalization Service

Department of Justice

And the

Employment Standards Administration

Department of Labor

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I. Purpose.

The purpose of this agreement is to foster cooperation and coordination between the Immigration and Naturalization Service (INS) of the Department of Justice (DOJ) and the Employment Standards Administration (ESA) of the Department of Labor (DOL), clarify the enforcement role of each agency in areas of shared authority, ensure more efficient use of resources, reduce duplication of effort, and delineate respective responsibilities.

The agreement affects the following INS and ESA enforcement and compliance components:

INS: Investigations Division
Border Patrol Division
Employer and Labor Relations Division

ESA: Wage and Hour Division
Office of Federal Contract Compliance Programs

Where investigative and enforcement jurisdiction is shared between the signatory agencies, both shall work cooperatively and, when appropriate, undertake joint activities. The federal statutes provided for in this agreement include, but are not limited to, the following:

- Immigration and Nationality Act as amended [Title 8 of the United States Code, Section 1101 et seq., specifically 8 U.S.C. Section 1324a] (INS and ESA)
- Title 18 of the United States Code, Sections 911, 1001, 1015, 1028, 1426, and 1546 (INS)
- Migrant and Seasonal Agricultural Worker Protection Act (ESA)
- Fair Labor Standards Act (ESA)
- Davis-Bacon Act and Related Acts (ESA)
- McNamara-O'Hara Service Contracts Act (ESA)
- Walsh-Healey Public Contracts Act (ESA)
- Contract Work Hours and Safety Standards Act (ESA)
- Executive Order 11246, as amended (ESA)
- Section 503 of the Rehabilitation Act of 1973 (ESA)
- Vietnam Veterans Readjustment Assistance Act of 1974 (ESA)

II. Background.

Historically, INS and ESA have maintained excellent working relationships in areas of mutual law enforcement interest. Immigration reform legislation has significantly expanded and intensified this interaction, prompting a revision of the Memorandum of Understanding which was executed in October 1983.

INS has primary responsibility for enforcing Section 274A¹ of the Immigration and Nationality Act, the provisions commonly referred to as "employer sanctions." The Act gives DOL a role in the enforcement of the employer sanctions provisions by requiring that employers "make [the Employment Eligibility Verification Form I-9] available for inspection by officers of...the Department of Labor."

The primary responsibility of ESA is the enforcement of labor standards statutes with the goal of ensuring that all covered workers are afforded the full benefits and protections of these laws. ESA, in carrying out the intent of this MOU, will take no action which will compromise its ability to carry out its fundamental mission, regardless of the workers' immigration status. This agreement standardizes the procedures to be used in enforcement activities common to both agencies.

III. Implementation.

A. National Procedures.

Liaison

The headquarters enforcement and compliance components of INS and ESA shall maintain liaison concerning matters of mutual interest and jurisdiction, including matters set forth in this Memorandum, and shall actively seek to improve communication at all levels. Information sharing at the headquarters level of each agency will include cooperation and coordination in the development of policy, procedures, regulations, enforcement approaches, training materials, and activity reports.

In order to implement this Memorandum, INS and ESA agree to exchange, periodically update, and disseminate to all their field offices information concerning office locations and jurisdictional areas of responsibility of their respective operational field units.

¹ Section 274A, which pertains to the unlawful employment of aliens and the verification of employment eligibility of workers, was enacted on November 6, 1986, as part of the Immigration Reform and Control Act (IRCA).

ESA shall acquire sufficient quantities of the Handbook for Employers (M-274) for distribution to all employers inspected by ESA officers. INS will provide to ESA printer's proofs for reproduction of the document and information regarding suppliers.

INS Authority

INS has primary responsibility for employer sanctions enforcement, including assessing civil penalties and initiating legal proceedings under Section 274A of the Immigration and Nationality Act. In addition, INS has responsibility for promulgating employer sanctions program policy, including the circumstances in which a warning notice may be issued to employers. Because of possible resource implications, INS will consult with ESA regarding proposed changes in employer sanctions program policy and, as changes are implemented, the two agencies will modify their procedures accordingly.

ESA Authority

Under the conditions prescribed in this MOU and in accordance with policy established under the direction of the Attorney General, authority is extended so that ESA, in addition to INS, may issue warning notices to employers found in violation of the employment eligibility verification requirements of the Act. In executing this authority, INS and ESA officers will adhere to the same standards of investigation.

Warning Notice Format

ESA shall utilize the standard warning notice format developed by INS. The warning notice advises the employer of his/her obligations under the law and of specific findings of non-compliance, as well as the need for corrective action(s). This format may be modified: (1) to specify ESA's authority under Section 274A of the Immigration and Nationality Act to conduct inspections of an employer's I-9 forms and other employment records to determine compliance with the law; (2) to enumerate follow-up procedures; and (3) to name a contact point at ESA to respond to questions from employers.

Referral Procedures

ESA will be responsible for the prompt referral to INS of all suspected substantive hiring violations, i.e., violations of the provisions against knowingly hiring or continuing to employ unauthorized workers, and violations of the prohibition against indemnity bonds. INS and ESA will work jointly to develop standard criteria for these and other referrals, including specification of the level of evidence sufficient to suggest substantive violations. ESA referrals that meet these criteria will be subject to appropriate follow-up action by INS field offices.

ESA's referrals will be made on Form ESA-91, specifying the number and kinds of violations disclosed, identifying a point of contact at ESA, and including a brief narrative explanation containing

sufficient information for INS to pursue the lead. INS and ESA will work jointly to ensure the usefulness of the information contained on the ESA-91 referral forms and will revise the form and procedures as may be deemed necessary. In compliance cases and warning cases, procedures will be jointly developed whereby ESA will provide INS with either ESA-91 forms or automated listings for informational purposes only.

The revised INS Immigration Officer's Field Manual for Employer Sanctions will clearly emphasize the Form ESA-91 as a primary source of credible information for predicated employer inspections and/or investigations. INS field offices will utilize this valuable source of lead information effectively and will provide feedback to the appropriate local ESA office on the outcome of cases initiated as a result of information furnished by ESA. If INS declines to follow-up a case in which ESA has made a determination of non-compliance, INS will advise the appropriate ESA field office of the basis for that decision. INS and ESA will promote the enhanced exchange of information and interaction among their respective field offices in such a manner as to avoid any extensive reporting burden on either field staff.

Training

INS shall assist ESA in revising its Employment Eligibility Verification training, to include policy and procedures on the issuance of warning notices. This training will be developed jointly by ESA and INS to help assure that useful leads are provided and to ensure conformity with established referral and reporting procedures.

ESA shall assist INS in training INS officers to identify suspected violations of the statutes under primary jurisdiction of ESA, and as otherwise determined by both agencies to be appropriate.

Information Exchange

ESA will share with INS periodic reports of employer sanctions enforcement activities, including data on employer compliance. ESA and INS will jointly explore the feasibility of utilizing management information systems (MIS) at the headquarters level to capture detailed compliance inspection information on a regular basis.

Until its conversion to an automated system is completed, INS will provide ESA with interim summary reports of employer sanctions field activity. To the extent possible, INS shall also furnish ESA with reports on INS enforcement actions (e.g., warning notices issued, fines levied, and aliens apprehended) resulting from receipt of ESA-91's showing evidence of non-compliance.

INS and ESA shall continue to examine the possibility of mutual access to any automated information systems, where such systems

relate to the enforcement of statutes of shared jurisdictional responsibilities.

B. Field Procedures.

Liaison

Field level liaison between INS and ESA is the responsibility of the INS District Director or Chief Patrol Agent and the District Director of the appropriate ESA office. An important goal of this liaison is the free flow of information between the agencies and the effective utilization of such information. The District Director of the appropriate ESA offices shall be responsible for ensuring that information is furnished to INS in a timely manner and that it conforms to the prescribed criteria. INS District Directors and Chief Patrol Agents shall be responsible for ensuring that information received by their subordinate units from ESA is promptly reviewed, classified as to required action, and acted upon appropriately, and that timely feedback on referrals reflecting non-compliance and follow-up results is provided to their ESA counterparts.

When INS receives a request from ESA for a review of INS records or to interview an individual in INS custody, it will make every effort to comply promptly with that request to the extent permitted by law, upon presentation of proper credentials by the ESA investigator.

When ESA receives a request from INS for a review of ESA records, it will make every effort to comply promptly with that request to the extent permitted by law, upon presentation of proper credentials by the INS officer.

INS and ESA field personnel shall cooperate and coordinate in enforcement activities and other areas of mutual concern, including training, and shall conduct joint investigations where appropriate, with each agency pursuing violations within its own jurisdiction. To the extent resources permit, INS and ESA will collaborate in enforcement actions taken against employers violating laws under both of their jurisdictions, such as sweatshop operators.

ESA Inspections

In the course of all on-site visits at employers' facilities and where appropriate in technical assistance activities with employer or employee groups, ESA personnel will advise employers about their responsibilities under IRCA and distribute copies of the Handbook for Employers: Instructions for Completing Form I-9 (Employment Eligibility Verification Form) [INS publication M-274] and informational material on anti-discrimination provisions from the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). Provision of the Handbook for Employers shall be documented on any ESA-91 referral.

Investigators assigned to ESA's Wage and Hour Division (WHD) and Office of Federal Contract Compliance Programs (OFCCP) shall conduct thorough inspections of Forms I-9 in conjunction with their other labor standards enforcement efforts. At the conclusion of the records inspection and generally before the completion of the investigation, ESA investigators will advise employers of their findings, and complete Form ESA-91.

ESA Warning Notices

ESA shall issue warning notices in the same form and under the same circumstances as INS when deficiencies are detected in an employer's verification process. Exercise of this authority will adhere to established policy, and will be coordinated with INS by telephone or any other mutually agreeable local means, prior to the issuance of a warning notice, in order to ascertain whether a past or current sanctions action exists against the employer. The warning will document the nature and extent of violations disclosed by the ESA inspection of all the employer's I-9 forms.

