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Homeland Security Proposals: Issues Regarding Transfer of Immigration Agencies and Functions

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Summary

As the 107th Congress considered the broader question of homeland security and the creation of a Department of Homeland Security (DHS), the issue of where to locate the various immigration and citizenship functions performed by the Department of Justice's (DOJ) Immigration and Naturalization Service (INS) and the Department of State's (DOS) Bureau of Consular Affairs posed a distinct set of questions. Congress weighed what immigration functions constituted border security, what were homeland security, and whether those immigration functions that may not have homeland security-related roles should be transferred to the proposed DHS. The debate centered on several options: place all of INS in a newly created DHS under a Border Security and Transportation Division; place INS's enforcement functions in DHS under the Border Security and Transportation Division but leave INS's service function in DOJ under a newly created Bureau of Citizenship and Immigration Services; place all of INS in DHS in its own Directorate of Immigration Affairs, which would have two separate bureaus for the enforcement and service functions; or place INS's enforcement functions in a DHS Bureau of Border Security and INS's service functions in a DHS Bureau of Citizenship and Immigration Services — the choice eventually enacted.

In addition to the transfer of INS, there had been considerable debate over whether the issuances of visas should remain with the DOS. While some called for transferring the visa issuance function to DHS, a compromise that maintains the visa issuance function with DOS but give the new Secretary of DHS authority to issue regulations on visa policy was included in legislation that was passed by Congress.

A third immigration function that sparked controversy was the placement of the Executive Office for Immigration Review (EOIR). Past legislative proposals would have created statutory authority within DOJ for EOIR. Congress included formal authorization of EOIR at DOJ as part of the enactment of DHS.

The Homeland Security Act of 2002 (P.L. 107-296, H.R. 5005) was signed into law on November 25, 2002. The Act transfers INS' immigration service and enforcement functions to a new DHS into two separate Bureaus. The visa issuance function remains at DOS' Consular Affairs; however, the Secretary of DHS will have authority over visa issuance regulations. Other immigration functions are either transferred to the Department of Health and Human Services or remain in DOJ. On January 30, 2003, the Administration submitted a reorganization plan that separates the immigration enforcement function, along with several other agencies, into two separate bureaus: the Bureau of Immigration and Customs Enforcement and the Bureau of Customs and Border Protection. The Plan will take effect on March 1, 2003.

Contents

| | |
|---|----|
| Latest Legislative Developments | 1 |
| Introduction | 1 |
| Background | 2 |
| Immigration Functions | 3 |
| Administrative Authorities | 3 |
| Immigration Enforcement | 3 |
| Border Security and Management | 4 |
| Interior Enforcement | 6 |
| Inspections | 8 |
| Detention and Removal | 8 |
| Intelligence Program | 10 |
| Immigration Adjudication Services | 10 |
| Immigration Adjudications and Services | 10 |
| Naturalization Adjudications | 10 |
| Humanitarian Functions | 11 |
| Visa Policy and Activities | 13 |
| Visa Issuances | 13 |
| Visa Waiver Program (VWP) | 13 |
| The Executive Office of Immigration Review (EOIR) | 13 |
| Major Homeland Security Proposals in the 107 th Congress | 15 |
| Earlier Homeland Security Proposals | 15 |
| INS Restructuring | 16 |
| The Administration's Restructuring Proposal | 16 |
| The Barbara Jordan Immigration Reform and Accountability Act of 2002 (H.R. 3231) | 16 |
| The Immigration Reform, Accountability, Security, and Enforcement Act of 2002 (S. 2444) | 16 |
| Post-September 11 Laws to Reform Immigration Policy | 16 |
| The USA PATRIOT Act | 16 |
| The Enhanced Border Security and Visa Entry Reform Act of 2002 .. | 17 |
| Administration's June 6 Homeland Security Proposal | 17 |
| Immigration Provisions in the Major Homeland Security Bills | 18 |
| Homeland Security Act of 2002 (H.R. 5005) | 18 |
| The Senate Substitute Amendment to the National Homeland Security and Combating Terrorism Act of 2002 (S.Amdt. 4471) | 18 |
| Homeland Security Act of 2002 (H.R. 5710) | 18 |
| The Homeland Security Act of 2002 (P.L. 107-296) | 19 |
| Discussion of Selected Options | 19 |
| Option: Locating All of INS in a DHS Border Security and Transportation (BST) Division | 20 |
| Option: Locating INS's Enforcement Functions in DHS and INS's Service Functions in DOJ | 20 |

| | |
|---|----|
| Option: Locating All of INS in a DHS Directorate of Immigration Affairs (DIA) | 21 |
| Option: Keeping INS in DOJ | 22 |
| Implementation and Oversight in the 108 th Congress | 22 |

List of Figures

| | |
|---|----|
| Figure 1. Border Patrol Apprehensions on the Southwest Border | 5 |
| Figure 2. Completed Criminal, Employment, Fraud, and Smuggling Investigations | 7 |
| Figure 3. Inspections of Citizens and Aliens at Ports of Entry | 8 |
| Figure 4. Completed Alien Removals | 9 |
| Figure 5. Applications for Immigration and Naturalization Benefits | 11 |
| Figure 6. Refugees Admitted and Asylum Cases Filed with INS | 12 |
| Figure 7. Immigration Court Matters Received | 14 |

Homeland Security Proposals: Issues Regarding Transfer of Immigration Agencies and Functions

Latest Legislative Developments

The Homeland Security Act of 2002 (P.L. 107-296) was signed into law on November 25, 2002. The Act transfers INS' immigration service and enforcement functions to a new DHS into two separate Bureaus. The visa issuance function remains at DOS' Consular Affairs, but the Secretary of DHS will have authority over visa issuance regulations. Other immigration functions are either transferred to the Department of Health and Human Services or remain in DOJ. On January 30, 2003, the Administration submitted a reorganization plan that separates the immigration enforcement function, along with several other agencies, into two separate bureaus: the Bureau of Immigration and Customs Enforcement and the Bureau of Customs and Border Protection. The Plan will take effect on March 1, 2003.

Introduction

President Bush's June 6, 2002 proposal to create a Department of Homeland Security (DHS) that would administer most immigration functions and activities led to an intertwining of legislation to establish a new federal department with legislation to restructure the Department of Justice's (DOJ) Immigration and Naturalization Service (INS). Legislation to restructure INS had been introduced in recent Congresses and was moving through the 107th Congress prior to the passage of the Homeland Security Act of 2002 (P.L. 107-296). The major homeland security proposals prior to the June 6, 2002 proposal typically included only the INS's border patrol or, in some instances, all of the INS enforcement functions.