When issuing a warning notice, ESA shall provide a form to the employer for certifying that corrective action has been taken by the employer within a specified time frame. Upon receipt, ESA will forward the employer certification of compliance, attached to a copy of the predicated warning notice, to the appropriate INS field office.

Should the employer fail to return the certification of compliance form in a timely manner, ESA will, to the extent resources permit, undertake a follow-up contact with the violating employer either by telephone or on-site visit to ascertain the reason the form has not been returned and if violations continue. In a case where non-compliance is detected after issuance of a warning notice, ESA will expeditiously convey a copy of the warning notice, a copy of the investigative report detailing what evidence was used in issuing the warning notice, and original I-9's or photocopies certified by the investigator or the District Director of the appropriate ESA office and other supporting documentation if available, to the local INS District Office for timely consideration of the issuance of a Notice of Intent to Fine. ESA and INS will arrange a method of delivery of this material that will protect the evidentiary chain of custody. The recipient INS office will promptly advise the sending ESA office of the disposition of each such case.

Referrals to INS

ESA-91 forms documenting either apparent compliance or warning notices issued by ESA, or automated listings of these contacts, will be furnished to INS field offices in accordance with procedures developed at the agencies' headquarters. In cases where substantive hiring violations are suspected, ESA will expeditiously communicate that information to INS and provide ESA-91 forms which clearly and specifically identify possible violations, along with any supporting documentation which may be available. Referrals of

other cases will be made in accordance with the criteria jointly established by INS and ESA.

Each INS field office is responsible for adhering to the policies for receiving, reviewing, classifying, filing, utilizing and providing feedback on Forms ESA-91, as agreed between the signatory agencies and prescribed in the INS Immigration Officer's Field Manual for Employer Sanctions.

To the extent resources permit, INS officers will investigate all ESA referrals that conform to the criteria agreed upon by INS and ESA. In cases evidencing substantive hiring violations, as well as in cases where ESA has made a determination of continuing non-compliance with the employment eligibility verification requirements after issuance of a warning notice, the INS field office conducting the follow-up investigation will promptly provide the ESA field office which made the referral with a report of the outcome of the case. ESA and INS will coordinate, as appropriate, to ensure the issuance of legally sufficient Notice of Intent to Fine documents and litigation support. If INS declines to follow-up a case in which ESA has made a determination of non-compliance, INS will notify the appropriate ESA field office of the reason why follow-up action was not completed on the case.

Referrals to ESA

When INS receives information during the course of its enforcement activities which indicates a possible violation of statutes within the jurisdiction of DOL, with particular emphasis on agriculture, child labor, the garment industry and industrial homework violations, the District Director of the appropriate ESA field office covering the area in which the suspected violation occurred shall be notified expeditiously by the INS. Such notification may be in the form of a telephone communication or via copies of INS records prepared in the course of its enforcement operations.

Referrals to OSC

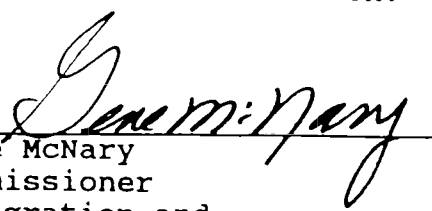
ESA and INS officers shall each be responsible for directly referring indications or allegations of discrimination violations under the Immigration and Nationality Act, Section 274B, to the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

IV. Agreement.

The provisions of this Memorandum of Understanding cancel and supersede the previous MOU and become effective on the date of signature. The provisions may be reviewed and jointly modified as appropriate when it is determined by either agency that such review and modification is in the interest of efficiently enforcing the

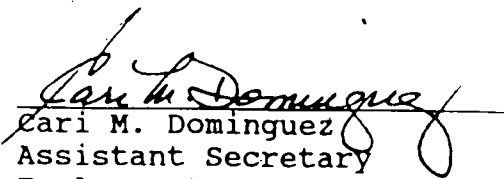
employer sanctions provisions of the Immigration and Nationality Act.

The preceding constitutes the full memorandum of understanding on this subject between the Department of Justice, Immigration and Naturalization Service, and the Department of Labor, Employment Standards Administration.


Gene McNary
Commissioner
Immigration and
Naturalization Service

Date

June 9, 1992


Carl M. Dominguez
Assistant Secretary
Employment Standards
Administration

Date

June 9, 1992



U.S. Department of Justice

Washington, D.C. 20530

APR 21 1997

Mr. Kenneth L. Schwartz
Deputy Associate Director
Transportation, Commerce, Justice
and Services Division
Office of Management and Budget
Washington, DC 20503

Dear Mr. Schwartz:

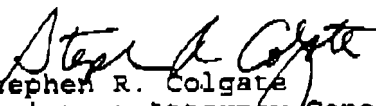
This letter transmits the Department of Justice's 5-year Federal Detention Plan for the period of 1997 through 2001, and requests clearance from the Office of Management and Budget (OMB) to transmit this report to Congress.

This report has been prepared at the direction of Congress. Both the House and Senate Appropriations subcommittees included language in their 1997 appropriations reports requesting this information.

This Federal Detention Plan is intended to provide a framework for identifying detention needs that can be reevaluated each year as requirements and circumstances change. Although the Plan projects specific increases in the number of Federal detainees through 2001, housing options are provided only through 1998, and are consistent with the President's 1998 budget request.

Also enclosed is a draft transmittal letter to Congress. Both the letter and report will be transmitted to the appropriate congressional committees upon OMB's approval. If you have any questions regarding this matter, please contact Adrian A. Curtis, Director, Budget Staff, on (202) 514-4082.

Sincerely,


Stephen R. Colgate
Assistant Attorney General
for Administration

Enclosures

Federal Detention Plan

1997 - 2001

April 1997 Update

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Executive Summary

The Department of Justice recognizes its responsibility to serve the public's interest by providing for Federal detention requirements, while at the same time expending public funds responsibly. To accomplish this, the heads of the Federal Bureau of Prisons (BOP), the U.S. Marshals Service (USMS), the Immigration and Naturalization Service (INS), and the Executive Office for Immigration Review (EOIR), along with a representative of the Executive Office of U.S. Attorneys, meet with the Office of the Deputy Attorney General and Department staff to plan and discuss detention policy issues. This update of the Federal Detention Plan is a product of this coordinated effort, and provides projections for the period of 1997 through 2001.

The Federal Detention Plan is intended to provide a framework for identifying detention needs which can be reevaluated each year as requirements change. Although the plan projects specific increases in the number of Federal detainees through fiscal year 2001, housing options are provided through fiscal year 1998 only, consistent with the President's 1998 Budget.

Population Projections

In 1996, the USMS detention population was 23,374. It is extremely difficult to accurately predict future trends in the USMS detention population due to several factors, such as multi-component investigative and prosecutorial efforts within the Department of Justice, and judicial rulings regarding detention and release periods that determine the length-of-stay in USMS custody. Given the historic erratic growth and several unpredictable variables, two models were used to provide a range that the USMS detention population is expected to fall within. The models yield an estimated average daily population of 31,200 to 43,500 in 2001, or a 33 to 86 percent increase over the 1996 population.

INS developed its projected detention needs based on the anticipated impacts of newly enacted detention requirements, the removals process, and INS' modified current staffing levels. This plan represents the bed spaces INS' Detention and Deportation program believes it would need to detain aliens apprehended or turned over to INS, and projects that its average daily population will increase from 8,592 in 1996 to 23,863 in 2001, an increase of 178 percent.

Housing Options

The Federal Detention Plan identifies the existing jail space for USMS and INS, and outlines factors that affect housing solutions. Specific plans as to how inmates are expected to be housed, beyond 1998, will be provided annually in the President's budget requests to Congress. Detention bedspace for Federal detainees is acquired at the least expensive cost to the Federal Government, through one of the four following ways: 1) Intergovernmental Service Agreements (IGAs); 2) the Cooperative Agreement Program (CAP); 3) Private-Sector Contracts; and 4) Federal Construction.

It is the Department's policy to acquire bedspace first by means of IGAs, then CAP, and private-sector contracts. As a last resort, Federal construction is used to meet Federal detention needs, because it is the most expensive method. Currently, BOP houses approximately 8,800 detainees in eight Federal Detention Centers and 20 detention units at other BOP facilities. BOP also detains for the INS approximately 1,000 Mariel Cubans and 800 other detainees in its facilities, as well as 500 detainees in its contract in Eloy, Arizona. Major BOP construction projects underway will add an additional 4,010 detention beds over the next couple years. In addition, INS currently operates nine Service Processing Centers, which housed approximately 2,700 detainees at the end of 1996. INS plans to add up to 2,600 new beds by 2001 (including 150 beds for the USMS).

The USMS determines the most crucial Federal detention bedspace needs by using both the current detention status and prisoner population projections for the Federal court cities. To develop the 1997-2001 Federal Detention Plan, the USMS conducted a survey of the adequacy of jail space in each of the 280 Federal court cities in the 94 judicial districts. Based on current survey results and subsequent verification with the districts, the USMS determined that adequate detention space will be available in the majority of the judicial districts and Federal court cities. However, 67 court cities identified as emergency or serious do not have existing solutions. Funds provided in 1997 and requested in the 1998 President's request will enable USMS to negotiate CAP agreements to combat problems in many of those cities. Problems in the 38 remaining court cities or districts are expected to be addressed through a mix of housing options, which will be outlined in annual budget requests.

The INS' policy on mix of detention space is to maintain a balance between federally-owned and federally-controlled beds and the use of rented jail space. Currently, about 54 percent of the beds are controlled by the Federal Government through ownership or direct contract. By fiscal year 1999, INS will have increased its federally-controlled space by 2,450 beds. The overall increased need for bedspace, however, will also necessitate a large increase in the use of local jails. Above the projected detention space available to INS through 2001, including on-going construction projects, an additional 8,459 beds will be required by 2001. INS will provide specific housing options in annual budget requests to address these needs.