As Congress considered the broader question of homeland security and the creation of a DHS, the issue of where to locate the various immigration and citizenship functions performed by INS and the Department of State's (DOS) Bureau of Consular Affairs posed a distinct set of questions. Congress weighed what immigration functions constituted border security, what were homeland security, and whether those immigration functions that may not have homeland security-related roles should be transferred to the proposed DHS. The debate centered on four options:

- Place all of INS in a newly created DHS under a *Border Security and Transportation Division* (Bush Administration);

- Place INS's enforcement functions in DHS under the *Border Security and Transportation Division* but leave INS's service function in DOJ under a newly created *Bureau of Citizenship and Immigration Services* (House-passed H.R. 5005);
- Place all of INS in DHS in its own *Directorate of Immigration Affairs*, which would have two separate bureaus for the enforcement and service functions (S.Amdt. 4471 to H.R. 5005); or
- Place all of INS in DHS, but in separate bureaus, with enforcement functions in the DHS Bureau of Border Security and the service functions as the DHS Bureau of Citizenship and Immigration Services (P.L. 107-296).

In addition to the transfer of INS, there had been considerable debate over whether the issuances of visas should remain with the DOS. While some called for transferring the visa issuance function to DHS, a compromise that maintains the visa issuance function with DOS but give the new Secretary of DHS authority to issue regulations on visa policy was included in the Homeland Security Act of 2002.¹

A third immigration function that sparked controversy was the placement of the Executive Office for Immigration Review (EOIR), which houses the immigration judges and the Board of Immigration Appeals. At various points over the years, legislation was introduced that would have created statutory authority within DOJ for EOIR. The Homeland Security Act of 2002 formally authorizes EOIR and maintains it in DOJ.

This report opens with a brief discussion of immigration policy priorities and agencies in the past and currently that have been responsible for the various immigration functions. An overview of the activities that comprise the two main immigration functions, enforcement and service, as well as other key immigration-related activities, follows along with an analysis of their workload statistics. The major proposals to establish DHS, to restructure INS, and to reform immigration policy post-September 11 are summarized in turn. The report concludes with an analysis of the main options regarding the role of immigration in the creation of DHS.

Background

U.S. immigration policy has historically balanced a set of generous principles with a set of restrictive principles. The generous principles emphasize the reunification of families, the admission of immigrants with needed skills, the protection of refugees, opportunities for cultural exchange, the facilitation of trade, commerce, and diplomacy, and the diversity of admissions by the country of origin. The restrictive principles focus on protecting public health and welfare, national security, public safety, and labor markets. Another principle of immigration policy is to provide immigrants an opportunity to integrate fully into society as citizens.

¹ For background and analysis of visa issuance policy and activities, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

These principles are embodied in federal law, the Immigration and Nationality Act (INA), first codified in 1952, but many date back to the early formation of the United States.

Over the years, a variety of federal agencies have had responsibility for administering U.S. immigration policy. Each move reflected a perceived change in the agency's focus as expressed in immigration law. In 1891, immigration functions were centralized under the Bureau of Immigration in the Department of Treasury. From 1903 to 1940, the immigration service received additional responsibilities and was transferred among several agencies, including the Department of Labor (DOL) and finally DOJ. For 20 years during that period — 1913 to 1933 — naturalization was handled independently by a Bureau of Naturalization with its own commissioner.

When INS was transferred from DOL to DOJ on the eve of World War II in 1940, it was largely due to national security concerns. Many organizational changes occurred as a result of the transfer to DOJ, including growth in personnel and establishment of additional divisions. In addition to legislative changes that moved immigration functions from one department to another, Congress has given the agency additional responsibilities that, in turn, prompted internal adjustments.

Immigration Functions

Administrative Authorities²

Section 103 of the INA gives primary responsibility for the administration and enforcement of immigration law to the Attorney General.³ In addition to INS, there are several agencies and offices within DOJ that have responsibility for some immigration functions, including EOIR.

Section 104 of the INA gives to the Secretary of State the responsibility for the administration and enforcement of immigration law as it relates to the duties and functions of diplomatic and consular officers. The most notable of these responsibilities are the visa issuance functions of DOS. More precisely, §221 of INA gives consular officers the authority to issue visas to both immigrants and nonimmigrants. DOS oversees 250 diplomatic and consular posts around the world from which visas are issued to immigrants seeking permanent residence and nonimmigrants seeking authorization for a temporary stay in the United States.

Immigration Enforcement

The immigration activities generally considered part of the enforcement function include the following: providing border security and management; conducting

² The Homeland Security Act of 2002 did not amend the INA to transfer certain responsibilities from the Attorney General and the Secretary of State to the Secretary of DHS or his designee.

³ 8 U.S.C. 1101 et. seq.

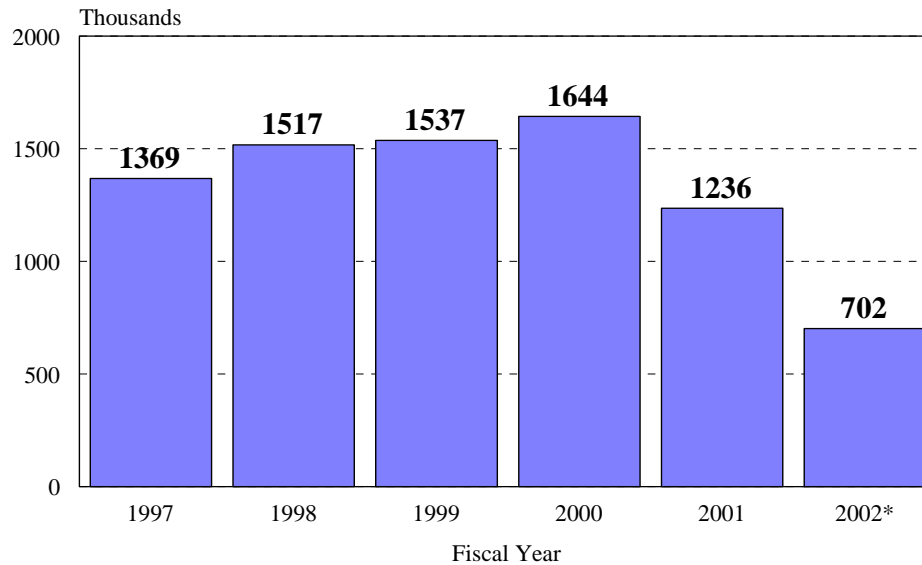
inspections of persons at U.S. ports of entry; enforcing immigration law within the interior of the United States; detaining and removing aliens found in violation of the INA and related laws; and providing immigration-related intelligence. Following is a summary of the immigration enforcement activities and those relevant workload statistics that are available.