As previously stated, USMS anticipates an average daily population of between 31,200 and 43,500 in 2001. USMS has identified the following locations as its highest priority detention areas: Tucson/Phoenix, Arizona; San Diego, California; and the Washington, DC metropolitan area. INS projects an average daily population of 23,863 in 2001, for an increase of approximately 8,800 above the average daily population in the President's 1998 Budget. INS reports that needs will exist throughout the country, with considerable needs existing in Del Rio, Texas and San Diego, California.

Improving the Projections

This update of the Federal Detention Plan includes a strategy for improving the accuracy of future detention population projections. To this end, the USMS has hired a contractor to develop a more sensitive model that will draw on a much wider range of variables than the USMS has been able to use in developing its own population projections. Once the projections have been finalized, these projections will be used to update the Federal Detention Plan.

In addition, the Department is working with the USMS to develop a Justice Detainee Information System that will provide both critical operational information to the districts, and centralized data to USMS headquarters for planning and oversight purposes. The Department believes that development of this system will greatly improve not only the development of more accurate detention projections, but also the overall efficiency of the USMS prisoner movement program.

The INS has recently released a new estimate of the resident illegal immigration population. Also, INS relies on several other sources to make estimates of the numbers of aliens who potentially require apprehension, detention, and removal. The expansion of county jail programs, the continued operation of the Institutional Hearing Program, and improvements to the Deportable Alien Control System should also make it possible for INS to capture more and better information about the aliens it interviews in institutional settings, which will help refine its estimates.

In addition, INS has been receiving information from applicants for reimbursement under the State Criminal Alien Assistance Program (SCAAP). The SCAAP application and verification process provides the agency with a range of information on undocumented aliens incarcerated in State and local correctional facilities. However, it does not provide information on the total incarcerated foreign born population or on those released on probation or parole. During 1997, the Department will be requesting information from applicants on a larger population of inmates than in prior years, and also anticipates receiving information from a larger number of county and local jails. This information will improve INS' knowledge about the number and kind of aliens incarcerated in these facilities.

Conclusion

The Department of Justice and the agencies involved in Federal detention are working together to address Federal detention requirements and more accurately predict future detention needs. This update to the Federal Detention Plan describes the current Federal detention situation, provides the framework for the Department's coordinated effort, and is structured to facilitate annual updates.

Federal Detention Plan

1997 - 2001

Introduction

Objective

This report has been prepared at the direction of Congress.¹ It is intended to provide a framework for identifying detention needs and is structured to facilitate annual updates. Although the plan projects specific increases in the number of Federal detainees through fiscal year 2001, housing options (contract, State, local, or Federal facilities) are provided through fiscal year 1998 only, consistent with the President's 1998 Budget.

The plan is divided into three sections, with each section covering a specific area of concern to the Congress:

- I. Population Projections
- II. Housing Options
- III. Improving the Projections

Agencies Involved In Federal Detention

U.S. Marshals Service

The U.S. Marshals Service (USMS) is responsible for maintaining the custody of all Federal detainees in the Federal judicial system, from the point at which a prisoner is initially brought into Federal custody, through the entire trial process, and ending when a prisoner is acquitted or arrives at a designated Bureau of Prisons facility to serve sentence. To meet its responsibilities, the USMS must acquire detention space within a reasonable commuting distance to the Federal courts. "Reasonable commuting distance" is defined as a one-hour, one-way trip, from a jail to the Federal court city. The USMS uses a mix of Intergovernmental Agreements, Cooperative Agreements, private-sector contracts, and Federal detention facilities.

¹ The Senate Appropriations Committee Report accompanying the 1997 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Bill, page 18, directed the Department to update the Federal Detention Plan. Similarly, the House Report, page 17, directed a review of jail space availability.

Immigration and Naturalization Service

The Detention and Deportation (D&D) program within the Immigration and Naturalization Service (INS) plans, manages, and directs the supervision, detention, and removal of criminal and other aliens found to be unlawfully present in the United States or inadmissible to the United States. The D&D program is responsible for acquiring and providing detention space to house criminal and other aliens subject to immigration proceedings.

INS houses a mix of aliens, a large portion of whom possess a criminal background, in INS-owned Service Processing Centers (SPCs), contract detention facilities, local jails, and joint INS/BOP detention facilities. INS currently operates nine SPCs, oversees six contract detention facilities, and will soon operate a joint INS/USMS criminal detention facility in Buffalo, New York. In addition, the joint BOP Federal detention facility in Oakdale, Louisiana is used to centralize criminal aliens, other than Cubans, to expedite their immigration hearings and eventual removal from the United States. The joint INS/BOP contract detention facility at Eloy, Arizona, is also used to centralize criminal aliens. INS uses about 700 different local jails to detain criminal and other aliens who are subject to immigration proceedings.

Currently, approximately 60 percent of aliens who are detained and processed by INS are non-criminals; however, on any given day, approximately 60 percent of beds used by INS are occupied by criminals because of their longer length-of-stay in INS custody. The recently enacted Illegal Immigration Reform and Immigrant Responsibility Act will increase the number of criminals who are detained.

Bureau of Prisons

The Bureau of Prisons (BOP's) primary mission is to carry out the judgments of the Federal courts for Federal offenders sentenced to imprisonment. Additionally, BOP houses approximately 8,800 detainees in eight Federal Detention Centers and 20 detention units at other BOP facilities. In addition to housing non-Cuban aliens in the facilities at Oakdale and Eloy, BOP detains approximately 1,000 Mariel Cubans for the INS.

Effective May 1, 1994, the Attorney General transferred the Mariel Cuban-related activities associated with section 501 C of the Refugee Education Assistance Act of 1980 to the BOP from the Community Relations Service. As part of this activity, BOP provides inpatient mental health care to seriously mentally-ill Mariel Cubans and conducts regular mental health evaluations of Mariel Cubans in INS custody. In addition, BOP administers halfway house and sponsorship programs for Mariel Cubans who are released from detention. These halfway house and sponsorship programs served 217 Mariel Cubans in fiscal year 1996.

Executive Office for Immigration Review

The Executive Office for Immigration Review (EOIR) is the Department of Justice component responsible for conducting hearings, presided over initially by immigration judges, and subject to appellate review by the Board of Immigration Appeals. The EOIR caseload involves detained, non-detained and incarcerated aliens charged by the INS as being deportable or excludable from the United States.

Pending Studies

In addition to an update of the Federal Detention Plan, Congress² directed the Department to conduct a study on the feasibility of consolidating the Department's detention responsibilities, and to recommend interim steps to reduce overall detention costs while streamlining operations. The feasibility study is not expected to alter projections included in this plan.

² The Senate Appropriations Committee Report accompanying the 1997 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Bill, page 9, directed the Department of Justice to undertake a comprehensive review of Federal detention and incarceration.

I. Population Projections

*"The Department's Federal detention plan for 1993-97 warned of a Federal detention crisis.... The Committee looks forward to the timely update this year of that report in order to adequately plan for future needs in this area."*³

USMS Population Projections

It is extremely difficult to accurately predict future trends in the USMS detention population, as indicated by the erratic growth outlined in the following chart.

Historical Growth in USMS Population		
Fiscal Year	Average Daily Prisoner Population	Growth in Average Daily Population
1983	5,045	11%
1984	5,383	7%
1985	6,428	19%
1986	7,329	14%
1987	7,262	-1%
1988	8,857	22%
1989	11,740	33%
1990	13,390	14%
1991	16,233	21%
1992	19,474	20%
1993	19,641	1%
1994	19,297	-2%
1995	20,652	7%
1996	23,374	13%

Several factors influence USMS detention populations, including multi-component investigative and prosecutorial efforts within the Department of Justice. For example, the population is affected by distinct U.S. Attorneys' prosecutorial policies throughout the 94 Federal judicial

³ From the Senate Appropriations Committee Report accompanying the 1997 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Bill, page 18.

districts. Prisoner intake levels are determined by Federal arresting and prosecuting authorities. In addition, judicial rulings regarding detention and release periods and legislative initiatives determine or affect the length-of-stay in USMS custody.

Given the erratic growth and several unpredictable variables, two models were used to provide a range that the USMS detention population is expected to fall within. The Department recognizes that neither method is ideal and the USMS has initiated methods to improve the projections (see Section III). However, alternative manipulations of historical growth is the best method available.

The low estimate (Model 1) is a numbers-based model that uses the absolute growth by district over the past ten years to predict future growth for that particular district. For example, if a district grew by an average of 10 inmates per year during the past 10 years, it would be expected to grow by that same average number each year through 2001. Model 1 yields an estimated average daily population of 31,200 in 2001. (See Attachment 1.)

The higher estimate (Model 2) is a percentage-based model that applies the aggregate nationwide percentage growth, which was approximately 13 percent between 1983 and 1996, to each district (and pro-rated to court cities). Model 2 yields an estimated average daily population of 43,500 in 2001. (See Attachment 2.)

Populations are expected to fall within the following ranges:

USMS Population Estimates	
Fiscal Year	Average Daily Population
1996 (actual)	23,374
1997	24,800 - 26,500
1998	26,400 - 30,000
1999	28,000 - 34,000
2000	29,600 - 38,500
2001	31,200 - 43,500

Note: These numbers vary from Attachments 1 and 2 due to rounding.

⁴ Model 2 can be distributed to court cities because it is based on an even distribution of the nationwide average. Conversely, absolute growth used in Model 1, is available only by district for the past 10 years.

INS Population Projections

For the purposes of this plan, INS developed its projected detention needs based on the anticipated impacts of newly enacted detention requirements, the removals process, and INS' modified current staffing levels.¹ This plan represents the bed spaces INS' Detention and Deportation program believes it would need to detain aliens apprehended or turned over to INS. Many variables were considered in making these estimates, and are discussed below.