Border Security and Management. The border patrol activities include enforcing U.S. immigration law as well as some aspects of the criminal law (i.e., drug interdiction) along the border and between ports of entry. Border security and management activities are coordinated with other federal agencies such as the U.S. Customs Service and the U.S. Coast Guard.⁴ The majority of border patrol agents, approximately 92%, are deployed along the southwest border.⁵ Border patrol agents, in particular at the southwest border, spend a large portion of their time apprehending aliens. The number of apprehensions at the southwest border had increased until recently, as **Figure 1** shows. The reason for the large increase in apprehensions at the southwest border is due, in large part, to a series of operations that were aimed at stemming illegal migration and interdicting human and drug smugglers.⁶ There was a sharp drop off in apprehensions immediately after September 11, depressing the FY2001 totals.

⁴ For further discussion on consolidation of agencies that have border security-related components, see CRS Report RL31549, *Department of Homeland Security: Proposals to Consolidate Border and Transportation Security Agencies*, by William J. Krouse.

⁵ U.S. Congress. Senate. Committee on Appropriations. *Northern Border Security*. 107th Cong., 1st Sess., October 3, December 5, 2001.

⁶ For example, in 1994 Operation Gatekeeper (San Diego Border Sector), Operation Safeguard (Tucson Border Patrol Sector), and Operation Hold the Line (El Paso Border Patrol Sector) were launched.

Figure 1. Border Patrol Apprehensions on the Southwest Border

* FY2002 data through June 2002.

Source: CRS analysis of INS workload data.

The majority of illegal immigrants seeking entry into the United States via the southwest border are Mexican nationals. According to INS data, in FY2001 98% of illegal immigrants that were apprehended along the southwest border were Mexican nationals.⁷ The majority of illegal immigrants seek entry into the United States, like their legal counterparts, for reasons including better wages and family reunification.⁸

The border patrol, in addition to enforcing U.S. immigration laws along the border, play a critical humanitarian role while protecting those aliens who cross the border illegally. Because of the number of illegal aliens who seek entry into the country by means that can cause them harm, or in more severe cases death, border patrol agents along the southwest border have taken measures to reduce injuries and death.⁹ Similar to their Coast Guard counterparts,¹⁰ border patrol agents have an

⁷ Data were obtained from INS, U.S. Border Patrol Apprehensions.

⁸ Orrenius, Pia M. Federal Reserve Bank of Dallas. *Illegal Immigration and Enforcement Along the U.S.-Mexico Border: An Overview*, June 2001. p. 2-3.

⁹ OIG. *INS' Southwest Border Strategy: Resource and Impact Issues Remain After Seven Years*. p. 16-21; 24-26.

¹⁰ The U.S. Coast Guard has, as one of its 14 statutory mandates, a maritime safety program that provides search and rescue missions. For further information, see CRS Report RS21019, *Coast Guard Deepwater Program: Background and Issues for Congress*, by Ronald O'Rourke.

initiative, the Border Safety Initiative, that is aimed at reducing deaths and making the border safer for migrants, officers, and border residents.¹¹

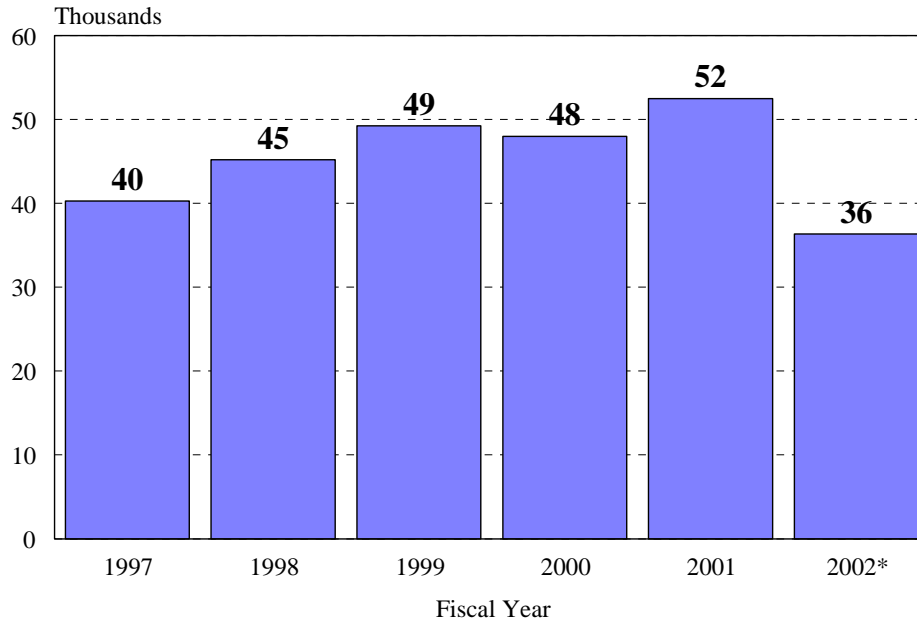
Interior Enforcement. The enforcement of immigration law within the interior of the United States includes investigating aliens who violate the INA and other related laws. Prior to September 11, 2001, the main categories of crimes that were investigated were:

- suspected criminal acts,
- suspected fraudulent activities (i.e., possessing or manufacturing fraudulent immigration documents),
- suspected smuggling and trafficking of aliens, and
- suspected work site violations, most frequently involving aliens who work without permission and employers who knowingly hire illegal aliens.

¹¹ For additional information, see [<http://www.usbpsd.com>].

The terrorist attacks prompted INS to reassign many investigators to work on terrorism investigations, which left half the total number of investigators (approximately 1,000) to perform the other four types of investigations.¹² There was a steady increase in completed investigations from FY1997 through FY2001, with the exception of FY2000 when the number of inspections dropped 1,249 from FY1999 (see **Figure 2**).

Figure 2. Completed Criminal, Employment, Fraud, and Smuggling Investigations



* FY2002 data through June 2002.

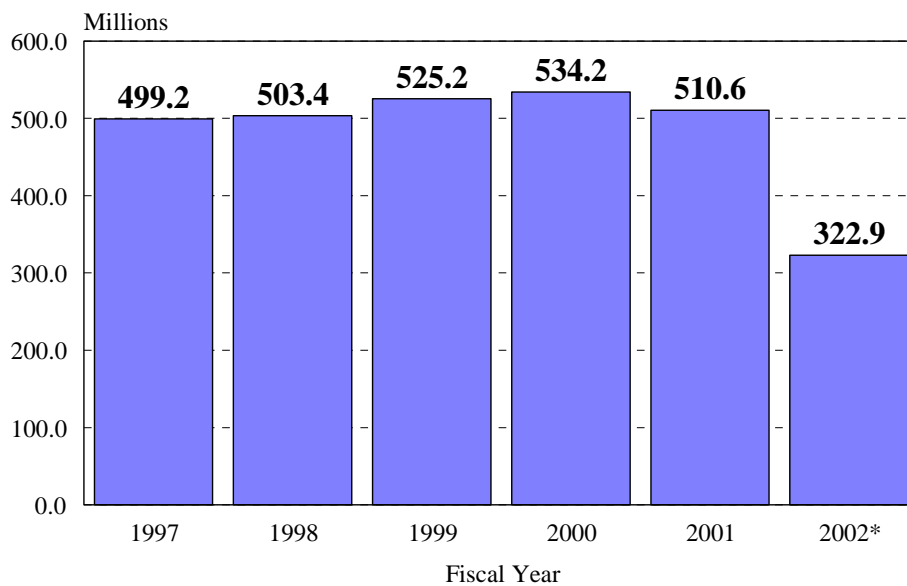
Source: CRS analysis of INS workload data.

¹² U.S. House. Committee on Appropriations. Subcommittee on Commerce, Justice, State and the Judiciary. Hearing on the President's FY2003 Budget Request, Testimony of INS Commissioner James Zigler, March 7, 2002.

Inspections. Immigration inspectors examine and verify U.S. citizens and foreign nationals who seek admission to the United States at ports of entry. Immigration inspectors determine if an individual qualifies for admission and if so under what status. They also inspect passports, visas, and other immigration documents for possible fraud. As **Figure 3** indicates, INS inspected 510.6 million persons in FY2001, down slightly from FY1999 and FY2000. The aliens that they find inadmissible number in the hundreds of thousands, but represent less than 0.2% of all inspections annually.¹³

In addition to inspecting individuals seeking entry into the United States, immigration inspectors, like their border patrol counterparts, are the first line of contact for all aliens seeking entry into the country, including asylum seekers who may not have proper documents. They also play a role in facilitating the processing of people, commerce, and trade into the United States.

Figure 3. Inspections of Citizens and Aliens at Ports of Entry



* FY2002 data through June 2002.

Source: CRS analysis of INS workload data.

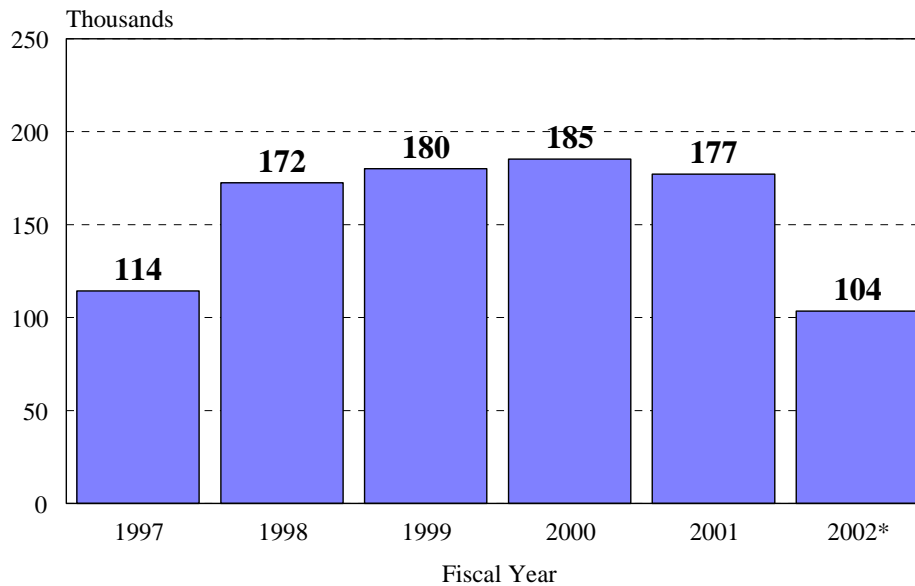
Detention and Removal. Responsibilities under the detention and removal activity include overseeing the custody of aliens who are detained and facilitating their release or deportation. (Other parts of DOJ handle prosecutions and other legal proceedings against aliens who are charged with violating immigration law.) The INA requires the detention of several classes of aliens, including those who are inadmissible or deportable on criminal, terrorist, or national security grounds; those

¹³ INS FY2002 workload data through June 2002, see [\[http://www.ins.gov/graphics/aboutins/statistics/msrjune02/INSP.HTM\]](http://www.ins.gov/graphics/aboutins/statistics/msrjune02/INSP.HTM)

who have arrived in the United States without proper documents and have requested asylum (pending a determination of their asylum claims); and those who have final orders of deportation.¹⁴

The INA also specifies the grounds that lead to the removal, i.e., deportation, of aliens already in the United States, legally or illegally. Criminal offenses, terrorist activities and security-related concerns, falsification of documents, unlawful voting, immigration fraud and violations of immigration status, and becoming a public charge within 5 years of entry are among the grounds for removal.¹⁵ **Figure 4** shows an increase in alien removals from FY1997 to FY2000. In 2001, however, the number of alien removals dropped by 7,979 from FY2000.

Figure 4. Completed Alien Removals



* FY2002 data through June 2002.

Source: CRS analysis of INS workload data.

¹⁴ §212, §235 and §237 of INA.

¹⁵ §237 of INA.

Intelligence Program. The intelligence program gathers, analyzes, and disseminates intelligence data to immigration staff about various illegal activities related to immigration law violations. The data are used to make operational decisions pertaining to acquiring and allocating resources as well as determining policy priorities. The intelligence program shares its intelligence with other federal law enforcement agencies. Workload statistics and staffing and resource data are not available.

Immigration Adjudication Services

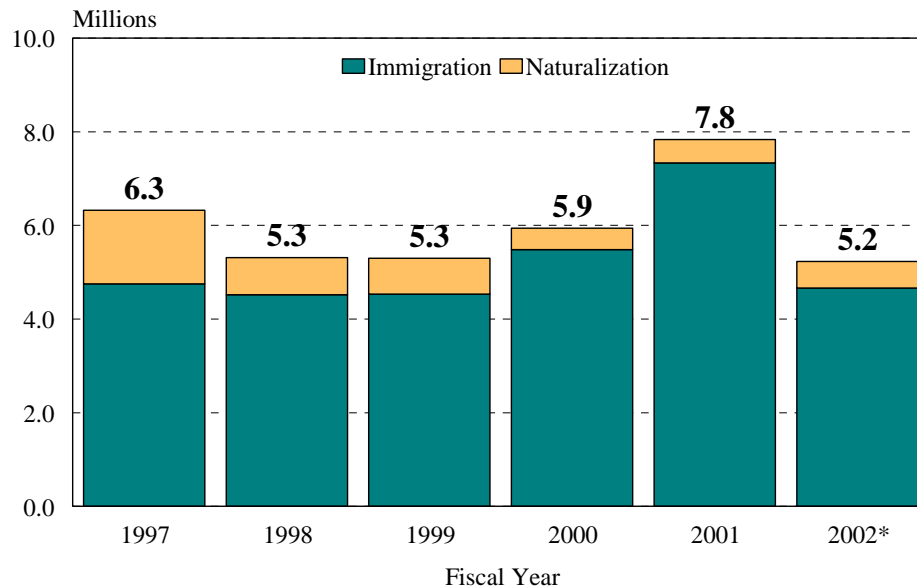
There are three major activities that dominate the service function of the INS: the adjudication of immigration petitions; the adjudication of naturalization petitions; and the consideration of refugee and asylum claims and related humanitarian and international concerns. In addition, DOS's Consular Affairs play an important role in many components of the service function, most notably the visa issuance responsibility.