This plan does not represent a comprehensive response to the larger issue of apprehending, detaining, and removing the estimated 5 million illegal aliens INS believes are present in the United States. These 5 million illegal aliens include those aliens specifically known to INS, such as those in the criminal justice system, no-shows at INS proceedings, or those who have final orders of deportation, as well as those who are not individually known to INS (see Attachment 3). It is important to note that many correctional agencies record and report the number of foreign-born criminals in their systems. However, just because a person is foreign-born does not mean that person is an alien subject to immigration proceedings.

In addition to detention considerations, a comprehensive approach to dealing with the estimated 5 million illegal aliens would also require significant increases for INS' various apprehending entities (Border Patrol, Investigations, Inspections, and Detention and Deportation), as well as necessary support functions like attorneys and EOIR.

As detailed in Attachment 4 and summarized in the following chart, based on anticipated staffing levels, INS projects that its average daily population will increase from 8,592 in 1996 to 23,863 in 2001.

INS Population Estimates	
Fiscal Year	Average Daily Population
1996 (actual)	8,592
1997	12,050
1998	15,050
1999	20,124
2000	23,376
2001	23,863

¹ For this report, INS assumed that its agent and officer staffing responsible for apprehending aliens would remain stable, except for Border Patrol agents, for whom an annual growth of 500 is projected.

In 1998, INS projects it will apprehend over 1.5 million aliens. Most of the aliens INS apprehends will be non-criminal Mexican aliens caught by Border Patrol along the Southwest border, and most of these non-criminal Mexicans will be processed and returned to Mexico without requiring long-term detention. Of the 1.5 million apprehensions, INS projects that it will detain 172,000 in 1998. (See Attachment 4.)

The Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), both passed in 1996, made many changes to the detention and removal process and requirements. The precise impacts that will result from these legislative changes on INS' detention needs is not certain.

Although this plan does not bring INS into immediate compliance with either of the new acts, it does reflect a realignment of INS' detention priorities in this direction. Beginning in 1997 and continuing through 2001, INS plans to detain a greater percentage of its apprehensions, so that by 2001, INS will detain 98 percent of the criminal aliens it apprehends and 95 percent of the non-criminal other-than-Mexicans apprehended. (See Attachment 4.)

While the overall impact of the new acts are uncertain, IIRIRA contains the following provisions, which have been factored into the population projections.

Expedited exclusion

Previously, immigration judges conducted the vast majority of exclusion proceedings. Under IIRIRA, however, immigration officers are empowered to exclude any alien who is inadmissible because of fraud or improper documents, except aliens who may be lawful permanent residents or who indicate a fear of persecution if denied admission into the United States. The law and implementing regulations provide for timely review of either of these claims.

Since expedited exclusion streamlines the removal process, this provision is expected to decrease the length-of-stay for non-criminal aliens, thereby making room to detain more aliens across-the-board.

Reduction of mandatory time period between service of notice to appear and first hearing

The IIRIRA decreases the statutory time period, from 14 to 10 days, given to aliens to prepare their cases. However, the time limit now applies to all removal cases conducted by an immigration judge, including exclusion cases, except for expedited exclusion cases mentioned above, since hearings will not be conducted.

Mandatory detention, transition and post-transition periods

IIRIRA requires mandatory detention during removal proceedings for most inadmissible and deportable criminal/subversive aliens. However, under the Transition Period Custody Rules (TPCR) within IIRIRA, a transition period is allowed wherein INS has the discretion to release certain criminal aliens during removal proceedings who are not a threat to the community and are not likely to abscond. The transition period becomes effective upon notification to Congress that INS cannot comply with the mandatory detention provisions. The INS Commissioner has notified Congress that INS cannot comply, which has triggered the TPCR until October 10, 1997. By law, the Commissioner may notify Congress that TPCR should be extended through October 10, 1998.

Therefore, the mandatory detention provisions will go into effect on either October 11, 1997 or 1998. After that, criminals/subversives must be detained during removal proceedings and will be authorized release only as a part of the witness security program.

To meet the requirement of mandatory detention, the population projections show a gradual increase in detention levels for criminals who are apprehended -- growing to 98 percent by 2001. This provision will also increase the length-of-stay for criminal aliens since they will be detained throughout removal proceedings.

Mandatory detention, post order

The law provides that all aliens subject to an administratively final order must be detained until they are removed. However, if 90 days have passed since the order and removal has not occurred, INS has the discretion to release aliens who are not a threat to the community and are not likely to abscond.

Since this provision affects all aliens, some non-criminal aliens who would not have been detained in the past will be detained. Similarly, some unremovable aliens, who would not have been detained in the past, will be detained during the removal proceedings. A portion of these unremovable aliens will not be released because they will be unable to demonstrate they are not a threat to the community or are likely to report for removal.

Overall, the provision will increase the percentage of aliens detained and will increase the length-of-stay for many non-criminal aliens who may not previously have been detained during the removal process.

Reinstated orders

Under IIRIRA, previously-removed aliens will not get a new hearing before an immigration judge. Once identity and prior removal or departure has been established, INS will reinstate the previous order and the alien will be removed. This provision is expected to decrease the length-of-stay.

Period of time between Final Administrative Deportation Order (FADO) and removal

Aggravated felons who are not permanent residents are subject to an order of deportation by INS and are not entitled to a hearing before an immigration judge. Changes made by the AEDPA and retained by the IIRIRA reduce the period of time between the issuance of a FADO and execution of the order from 30 to 14 days. This will minimally impact INS detention because most of the cases are encountered in correctional institutions.

However, INS population estimates include a slight decrease in length-of-stay for instances in which INS will have custody of aliens who are aggravated felons.

Factors in the INS Projections

Developing Outyear Projections

Along with the impact of legislation, key factors in developing outyear detention projections include apprehension levels (based on resources available to apprehend), length-of-stay in INS custody; availability of detention beds; and resources to acquire detention space.

Apprehension Levels

INS' outyear population projections are based on apprehension projections from the Border Patrol, Investigations, and Inspections Programs, which are the apprehending entities of the Service. Except for Border Patrol, apprehension projections are based on approved staffing levels through the fiscal year 1998 President's budget. The plan does not assume that additional resources will be provided to address the entire universe of illegal aliens, as described above.

Since Border Patrol has consistently received additional staff, the projections assume an increase of approximately 500 additional staff per year. While additional staff are not assumed for the Inspections program, the level of apprehensions within this program is expected to increase substantially due to the expedited removal provisions of the IIRIRA (aliens identified at inspection checkpoints will be apprehended rather than returned as often occurs now). Of course, if additional staff are provided, then apprehensions would be expected to increase with a resulting increase in detention needs.

Length-of-stay

To effectively calculate the estimated length-of-stay for each major group of aliens, apprehension projections were separated into four groups: Mexican criminals, Mexican non-criminals, Other-than-Mexican (OTM) criminals, and OTM non-criminals.

INS obtained the 1996 average length-of-stay, by group, from the Deportable Alien Control System (DACS). INS used that length-of-stay to estimate the number of beds that would be required to detain a certain percentage of each group. For 1997 and beyond, INS factored in the expected effects of IIRIRA on average lengths-of-stay by group.

Outyear projections for the percentage detained were affected by anticipated resource levels (based on the fiscal year 1997 appropriation and the President's 1998 budget request), and the requirements of IIRIRA. For example, in the case of Mexican non-criminals, the percentage detained reflects the estimated number of individuals that could reasonably be detained given anticipated resource levels, as opposed to the over 1,000,000 apprehensions that take place along the border, the overwhelming majority of whom will be returned to Mexico the same day.

Length-of-stay is also affected by factors beyond INS' control, such as policies and activities of the EOIR and foreign governments. The time it takes a case to go through the hearing and appeal process will affect the length-of-stay. Also, difficulty in obtaining travel documents for some nationalities has been factored into the projections. Nationals of countries such as Cuba (non-Mariels), Vietnam, Laos, and Cambodia, who are criminals requiring mandatory detention, are becoming an increasing presence in INS detention without INS having the ability to remove them because of the inability to obtain travel documents. While provisions of the IIRIRA address these issues, the extent of positive results cannot be predicted at this time.

IIRIRA is expected to improve INS' ability to remove aliens, and the overall effect is that it decreases average lengths-of-stay in all categories except OTM criminals who will be kept longer due to the mandatory detention provisions.

Attachment 4 provides projections by group and includes an explanation of IIRIRA's impact on projected lengths-of-stay by group.

II. Housing Options

"The Committee directs the U.S. Marshals Service to undertake a review of jail space availability to determine the adequacy of current jail space for Federal pre-sentenced prisoners and provide recommendations to the House Committee on Appropriations by March 31, 1997, to address current shortfalls and any future requirements."⁶

This report identifies the existing jail space for USMS and INS, and it outlines factors that affect housing solutions. Specific plans as to how inmates are expected to be housed, beyond 1998, will be provided annually in the President's budget requests to Congress.

Existing Detention Situation

Local detention bedspace for Federal detainees is acquired at the least expensive cost to the Federal Government, through one of the following four ways: 1) Intergovernmental Service Agreements; 2) Cooperative Agreement Program; 3) Private-Sector Contracts; and 4) Federal Construction.

- **Intergovernmental Service Agreements (IGAs) -- USMS & INS**

These contracts with State and local governments set per diem rates but contain no bedspace guarantees. This is the most desirable and cost-effective means of acquiring jail space, since these beds are already constructed and do not require up-front capital expenditures. Without bedspace guarantees, these agreements allow the Federal Government the flexibility to use only the beds needed, which is particularly important when dealing with fluctuating bedspace needs. Conversely, these agreements can be canceled by the host jail at any time as local needs for additional bedspace arise.

Currently, the USMS has approximately 1,200 IGAs with State and local governments, to house approximately two-thirds of its population. INS uses about 700 different local jails, to house less than one-half of its population. USMS and INS enter into IGAs together, where appropriate.