Immigration Adjudications and Services. Immigration adjudicators determine the eligibility of the immediate relatives and other family members of U.S. citizens, the spouses and children of legal permanent residents (LPRs), employees that U.S. businesses have demonstrated they need, and other foreign nationals who meet specified criteria. They also determine whether a foreign national in the United States on a temporary visa (i.e., a nonimmigrant) is eligible to change to another nonimmigrant visa or whether an alien can adjust to LPR status. In addition, work authorizations are issued to aliens who meet certain conditions and provides other immigration benefits to aliens under the discretionary authority of the Attorney General.

Adjudication of these immigration petitions, however, is not a routine matter. Adjudicators must confirm not only that the aliens are eligible for the particular immigration status they are seeking, but also whether they should be rejected because of other requirements of the law.¹⁶

Naturalization Adjudications. INS was responsible for naturalization, a process in which LPRs may become U.S. citizens if they meet the requirements of the law. Adjudicators must determine whether aliens have continuously resided in the United States for a specified period of time; have good moral character; have the ability to read, write, speak, and understand English; and have passed an examination on U.S. government and history. All persons filing naturalization petitions must be fingerprinted, as background checks are required of applicants.

¹⁶ For more information, see CRS Report RS20916, *Immigration and Naturalization Fundamentals*, by Ruth Ellen Wasem.

Figure 5. Applications for Immigration and Naturalization Benefits

* FY2002 data through June 2002.

Source: CRS analysis of INS adjudications and naturalization workload data.

Note: "Immigration" receipts include relative petitions, employment authorizations, and adjustment of status petitions.

As **Figure 5** illustrates, INS received approximately 7.8 million petitions for immigration and naturalization benefits in FY2001. In comparison, the Social Security Administration received 6.6 million claims in FY2001.¹⁷ Petitions for immigration benefits dominated the service-side workload of INS, including petitions for family member benefits, employment authorizations, and adjustments of status. There were 7.3 million petitions filed for immigration benefits and about half a million petitions for naturalization in FY2001. Naturalization petitions through June in FY2002 exceeded all of FY2001.

Humanitarian Functions. This activity was located in the INS Office of International Affairs (OIA). OIA adjudicated refugee applications, processed parolees, and conducted background and record checks related to some immigrant petitions abroad. The largest component of this program was the asylum officer corps, whose members interviewed and screened asylum applicants.

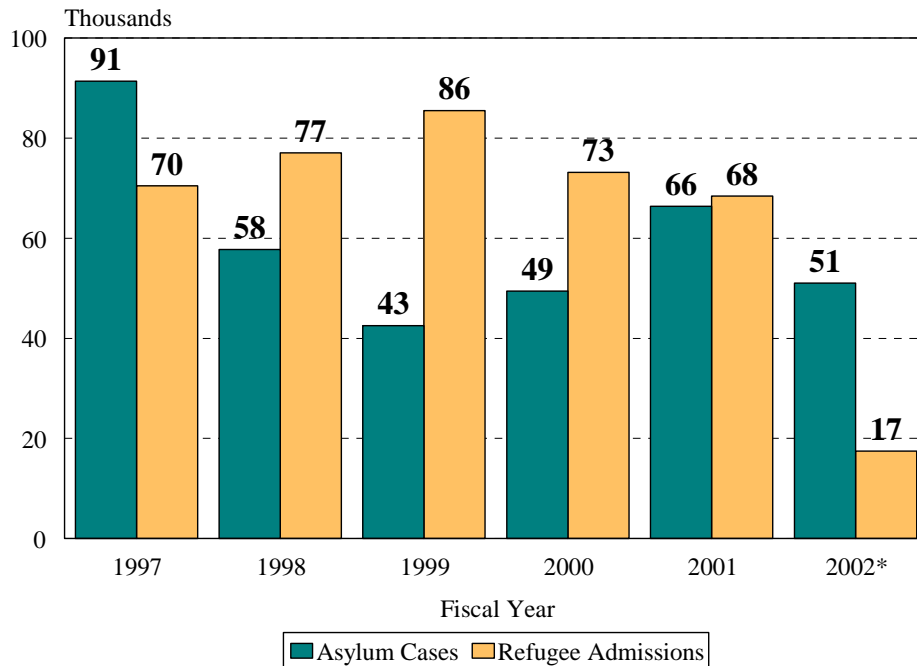
To obtain asylum or refugee status, aliens must demonstrate a well-founded fear that if returned home, they will be persecuted based upon one of five characteristics: race, religion, nationality, membership in a particular social group, or political opinion. Aliens may apply for asylum after arrival into the country or may seek asylum before an EOIR immigration judge during removal proceedings. Decisions

¹⁷ Social Security Administration. *Performance and Accountability Report for Fiscal Year 2001*. p. 207.

on refugee cases were made by INS overseas. INS also processed other humanitarian cases, most notably aliens who have been given Temporary Protected Status (TPS) and humanitarian parole by the Attorney General.

As **Figure 6** illustrates, refugee admissions have fluctuated over the past 5 years. Asylum petitions filed with INS went down in the late 1990s but rose again in FY2001. The rate of all asylum cases approved by the then-INS has varied from 28% to 44% in recent years.¹⁸

Figure 6. Refugees Admitted and Asylum Cases Filed with INS



* FY2002 data through June 2002.

Source: CRS analysis of INS asylum workload data and DOS refugee admissions data.

¹⁸ For a complete discussion of refugee admissions policy and reasons for the low admissions numbers in FY2002, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno.

Visa Policy and Activities

Visa Issuances. Foreign nationals not already legally residing in the United States who wish to come to the United States generally must obtain a visa to be admitted, with certain exceptions such as the Visa Waiver Program specified in law. Under current law, DOS and DHS play key roles in administering the law and policies on the admission of aliens. DOS's Consular Affairs is the agency responsible for issuing visas, and DHS will play a pivotal role in approving immigrant petitions and in inspecting all people who enter the United States.¹⁹

The DOS consular officer, at the time of application for a visa, as well as the immigration inspectors, at the time of application for admission, must be satisfied that the alien is entitled to the immigrant or nonimmigrant status. The burden of proof is on the applicant to establish eligibility for immigrant or nonimmigrant status and for the type of visa for which the application is made. Both DOS consular officers (when the alien is petitioning abroad) and immigration inspectors (when the alien is entering the United States) must confirm that the alien is not ineligible for a visa under the so-called "grounds for inadmissibility" of the INA, which include criminal, terrorist, and public health grounds for exclusion.