- **Cooperative Agreement Program (CAP) -- USMS & INS**

The USMS uses CAP agreements to provide capital investment funding to selected State and local governments to renovate, construct, and equip detention facilities in return for long-term, guaranteed jail space for Federal prisoners in or near Federal court cities. CAP funding is provided in areas of the country where adequate IGA bedspace is not available. Each CAP project is unique and provides partial funding to the State or local government

⁶ From the House Appropriations Committee Report for the 1997 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Bill, page 17.

to enable them to go forward with adding new jail capacity, renovating existing jail space, or upgrading existing facilities to establish acceptable conditions of confinement and detention services in accordance with Federal, State, and local detention standards.

CAP agreements help the USMS, and also provide an economic stimulus to the local economies, both through the initial capital investment, and continuing through the per diem payments when USMS prisoners are actually housed in these jails. Finally, the CAP program avoids the most expensive bedspace acquisition option, which is to construct Federal jail beds. Under the recently enacted IIRIRA, INS now has CAP authority. The success and cost effectiveness of the CAP program was substantiated in the General Accounting Office's September 1992 audit of the Federal Detention Plan. Over the years, USMS has negotiated numerous CAP agreements. Attachment 5 identifies recently-negotiated agreements that will alleviate detention problems in the respective court cities once the projects are completed.

- Private Sector Detention Facilities -- USMS & INS

Contracts with private jail facilities set per diem rates for a specified number of beds and time period. Private sector detention facilities are a fairly recent phenomenon and are a new industry for unsentenced prisoners. Claims stating significant cost savings have not been validated, and several legal and philosophical issues related to the privatization of prisons remain unresolved. For these reasons, it is recommended that a cautious and analytical approach be taken in this area in order to ensure public safety and maximize cost-effectiveness. However, as detention needs increase, both USMS and INS will continue to pursue sensible arrangements with the private sector.

Currently, USMS contracts with private companies operating jails in Leavenworth, Kansas and Mason, Tennessee. In addition to the joint INS/BOP facility in Eloy, Arizona, which is operated by a private contractor, INS uses six contract facilities, which are identified in the chart on page 17.

- Federal Construction: BOP -- Federal Detention Centers (FDCs); Metropolitan Detention Centers (MDCs); Metropolitan Correctional Centers (MCCs). INS -- Service Processing Centers (SPCs).

USMS relies on BOP to construct Federal detention facilities as a last resort in those locations, usually large metropolitan areas, where it has become impossible to acquire adequate State or local jail space for USMS prisoners through IGAs or CAP. Depending on the detention need and location, the BOP can construct a stand-alone facility dedicated to housing Federal detainees (FDCs, MDCs, or MCCs--varies by location and design), or a less expensive detention unit at an existing BOP institution.

Currently, BOP houses approximately 8,800 detainees (primarily for the USMS) in eight Federal Detention Centers and 20 detention units at other BOP facilities. BOP also detains approximately 1,000 Mariel Cubans for the INS. Major BOP construction projects underway will add an additional 4,010 detention beds.

INS currently operates nine SPCs (see page 17), which housed approximately 2,700 detainees at the end of 1996. INS plans to add up to 2,600 new beds by 2001 (including 150 beds for the USMS). Except for El Paso, Texas, the addition of these beds will require future construction and operations funding.

The following charts identify major BOP and INS projects that are underway, scheduled activation dates (fiscal year), and locations supported.

Major BOP Detention Projects Underway						
Location	BOP ⁷ Beds	USMS Beds	INS Beds	Total Beds	Activation Date	District/Court Cities Supported
Brooklyn, NY ⁸	126	1,103	—	1,229	1998	Eastern New York ⁹
Seattle, WA ¹⁰	126	425	126	677	1997	Seattle/Tacoma/JPATS mini-hub ¹¹
Houston, TX ¹²	126	418	126	670	1999	Houston
Honolulu, HI ¹²	150	420	100	670	2000	Honolulu
Philadelphia, PA ¹⁰	126	593	38	757	1999	Phil., Delaware; New Jersey
Total	654	2,959	390	4,003	—	

⁷ Beds listed for BOP are occupied by a work cadre of sentenced inmates who are housed at the detention facility to perform routine work assignments.

⁸ The first priority is pretrial detention and, if available, INS may have access to 300 beds at this facility or the interim facility.

⁹ The Brooklyn, New York facility will free beds in MCC Manhattan for New York City detainees and will relieve crowding in White Plains jails.

¹⁰ The first priority is pretrial detention and, if available, INS may have up to 126 beds at these facilities.

¹¹ Of the USMS projected beds, approximately 100 will be available for Seattle to serve as a mini-hub for the Justice Prisoner and Alien Transportation System (JPATS).

¹² The Department plans to build a 670-bed facility to accommodate anticipated growth, instead of the previous plan to build up to 500 beds.

Major USMS Detention Projects Underway					
Location	USMS Beds	INS Beds	Total Beds	Activation Date	Comments
Buffalo, NY	150	100	450	1998	
Krome, FL	...	600	600	1998	Phased-in Expansion
El Paso, TX	...	400	400	1997	Expansion
Port Isabel, TX	...	650	650	1998	Expansion
San Francisco, CA	...	500	500	2001	
Total:	150	2,450	2,600	...	

USMS Beds Required

The most crucial Federal detention bedspace needs are determined using both the current detention status (listed below) and prisoner population projections for the Federal court cities. To develop the 1997-2001 Federal Detention Plan, the USMS conducted the most detailed survey of the field it has undertaken in almost a decade to determine the adequacy of jail space in each of the 280 Federal court cities in the 94 judicial districts. Districts were asked to state whether their current detention situation falls into the "Emergency, Serious, or No Problem" category.

1. **Emergency:** All bedspace within the district is exhausted or terminated. Prisoners must be housed in other districts, which increases security concerns and costs, and adversely impacts court productions. The Justice Prisoner and Alien Transportation System (JPATS) land or air support may be required.
2. **Serious:** The district must make multiple prisoner production runs (to various jails within or outside the district) to house prisoners. Reasonable commuting distances (one-hour, one-way) are exceeded, resulting in excess transportation costs, safety concerns, and increased overtime payments.
3. **No Problem:** All required bedspace can be obtained within a one-hour, one-way commuting distance.

Each district that reported an "Emergency" or "Serious" classification was required to provide a wide variety of information justifying that classification. The information included:

- Existing jailspace (jails currently being used by the district, type and number of beds in each);
- Driving time (one-way driving time and description of the hardship);
- Unused jailspace (unused jails in the district, reasons for not using them, estimate of the number of beds that could be available to the USMS from the unused jails);
- Planned construction (planned construction of local jail space (State, local, or private) in the next five years in each district; the closest Federal court city to that projected construction; anticipated year of completion; etc.);
- Proximity to airport (specific information on available detention bedspace in blocks of 100 beds or more located near an airport.) Note: This information can be used by the USMS in the event it becomes necessary to "shuttle" detainees from one area of the country with a serious detention shortage to another area with a detention surplus.

Based on current survey results and subsequent verification with the districts, the USMS determined that adequate detention space would be available in the majority of the judicial districts and Federal court cities. However, 67 court cities identified as emergency or serious do not have existing solutions.¹³ Funds provided in 1997 and requested in the 1998 President's request will enable the USMS to negotiate CAP agreements to combat problems in many of those cities (See Attachment 6). Problems in the remaining court cities (also identified in Attachment 6) are expected to be addressed through a mix of housing options, which will be outlined in annual budget requests.

INS Beds Required

The INS' policy on mix of detention space is to maintain a balance between federally-owned and federally-controlled beds and the use of rented jail space. Currently, about 54 percent of the beds are controlled by the Federal Government through ownership or direct contract. By fiscal year 1999, INS will have increased its federally-controlled space by 2,450 beds. The overall increased need for bedspace, however, will also necessitate a large increase in the use of local jails.

¹³ The survey identified a total of 85 court cities (approximately 30%) with a status of emergency or serious. However, 18 of those cities are being addressed through Federal construction or negotiated CAP agreements. See Attachment 5 which lists 9 Federal court cities that have recently negotiated CAP projects with USMS to address crucial Federal bedspace needs.

INS has been most vulnerable in conditions of confinement lawsuits and complaints when local jail space has been used. If local beds are relied on more extensively, INS may need to execute IGAs for facilities with large numbers of beds available. The INS will have to place its staff on site, arrange for EOIR deployment, and will probably have to provide minimum usage guarantees.

Increased reliance on local jail space carries an additional risk because of unpredictable availability. At times, there appears to be an abundance of local jail space, but for political, economic, or other reasons the source of beds can be reduced very quickly. In addition, the USMS needs access to some of the existing local jail space.

The following chart shows the projected detention space available to INS through 2001, including on-going construction projects. Specific housing options (for the line identified as "bedspace to be located") will be provided in annual budget requests. However, INS expects to continue its effort to balance the mix of its space.

Immigration and Naturalization Service Projected Detention Space Availability						
Facility Type	Fiscal Year Facilities will be On-line					
	FY 1996*	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001
SPC's						
Aguadilla	65	65	65	65	65	65
Boston	50	50	50	50	50	50
Buffalo	...	...	300	300	300	300
El Centro	540	540	540	540	540	540
El Paso	350	750	750	750	750	750
Florence	472	472	472	472	472	472
Krome	210	510	810	810	810	810
Port Isabel	350	350	550	550	800	1,000
San Francisco**	...	...	...	...	...	500
San Pedro	450	450	450	450	450	450
Varick St.	224	224	224	224	224	224
Subtotal	2,711	3,411	4,211	4,211	4,461	5,161
Contract Facilities						
Denver	300	300	300	300	300	300
Elizabeth	...	300	300	300	300	300
Houston	160	320	420	420	420	420
Laredo	185	185	300	300	300	300
Queens	...	200	200	200	200	200
Seattle	150	150	150	150	150	150
Subtotal	795	1,455	1,670	1,670	1,670	1,670
Juveniles						
ERO Juveniles	28	28	28	28	28	28
CRO Juveniles	120	120	120	120	120	120
WRO Juveniles	48	72	72	72	72	72
1998 Increase	...	...	14	40	40	40
Subtotal	196	220	234	260	260	260
INS/BOP						
Oakdale II (Joint)	630	630	630	630	630	630
Eloy (Joint)***	500	750	750	1,000	1,000	1,000
Hawaii (BOP)	...	...	...	...	100	100
Philadelphia (BOP)	...	...	...	38	38	38
Seattle (BOP)****	...	126	126	126	126	126
Houston (BOP)****	...	...	...	126	126	126
Guaynabo (BOP)*****	...	100	100	100	100	100
Subtotal	1,130	1,606	1,606	2,026	2,120	2,120
State/Local*****						
San Diego (IGA)	3,760	5,358	5,793	5,793	5,793	5,793
Subtotal	3,760	5,358	6,193	6,193	6,193	6,193
Bedspace to be Located*****						
	...	...	1,136	5,770	8,672	8,459
Grand Total	8,592	12,050	15,030	20,124	23,376	23,863

- * In FY 1996, the overall average daily bed space usage was 8,592. However, at the end of FY 1996, 8,989 beds were being used.
- ** In FY 1999, INS will be requesting funds to support the already proposed San Francisco SPC.
- *** Current contract expires in 1999. This plan reflects INS' desire to increase these beds to 1,000 in the future contract. If INS' share of beds under the future contract is less than 1,000, more beds would be needed elsewhere.
- **** Up to 126 beds may be available; however, pre-trial detention has the first priority.
- ***** Up to 100 beds may be available; however, pre-trial detention has the first priority.
- ***** State/Local numbers are estimates, usage will be based on funding availability.
- ***** Beds will consist of SPC's, contract facilities, joint federal facilities and state/local. The numbers include 1,136 beds per year (1998-2001) that are expected to be funded from the Immigration Detention Account, which receives revenues based on applications for adjustments of status. Consequently, that number could change depending upon the number of applications.

Addressing Outyear Needs

Approach

To meet future needs, the Department will continue to follow a policy of increasing capacity through a cost-effective process using the following detention objectives:

(1) Use IGAs to obtain additional State and local beds

- USMS and INS needs that can be met through IGAs will require per diem funds to pay State/local host jails. In 1998, the average per diem cost¹⁴ for USMS is estimated at \$60.92, while INS' average per diem cost is estimated at \$58.46. Costs will vary considerably according to location and local demand for beds.

(2) Aggressively pursue CAP agreements throughout the country

- The average per bed capital investment cost for CAP projects is estimated at \$35,000 between 1999 and 2001. In addition to capital expenses, per diem costs, similar to that of IGAs, will be required.

(3) Where appropriate, the Department will look to the private sector to finance, construct, and operate private jail space to be acquired on a contractual basis.

- USMS and INS needs that can be met through private-sector contracts will require per diem funds, which often include a premium above State/local rates for the contractor to recover capital expenses.

(4) Expand Federal detention capacity for USMS & INS

- As a last resort, Federal construction will be used to meet Federal detention needs. Construction costs vary by location and design. However, the average cost to construct an MDC is estimated at \$113,000 per bed (based on projects in Brooklyn, New York; Seattle, Washington; Houston, Texas; and Philadelphia, PA). The average cost to construct an SPC is estimated at \$55,000 (based on Buffalo, New York).

¹⁴ USMS' per diem assumes 5 percent inflation above 1996 actual rates, which coincides with the President's 1998 Budget Request. All other per diem costs are estimated at 3.1 percent above 1996 actual rates.

- In addition to construction costs, the average annual per diem¹⁵ cost for each detainee in an MDC is estimated at \$65.19 in 1998. Average per diem costs for SPCs are estimated at \$70.15 per detainee. Actual costs to operate facilities proposed in the future will depend on the design and the year activated.

OMB Circular A-87

The U.S. Marshals Service (USMS) has approximately 1,200 intergovernmental agreements (IGAs) with state and local governments to house USMS detainees. Over 850 of the approximately 1,200 agreements are currently active, or currently being used by the USMS. All of these agreements set forth terms and conditions applicable to the housing of Federal prisoners and the per diem rates to be charged for those services.

The USMS receives its authority to acquire bed spaces for Federal prisoners in non-federal facilities from 18 U.S.C. 4013. Although Section 4013 does not address the allowability of costs under agreements with governmental units, the USMS is restricted in the amounts it may reimburse for these services by 18 U.S.C. 4006. This section provides that the Attorney General shall allow and pay only the reasonable and actual cost of the subsistence of prisoners in the custody of any U.S. Marshal. "Actual costs" are amounts determined on the basis of costs incurred by the governmental unit during a specific period of time.

Pursuant to the Budget and Accounting Act of 1921, as amended, 31 U.S.C. 501-504, the Office of Management and Budget (OMB) issued OMB Circular A-87, Cost Principles for State, Local, and Indian Tribal Governments. The Circular establishes principles and standards for determining allowable costs for IGAs, which are cost-reimbursement contracts. The Circular is binding on all Executive Agencies. For purposes of 18 U.S.C. 4006, and OMB A-87, costs will be "allowable" for Federal reimbursement only to the extent that the costs are incurred specifically for the IGA; benefit (proportionately) both the IGA and the governmental unit; are necessary for the overall operation of the facility, and are adequately documented. Thus, the USMS must work within very narrow guidelines when it reimburses governmental entities for the services they provide.

Compliance with A-87 is time consuming and labor intensive for state and local jails that do not maintain sophisticated accounting systems. Further, A-87 does not take into account practical considerations such as proximity to the federal court city, good working relationships between the USMS and the local jail (e.g., accepting prisoners 24 hours a day), and the availability of desirable medical programs such as TB testing. The USMS is seeking approval from OMB to adopt alternatives that will reduce the burden on state and local jails to comply with A-87 and which will allow the USMS more flexibility in obtaining needed jail space.

¹⁵ Per diem estimates are based on 3.1 percent annual inflation.

Critical Detention Areas

As outlined previously, USMS anticipates an average daily population of between 31,200 and 43,500 in 2001. USMS has identified the following locations as its highest priority detention areas (in alphabetical order by State): Tucson/Phoenix, Arizona; San Diego, California; and the Washington, DC metropolitan area. A complete list of areas identified by the USMS as having unresolved emergency or serious detention conditions is provided in Attachment 6.

INS projects an average daily population of 23,863 in 2001, for an increase of approximately 8,800 above the average daily population in the President's 1998 Budget. INS reports that needs will exist throughout the country, with considerable needs existing in Del Rio, Texas and San Diego, California.

Video Conferencing

USMS has introduced video conferencing to a number of districts across the United States. While this technology is currently used primarily for attorney and probation officer interviews (it is also utilized for mental competency hearings, depositions and other court related interviews) the potential for expanded use is substantial.

Producing prisoners to court is a very time intensive, labor intensive, as well as a security intensive proposition. This is a core function of the USMS and one which the Service takes great pride in being able to perform. However, any time prisoners are moved, there is a risk of injury or worse to the deputy marshals (DUSMs), the prisoners, the judiciary, and the public at large. Travel times from the jail to the courthouse often exceed 2-3 hours which can only heighten security concerns. Recognizing that many court appearances take mere minutes to conclude, being able to minimize the manpower and security measures needed for such appearances would be a great benefit for all parties concerned.

Using video conferencing for routine court proceedings that traditionally require a minimum of the court's time creates the opportunity for a more optimum use of both manpower and bedspace resources and capitalizes on technology which is increasingly being utilized by other government components (all U.S. Attorneys Offices are utilizing or in the process of utilizing video equipment, BOP has installed video conferencing equipment in all of its regional offices and all of its training facilities, and the U.S. District Courts have been funded in FY 96 and 97 for video conferencing equipment in 14 states and is considering proposals for 7 others). Video conferencing is also being used by INS for certain types of hearings, and it has been widely used by State and local courts for a variety of legal proceedings for over 10 years.

Video conferencing technology makes the prisoner immediately available to the court. This may translate into more expeditious adjudication which enhances the efficiency of the court and frees bedspace more rapidly for the USMS. Part of the Department of Justice Strategic Plan calls for maintaining and "...operating federal prisons and detention systems in a safe, secure, humane and

efficient manner." Video conferencing allows prisoners to carry on their business with the court, their attorneys, etc., within the secure confines of the jail. As is the case with transporting prisoners, there is no threat of escape or injury to the prisoner, law enforcement personnel, or the public. The prisoner avoids the humiliation and uncomfortable circumstances surrounding transportation (i.e. being searched, placed in restraints, and held in close confines for an often lengthy period of time). And finally, the use of video conferencing is time efficient.

III. Improving the Projections

"The Committee directs the Department to include a plan for addressing the problems it has experienced in developing accurate USMS detention population projections."¹⁶

The Senate Report requires the Department to include in this update a plan for improving the accuracy of its detention population projections. To satisfy this requirement, the Department has undertaken the following actions.

A clear example of the challenges faced in predicting the detainee population is evidenced in the last Federal Detention Plan published in December 1992. At that time, the detainee population in Los Angeles, California was projected to increase from 841 in 1992 to 1,355 in 1997 because of the heavy drug and smuggling related caseload which caused significant overcrowding in the Los Angeles Metropolitan Detention Center, resulting in the facility operating at 146 percent of its capacity. Five years later, though, the detainee population in Los Angeles has remained fairly constant, reaching a level of 860 in 1996. At the other end of the spectrum, however, is San Diego, California, which reported no problem in 1992, but has emerged as a critical detention area because of the aggressive prosecution of immigration cases over the past two years. In fact, the detainee population in San Diego increased from 871 in 1992 to 1,317 in 1997. Who could have predicted the shift in prosecutorial initiatives?