Visa Waiver Program (VWP). The visa waiver program allows nationals from certain countries to enter the United States as temporary visitors for business or pleasure without first obtaining a visa from a U.S. consulate abroad.²⁰ The Attorney General in consultation with the Secretary of State, using criteria established by Congress, determines which countries may participate in the program. By eliminating the visa requirement, this program facilitates international travel and commerce and eases consular office workloads abroad, but it also bypasses the first step by which foreign visitors are screened for admissibility to enter the United States. Travelers under the VWP do not need a visa, and thus no background checks are done prior to arrival at ports of entry, which allows only one opportunity — immigration inspection at the port of entry — to identify inadmissible aliens. In 2001, 17.1 million visitors entered the United States under this program, more than half of all overseas visitors.

The Executive Office of Immigration Review (EOIR)

As part of a 1983 reorganization at DOJ, the Attorney General created EOIR by regulation as an agency independent from the INS. The role of EOIR is to administer and interpret federal immigration laws and regulations through immigration court proceedings, appellate reviews, and administrative hearings in individual cases. There are three main components to EOIR: the Board of Immigration Appeals; the Office of the Chief Immigration Judge; and the Office of the Chief Administrative

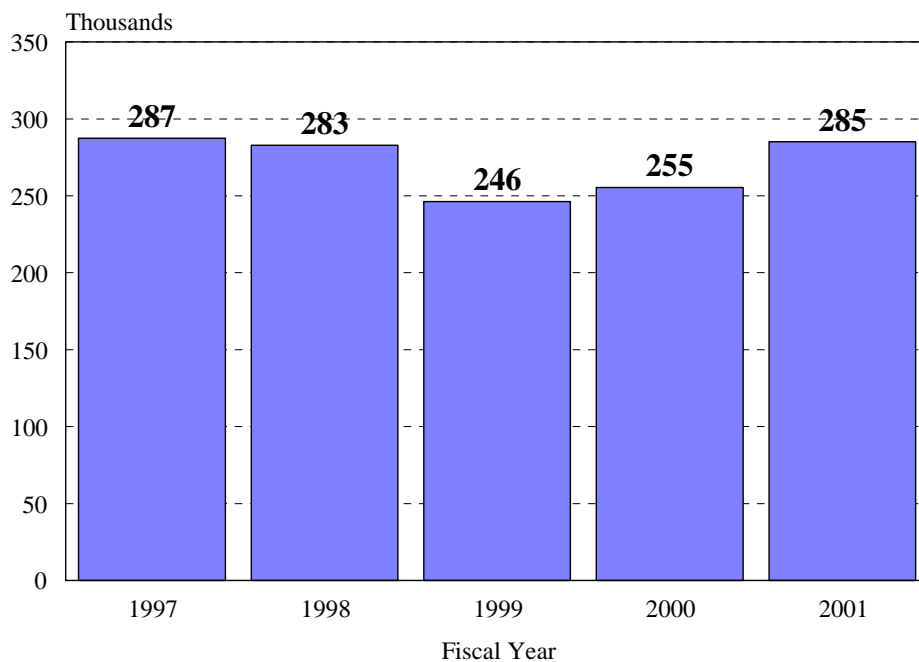
¹⁹ For background and analysis of visa issuance policy and activities, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

²⁰ For more information on the Visa Waiver Program, see CRS Report RS20546, *Immigration: Visa Waiver Program*, by Alison Siskin.

Hearing Officer.²¹ An Office of Administrative Appeals handles mostly employment-related matters.

There are 220 immigration judges in 51 immigration courts across the nation. They decide cases of eligibility, inadmissibility, deportation or removal, asylum appeals, and requests for relief from deportation. Some of the judges hear cases in prisons as part of the Criminal Alien Institutional Hearing program. Their decisions are administratively final unless appealed to the Board of Immigration Appeals (BIA). BIA is the highest administrative body for interpreting and applying immigration law and is composed of 23 board members.²²

Figure 7. Immigration Court Matters Received



Source: CRS analysis of EOIR data.

Judges in the Office of Administrative Appeals hear cases and adjudicate issues relating to the unlawful hiring, recruiting, referring for a fee, or continued employment of unauthorized aliens, and failure to comply with employment verification requirements (employer sanctions); immigration document fraud; and immigration-related unfair employment practices. Complaints are brought by the

²¹ 8 CFR Part 3.

²² For the Attorney General's recently promulgated regulations aimed at streamlining the BIA, see *Federal Register*, v. 67, August 26, 2002.

Office of Special Counsel for Immigration-Related Unfair Employment Practices and private individuals as prescribed by statute. INS also brought forth complaints.²³

As **Figure 7** depicts, the number of matters received by the EOIR immigration courts dipped in 1999 and 2000, but rose again in 2001 to a level matching 1997 and 1998. Of these matters, removal cases dominated the workload, comprising almost 230,000 of the 285,000 matters received in 2001.

Major Homeland Security Proposals in the 107th Congress

Since the September 11, 2001 terrorist attacks, considerable concern has been raised because the 19 terrorists were aliens who apparently entered the United States legally despite provisions in immigration laws that bar the admission of terrorists. Fears that lax enforcement of immigration laws regulating the admission of foreign nationals into the United States may continue to make the United States vulnerable to terrorist attacks have led many to call for revisions in immigration policy and changes in who administers immigration law. These concerns have been expressed in legislation to tighten up the standards for admitting foreign nationals, to improve communication and sharing of intelligence data with INS and consular officers who make admittance decisions, and to restructure INS, as well as to create a Department of Homeland Security. A summary of major legislative action in these areas follows.

Earlier Homeland Security Proposals

Prior to September 11, 2001, the U.S. Commission on National Security/21st Century (Hart-Rudman Commission) recommended the creation of a National Homeland Security Agency with a director who would have cabinet-level status. The Hart-Rudman Commission opted to include the border patrol — but no other immigration activities — in its January 2001 proposal.²⁴ When the Gilmore Commission, another major advisory group, issued its third and final report to the President and the Congress of the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction in December 2001, it included an intergovernmental border advisory group among its recommendations. The Gilmore Commission, however, did not recommend creation of a cabinet-level department on homeland security.²⁵

On October 11, 2001, Senators Joseph Lieberman and Arlen Specter introduced S. 1534, which would have established a Department of National Homeland Security. Under S. 1534, the only immigration activity that would have been transferred to the

²³ The Office of Administrative Appeals in EOIR was established by the Immigration Reform and Control Act of 1986 and amended by the Immigration and Nationality Amendments Act of 1990.