USMS Projections

First, the USMS has hired a contractor to develop a more sensitive model that will draw on a much wider range of variables than the USMS has been able to use in developing its own population projections. The contractor's population projection model will consider such variables as:

Judicial Variables (number of district judges, magistrate judges, defendants, weighted caseload, cases commenced and pending, etc.);

Demographic Variables (total population, population density, population age, racial composition, etc.);

Facility Variables (number of jails and courthouses, jail and courthouse locations, etc.);

Prisoner Variables (number in custody, prisoner productions, prisoners received, etc.);

¹⁶ From the Senate Appropriations Committee Report accompanying the 1997 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Bill, page 18.

USMS Workload Variables (number of arrests, process served, warrants received, criminal bench hours, etc.); and

Related Organization Variables (number of FBI, DEA, INS, BATF, and Customs agents, number of Assistant U.S. Attorneys, number of arrests, etc.).

After gathering this data, the contractor will perform cluster analysis to segment the Federal districts into distinct groups, and develop a regression model for each cluster. Next, the data from the individual districts will be processed through the respective cluster models to project prisoners in custody. Once preliminary projections have been made, the models will be tested on historical data to confirm their validity and reliability. From these tests, the models will be modified to produce more accurate results. Once the models have been finalized, projections will be produced for each district (summing to a national total) for 1997-2001. Once accepted by the Department, these projections will be made available to the Congressional Committees to update the current Federal Detention Plan.

Second, the Department is working with the USMS to develop a Justice Detainee Information System (JDIS) that will provide both critical operational information to the districts, and centralized data to USMS headquarters for planning and oversight purposes. The need for an automated system such as this has been recognized for a number of years; however, it has not yet materialized. Although a wealth of prisoner information is stored in each district's database, the extremely fragmented and decentralized nature of the existing systems makes this information inaccessible to anyone outside of a given district. This makes it impossible for USMS headquarters to automate the compilation of aggregate level data on prisoners in custody, criminal offense data, demographics, etc. — information that is critical for justifying resource requests and projecting future workload requirements.

Currently, prisoner reports must be faxed in from each of the 94 district offices to headquarters and then be manually entered into a spreadsheet to develop aggregate totals. In addition, without a Service-wide system, the district offices lack access to other districts' prisoner data, which can be useful in tracking and locating prisoners or obtaining information on fugitives. As a result, data that exists in one district office is of little assistance to another district office.

Funding to begin the JDIS was requested in the 1997 President's Budget. Although the Congress was supportive of the system in its report language, no additional funding was provided to the USMS to develop it. The Department believes the development of this system will greatly improve not only the development of more accurate detention projections, but also the overall efficiency of the USMS prisoner movement program. Accordingly, the Department is considering available options to provide funding for this system from funds at its disposal.

INS Projections

The INS has recently released a new estimate of the resident illegal immigration population -- the first update of this number since 1992. In addition, INS relies on several other sources to make estimates of the numbers of aliens who potentially require apprehension, detention, and removal. The expansion of county jail programs, the continued operation of the Institutional Hearing Program, and improvements to the DACS should also make it possible for INS to capture more and better information about the aliens it interviews in institutional settings, which will help refine its estimates.

In addition, INS has been receiving information from applicants for reimbursement under the State Criminal Alien Assistance Program (SCAAP). The SCAAP application and verification process provides the agency with a range of information on undocumented aliens incarcerated in State and local correctional facilities. However, it does not provide information on the total incarcerated foreign born population or on those released on probation or parole. During 1997, the Department will be requesting information from applicants on a larger population of inmates than in prior years, and also anticipates receiving information from a larger number of county and local jails. This information will improve INS' knowledge about the number and kind of aliens incarcerated in these facilities.

There are currently no accurate statistics of the number of foreign-born aliens who have been released on probation and parole. The Administrative Office of the U.S. Courts and the Center for State Courts do not have demographic data available about individuals released on probation or parole. The INS is considering options to implement its new authorization under section 263(a)(5) of the Immigration and Nationality Act that allows INS to establish a registration process for criminal aliens released on probation or parole. The INS is also pursuing discussions with the Bureau of Justice Statistics about the characteristics of those released on probation or parole to determine whether it will be possible to make accurate estimates of this population based on what is known about the incarcerated population.

NOTE:
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Divider Title: 3

IMPROVING THE ORGANIZATION OF THE INS

III. *Should the Commission make recommendations specifically discussing the structure of INS?*

As the lead immigration agency in the federal government, the Immigration and Naturalization Service [INS] has the majority of the immigration resources and public visibility on immigration issues. With them, it also has attracted a majority of the criticism.

In 1993, as one of her first acts in office, INS Commissioner Doris Meissner announced her intention to reorganize INS, in particular to address management problems identified in previous studies and reports. This reorganization was approved and went into effect in late 1994 [see attached Organization Chart]. In it, INS was organized—not along functional—but along planning and implementation process lines. (A further reorganization—called a “series of structural realignments, management reforms and senior personnel changes”—were recently proposed by the INS Commissioner to complete the process begun in 1994).

In 1994, four “co-equal” Offices were created, covering the continuum from policy conceptualization to program development, to implementation, and to reporting back to Congress. The four offices established in 1994 and continued in the recently-announced proposed changes, are:

The Office of Policy and Planning, charged with long-range policy development, strategic planning, oversight of the Commissioner’s priorities management process, statistical recordkeeping and analysis, formulation and dissemination of policy directives and instructions, and research;

The Office of Programs, charged with turning overall policies and long-range planning into fully-developed programs by formulating standards, criteria, performance measures, timeframes and benchmarks, monitoring progress, spotting potential problems; developing options for resolving problems, and assessing effectiveness, efficiencies, and results;

The **Office of Field Operations**, charged with oversight of all field office personnel and budgets and accountable for implementing the policies and programs developed by the first two Offices; and,

The **Office of Management**, charged with providing administrative and managerial support to INS activities in Headquarters and the field and serving as liaison to Congressional budget processes.

One of the primary aims of this 1994 reorganization was to increase the capacity of INS to think and to plan—not just to do. The Commissioner wanted to focus some organizational units on long-range and shorter-range policymaking (i.e., Policy and Planning) and more careful and more useful program development (i.e., Programs), without being caught in the problems of day-to-day program operations and implementation. She also aimed at boosting the INS role as the lead in developing and articulating the government's immigration policy. And finally, she sought to increase the visibility of field concerns at INS Headquarters and the ability of Headquarters to improve guidance and direction of field actions (completing this goal is another major part of her recently-announced reorganization plans).

In practical effect, under the four process-oriented main Offices, INS already partially is divided into sections dealing almost exclusively with enforcement matters and primarily with benefits adjudications and service matters. The Office of Programs is divided into two main parts, the Office of Examinations ("benefits and services") and the Office of Enforcement. INS Field Operations also is divided (though as yet not officially) into enforcement and benefits sections. (One of the aims of the Commissioner's recently-announced reorganization plans is to formalize this division and augment the staff of each Field Operations section.)

In the field, under the overall coordination of three regional offices (Eastern, Central and Western), INS operational units also are somewhat divided into offices focusing either on border control or other district services, including inspections. Each of the three regions is headed by a regional director and they oversee a total of thirty-three district offices, each headed by a district director. In what is, in effect, a fourth region, the Office of International Affairs oversees three overseas district offices and eight single-purpose asylum offices. Several district offices also super-

wise one or more suboffices, each headed by an officer-in-charge. In addition, the three Regions also supervise twenty-one stand-alone, single-purpose Border Patrol Sector Offices, each headed by a sector chief or chief patrol agent. Four INS Service Centers in the field report directly to INS Headquarters (previously in Programs, now proposed for transfer to Field Operations). Four INS Administrative Centers in the field previously reported directly to INS Headquarters Management; they are now proposed for transfer to regional director jurisdiction.

This 1994 structure, particularly the split between Offices of Programs and Field Operations, has not been without its critics inside and outside of INS. The Commission has heard a number of criticisms during field visits. First, the division of responsibilities between Programs and Operations is unclear and confusing. INS field staff and others do not understand where program development responsibilities end and operations begin. When there is concern about the implementation of a program, such as naturalization, 245i adjustments, or detention and deportation, does responsibility for correcting identified problems rest with Programs or Operations, or in the case of INS priorities, the Lead Official for that priority?

Second, and related, if Programs has responsibility for developing new approaches and setting standards, does that division have the authority to ensure that these are implemented? It appears that Programs does not have the authority as Operations controls implementation personnel and the allocation of resources. Conversely, Operations staff (not just at headquarters but throughout the field structure) do not see themselves as having the responsibility or the authority to make changes in program design even when they see problems in what Programs has dictated. Separating responsibility for program development from the actual implementation of existing standards and/or new ideas leads to a situation where no one is, or can be, held fully accountable for performance outcomes.

Third, the current division between Programs and Operations makes lines of communication difficult and timeconsuming to negotiate. Field staff relate that if they need clarification of program directions, it can take months to get an answer through the existing chain of command because of the awkward structures involved. They tell us that a program guidance request from an Assistant District Director for Examinations, for example, goes through the District Office to the

Regional Office, and then to the headquarter Operations Division, which then forwards it to headquarters Program Division, which routes it to the appropriate staff in the office of the Associate Commissioner for Examinations. The answer must then travel back along the same complicated route, getting the requisite clearance signatures along the way, before it finally reaches the field officer awaiting guidance. There appears to be no sure way to ensure timely responses to legitimate requests for guidance or clarification. Field staff report that, when they do not receive answers, they find it difficult to track down where requests went astray.

To address some of these criticisms, Commissioner Meissner recently announced a series of refinements to the basic 1994 organizational structure that she would be recommending to the Department of Justice, OMB and the Congress. Primarily, the announced changes retain the separate Programs (to be renamed the Office of Program Development) and Field Operations Divisions, but they strengthen the Field Operations Headquarters structure and staffing. The Commissioner has announced an intention to clarify roles and responsibilities within the two divisions. Program development will bring together subunits "to work across functional lines to address program issues," with at least three new units reconfigured in this way, including a Border Management Unit to integrate the activities design along the border. Further, Administrative Centers are to go under the Direction of Regional Directors, and oversight of the four INS Service Centers will be transferred to Field Operations. While these basic outlines have been announced, the actual reorganization plan has not yet been made public.