²⁴ The text of this report is available at [<http://www.homelandsecurity.org/research.cfm/>].

²⁵ The text of this report is available at:
[<http://www.rand.org/nsrd/terrpanel/terror3-print.pdf/>].

proposed National Homeland Security Department would have been the border patrol. When S. 2452 was introduced by Senator Lieberman on May 2, 2002, the new bill included all the immigration enforcement activities as well as the refugee and asylum processing functions in the proposed department. Congressman Mac Thornberry introduced H.R. 4660 as a companion bill to S. 2452. It would have transferred the immigration enforcement activities to a new homeland security department.

INS Restructuring²⁶

The Administration's Restructuring Proposal. On November 11, 2001, the Bush Administration unveiled a restructuring plan to split the agency's service and enforcement functions within INS. On April 17, 2002, Attorney General John Ashcroft announced action on his first steps to reorganize INS along these lines.

The Barbara Jordan Immigration Reform and Accountability Act of 2002 (H.R. 3231). On April 25, 2002, the House passed the Barbara Jordan Immigration Reform and Accountability Act of 2002 (H.R. 3231). H.R. 3231 would have abolished INS and created an office of Associate Attorney General for Immigrant Affairs within the DOJ. Under the newly created Office, two new bureaus would have been established, the Bureau of Citizenship and Immigration Services and the Bureau of Immigration Enforcement. Each bureau would have been headed by a director who would have reported to the Associate Attorney General for Immigration Affairs.²⁷

The Immigration Reform, Accountability, Security, and Enforcement Act of 2002 (S. 2444). On May 2, 2002, the Immigration Reform, Accountability, Security, and Enforcement Act of 2002 (S. 2444) was introduced by Senator Kennedy and Senator Brownback. The act would have abolished INS and created a new Immigration Affairs Agency within DOJ, that would have been headed by a director. Two new bureaus would have been created under the act: the Bureau of Immigration Service and Adjudication and the Bureau of Enforcement. Both bureaus would have been headed by a deputy director who would have reported to the director of immigration affairs.

Post-September 11 Laws to Reform Immigration Policy

The USA PATRIOT Act. The USA PATRIOT Act of 2001 (P.L. 107-56) was enacted into law on October 26, 2001. The Act has several homeland security-related provisions that strengthen INS. For example, the Act authorizes appropriations to triple the number of INS border patrol agents and immigration inspectors on the northern border. The Act also authorizes appropriations to improve technology for

²⁶ For further information, see CRS Report RL31388, *Immigration and Naturalization Service: Restructuring Proposals in the 107th Congress*, by Lisa Seghetti.

²⁷ For further information on this bill and related bills, see CRS Report RL31388, *Immigration and Naturalization Service: Restructuring Proposals in the 107th Congress*, by Lisa M. Seghetti.

monitoring the northern border. The Act amended the INA by requiring the Attorney General and the Director of the Federal Bureau of Investigation (after it has been agreed upon by all involved parties) to provide INS (and DOS) access to the criminal history records and other relevant information maintained by the National Crime Information Center's Interstate Identification Index (NCIC-III) for the purpose of determining visa issuance eligibility. The PATRIOT Act includes provisions to expand the foreign student tracking system and authorizes appropriations for the foreign student monitoring system.

The PATRIOT Act also amends the INA's inadmissibility provisions to broaden somewhat the terrorism grounds for excluding aliens. The INA already barred the admission of any alien who has engaged in or incited terrorist activity, is reasonably believed to be carrying out a terrorist activity, or is a representative or member of a designated foreign terrorist organization. To this list of inadmissible aliens, the PATRIOT Act adds representatives of groups that endorse terrorism, prominent individuals who endorse terrorism, and spouses and children of aliens who are deportable on terrorism grounds on the basis of activities occurring within the previous 5 years.

The Enhanced Border Security and Visa Entry Reform Act of 2002.

The Enhanced Border Security and Visa Entry Reform Act of 2002 (P.L. 107-173) was enacted into law on May 14, 2002. The Act increases the number of INS inspectors, investigators, and support staff by 200 per group for each fiscal year from FY2002 through FY2006. It authorizes appropriations for personnel training, increased resources for INS and Consular Affairs, and technology and infrastructure improvements. The Act also addresses the need for increased interagency data sharing pertaining to the admissibility and removability of aliens through the development of an "interoperable electronic data system." In addition, P.L. 107-173 has provisions intended to close perceived loopholes in the admission of foreign students.²⁸

Administration's June 6 Homeland Security Proposal

The goal of the Administration's proposal was to consolidate into a single federal agency under one cabinet-level official many of the homeland security functions performed by units within various federal agencies and departments. To this end, the Administration plan would have placed all of the functions of INS under the Border and Transportation Security Division of the proposed department. The plan would have separated INS's service and enforcement functions into two bureaus within the Border and Transportation Security Division. The plan would have also maintained the visa issuance function at the Department of State. Although the President's June 6, 2002 proposal was silent with regard to EOIR, he subsequently made it clear that EOIR would have been moved to DHS under his proposal.²⁹

²⁸ For further information, see CRS Report RL31146, *Foreign Students in the United States: Policies and Legislation*, by Ruth Ellen Wasem.

²⁹ U.S. White House Office of Homeland Security. *The Department of Homeland Security*, August Recess 2002. p. 20.

Immigration Provisions in the Major Homeland Security Bills

Homeland Security Act of 2002 (H.R. 5005). Representative Dick Armey, Majority Leader and Chair of the Select Committee on Homeland Security, introduced the President's proposal for homeland security as H.R. 5005. Breaking with the Administration, the House Judiciary Committee recommended and the House Select Committee on Homeland Security approved language that would have placed many of INS's adjudication and service responsibilities — including its role in approving petitions — within a new Bureau of Citizenship and Immigration Services that would have been headed by an Assistant Attorney General at DOJ. As passed on July 25, 2002, H.R. 5005 would have transferred the INS enforcement function to a newly created DHS under its Border Security Division, but would have left intact INS's service function in DOJ. H.R. 5005 would have maintained DOS's jurisdiction over the visa issuance function but would have given the Secretary of DHS authority to issue regulations on visa policy. EOIR is not specified in H.R. 5005 as an office that would have been transferred from DOJ to the new department. H.R. 5005 would have given INS' unaccompanied alien children function statutory authority and would have transferred it to the Department of Health and Human Services' (DHHS) Office of Refugee Resettlement (ORR).