Advantages. There may be some advantage in the Commission providing alternative views on what constitutes the best organizational structure needed by INS to successfully implement its responsibilities over the coming years. Indeed, at the recently-conducted April 3rd consultation with former government officials, most—if not all—felt that major changes should be made to the current immigration system, in particular, to the structure and organization of INS.

Disadvantages. A Commission recommendation on reorganization of INS may be too late or too soon. INS is likely to reorganize before our September

report, and the Commission would have insufficient time to assess its effects before we cease operations.

If yes, should the Commission recommend that INS, as the lead agency on immigration matters, be organized to promote maximum accountability in implementing its principal and core responsibilities: benefits adjudications, border management, interior enforcement, with administration providing support to the operational divisions?

A possible structure that would support more effective management is reflected in the attached chart. As structured, INS would be organized along the three principal functions, with the head of each function taking full responsibility for program development, program guidance, field operations, monitoring and, if needed, program redesign and refinement. More specifically, each of the three principal Divisions at Headquarters would provide: (1) program guidance on the development of long-term and shorter-term outcomes-oriented goals and objectives; (2) criteria and standards to be used in implementing programs and in guiding and assessing implementation and results; (3) conceptual and operational oversight of program implementation, including the electronic databases needed to manage cases and evaluate efficiencies and effectiveness; and (4) operational support for monitoring progress and evaluating programs.

The proposed Headquarters Divisions would recombine the responsibilities and process functions currently split between Programs and Field Operations. They would guide and support functional field offices in the implementation of their responsibilities. This structure permits retention of offices within each Division that are dedicated to program planning, including identification of pilot programs to test new approaches. Under this plan, however, the head of each functional Division would have authority over implementation of programs designed by his or her staff and would be held accountable for results.

The proposed structure retains Regional Offices and field offices, but the Directors of these offices will take on roles similar to those played by Ambassadors. They will have responsibility for overall management, but the staff responsible for specific

functions (border management, interior enforcement, benefits adjudication) will report (through the Directors) to the Regional and headquarters Divisions responsible for those areas. (INS offices based in embassies have such dual reporting lines; they report to the Chief of Mission and Ambassador but also to the Director of International Programs at INS.) Managers in headquarters and regional functional offices would have input into completion of the annual performance appraisal reports of appropriate staff in the functional field offices.

More specifically, the structure would be as follows:

INS Headquarters

Border Management: Under a Division of Border Management, INS Inspections and Border Patrol would be combined into a single unit responsible for border management at and between ports of entry. Having separate Border Patrol and inspections offices within INS makes little policy sense when decisions taken along one part of the border affect the others. Repeatedly, experts have recommended establishing a border management agency to address such problems. Rather than recommend wholesale changes, a more manageable approach would consist of combining INS-only border management activities under one common program development and operational oversight function at INS Headquarters. This structure could then be reflected in the establishment of border management field offices operated under the responsibility of regional directors [see Field Structure, below]. This new Office also would supervise the INS Intelligence Unit and the Anti-Smuggling Unit.

Interior Enforcement: A Division of Interior Enforcement would combine the program development and operational oversight function of all INS interior enforcement activities into one office. The primary focus of this Division would be the identification and removal of criminal and illegal aliens. [Depending on the Commission's recommendations on employer sanctions, this unit may also have responsibility for this activity.] This Division would combine the current INS Offices of Investigations (and worksite enforcement) and Deportations into a new Office of Removals and retain the Offices of Assets Forfeiture and Detention separately. The Division also would be responsible for investigation of counterfeit documents, working in cooperation with the Adjudications Benefits fraud unit

when the latter identifies potential criminal behavior. A division of Interior Enforcement would be established in each regional office as well as in field offices. While most interior enforcement offices would be cohoused with the benefits adjudication offices [see below], separate interior enforcement offices or suboffices could be established in areas with relatively little need for services but high need for enforcement activity.

Benefits Adjudication: A Division of Benefits Adjudication would combine the program development and operational oversight functions of all INS service and benefits activities into one service-oriented office. This Division would combine current INS Offices of Naturalization, Adjudications, INS Service Centers, and the Administrative Appeals Unit. Fraud investigations units would be established, as relevant, in each of the offices within the Division of Benefits Adjudications. A separate career track could be developed for recruitment of a professional, customer-oriented staff to adjudicate applications for benefits. Benefits Adjudications field offices would be continued in existing INS District Office locations, with suboffices as needed to serve high demand locations.

Management Support: All offices within the current Office of Management would be retained in a new Office of Management Support.

[Commission review of recommendations concerning the INS Office of Policy and Planning are discussed under **I. Policymaking and Coordination**, above].

INS Field Structure

Regional Directors would be retained and would be responsible for directing, supporting, and coordinating the work of the functional offices operating in their regions. They also would supervise the Administrative Centers in their areas and any Service Centers in their jurisdictions.

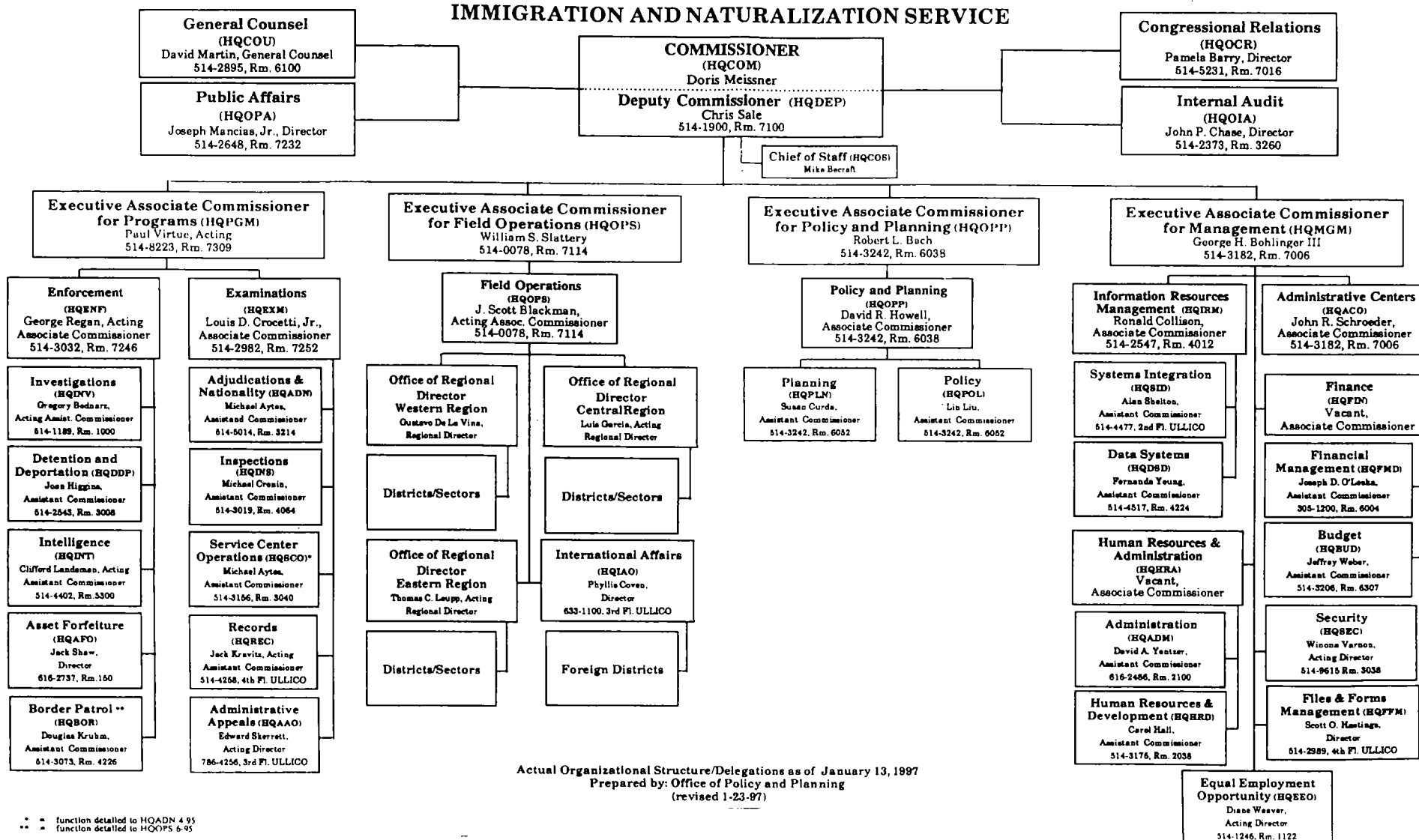
Regional Directors and the Director of International and Humanitarian Affairs would report directly to the INS Deputy Commissioner, but would be responsible to

the functional offices for implementing policy and program guidance and accountable for achievement of identified expected results.

The Director of International and Humanitarian Affairs, located at INS Headquarters, would be the equivalent of a regional director and would supervise all overseas district offices and the domestic asylum offices.

Some INS field facilities might house offices of all three functional divisions, while some field establishments might perform only two functions and others only one. Where appropriate, current Border Patrol Sector offices would be expanded to serve as the Border Management Offices, housing staff providing oversight and direction to the Border Patrol, Inspections, Intelligence, and Anti-Smuggling programs in their areas.

IMMIGRATION AND NATURALIZATION SERVICE



Actual Organizational Structure/Delegations as of January 13, 1997
Prepared by: Office of Policy and Planning
(revised 1-23-97)

* = function detailed to HQADN 4-95
** = function detailed to HQOPS 6-95

Proposed INS Organization