The Senate Substitute Amendment to the National Homeland Security and Combating Terrorism Act of 2002 (S.Amdt. 4471). On July 25, 2002, the Senate Governmental Affairs Committee ordered reported the Chairman's substitute amendment to the National Homeland Security and Combating Terrorism Act of 2002 (S.Amdt. 4471). The Senate amendment would have transferred all of INS to a newly created DHS under two new bureaus (the Bureau of Immigration Services and the Bureau of Enforcement and Border Affairs) in a Directorate of Immigration Affairs. Similar to H.R. 5005, the Senate amendment would have given the Secretary of DHS authority to issue regulations on visa policy; however, it would have permitted the Secretary of the new department to delegate the authority to the Secretary of State. Similar to H.R. 5005, the Senate amendment would have given INS' unaccompanied alien children function statutory authority and would have transferred it to DHHS' ORR. The Senate amendment would have created statutory authority within DOJ for an Agency of Immigration Hearing and Appeals, and it would have abolished EOIR in its current form. As in the current administrative structure, the Senate amendment would have given EOIR three main components: the Board of Immigration Appeals; the Office of the Chief Immigration Judge; and the Office of the Chief Administrative Hearing Officer.³⁰

Homeland Security Act of 2002 (H.R. 5710). On November 13, 2002, the House passed the Homeland Security Act of 2002 (H.R. 5710). Reportedly, H.R. 5710 was a compromise between both chambers and the Administration. The bill would have abolished INS and transferred its immigration enforcement function to a newly created Bureau of Border Security under a Directorate of Border and Transportation Security in DHS. It would have created an Assistant Secretary

³⁰ For a side-by-side analysis, see CRS Report RL31584, *A Comparative Analysis of the Immigration Functions in the Major Homeland Security Bills*, by Lisa M. Seghetti and Ruth Ellen Wasem.

position that would have been in charge of the Bureau of Border Security and would have reported to the Under Secretary for Border and Transportation Security.

The bill would have transferred INS' immigration service function to DHS in a Bureau of Citizenship and Immigration Services. Similar to the House-passed H.R. 5005, H.R. 5710 would have created a Director position that would have overseen the Bureau of Citizenship and Immigration Services and would have reported directly to the Deputy Secretary of DHS. The Director of Citizenship and Immigration Services would have been paid at the same level as the Assistant Secretary Border Security. The act would have allowed the reorganization of functions or organizational units within both bureaus but explicitly would have prohibited the joining of these two bureaus into a single agency or the consolidation of the functions or organizational units of these two bureaus with each other.

Similar to H.R. 5005 as passed by the House and S.Amdt. 4471, HR 5710 would have retained the visa issuance function with DOS but would have given the Secretary of DHS authority to issue regulations on visa policy. The bill would have established statutory authority for EOIR and would have kept it under the Attorney General. Similar to H.R. 5005 as passed by the House, it would have given statutory authority to the unaccompanied alien children function and would have placed it in DHHS' ORR.

The Homeland Security Act of 2002 (P.L. 107-296). The Senate considered and passed, amended, H.R. 5005 (S.Amdt. 4901) on November 19, 2002. The immigration-related provisions in the Senate passed H.R. 5005 are similar to the provisions in H.R. 5710, see above. On November 22, 2002, the House considered and passed the Senate amendment to H.R. 5005. The Homeland Security Act of 2002 (P.L. 107-296) was signed into law on November 25, 2002.

Discussion of Selected Options

A question that has emerged from the debate with regard to transferring immigration functions to a department whose primary mission is to secure the homeland is: What immigration and naturalization functions have primarily homeland security-related components? Some functions that are performed by INS arguably fit the homeland security mission more closely, while other functions arguably more closely address other priorities of U.S. law and public policy. For example, one could assert that the border patrol's primary purpose is consistent with the objectives of DHS, but that adjudications and naturalization activities are not primarily homeland-security related. Is effective administration and implementation of immigration and naturalization policies more likely achieved by re-prioritizing the functions with border security as the primary mission, by splitting the functions into two departments with different missions, or by coupling the functions under their own directorate with a broader homeland security mission? Prior to reaching a compromise, the 107th Congress weighed several options, and the main options are discussed below. While some of the issues may have been resolved with the passage of the Homeland Security Act of 2002, others are arising as the Administration begins to implement the Act.

Option: Locating All of INS in a DHS Border Security and Transportation (BST) Division

According to some, INS's disparate enforcement and service functions created two different cultures that often competed for the same resources. Under the previous organizational structure, the two functions appeared to be blurred with no clear chain of command. As proposed by the Bush Administration, a new BST division would have had as its primary mission securing the border, unlike the previous immigration structure, which had varying competing missions. Others contend that a single mission would bring clarity and direction to personnel who are charged with carrying out immigration and naturalization activities.

In addition to clarifying the mission of INS, some contended that consolidating the functions of INS and several other agencies, such as the U.S. Customs Service and U.S. Coast Guard, would give these various agencies a common mission under a single chain of command. These proposals would have pooled resources and expertise under one agency that would have, according to some critics of the previous arrangements, provided a unified approach to border security and management.

Some also argued that the apparent duplicative functions that have been performed by several different agencies would be consolidated.³¹ According to critics of previous arrangements, duplication of efforts raises concerns such as waste of resources (i.e., funds, personnel, and equipment) that would also be addressed by consolidating the responsible agencies. They also argued that merging these agencies addresses concerns about rivalry that may exist between them as well as their lack of coordination and communication with one another. Moreover, there would be one person in charge, rather than several persons with different missions, objectives, and interpretations of the various laws.

Option: Locating INS's Enforcement Functions in DHS and INS's Service Functions in DOJ

Some maintained that transferring those functions that are not primarily homeland security could have potential negative impacts on the new department, as proposed in H.R. 5005 as passed by the House. They maintained that either the department may be bogged down with non-homeland security-related functions or that the other functions may be ignored or given less attention. Transferring only those immigration functions that most directly pertain to homeland security would, some further contended, keep the new department from the very types of "mission overload" that reportedly characterize the current administration of these functions by the various agencies and departments. They warned that this "mission overload" might actually exacerbate the problems the new department is designed to address. If, for example, the new department was unable to keep pace with the processing of

³¹ For example, immigration inspectors and U.S. Customs inspectors both perform inspections at ports of entry. Although they have different functions (immigration inspectors inspect people who present themselves for entry into the country and the U.S. Customs Service inspects goods), some observers have argued that there is a potential for overlap.

adjudications and naturalization petitions, it could be argued that dangerous aliens may be less likely to be detected because their background checks would be pending.

Some commentators who supported transferring INS's law enforcement functions from DOJ contend that INS's dual missions of providing immigrant services and enforcing the immigration law are inherently conflicting. Moving selected components of the enforcement function to the new department would, proponents contended, bring clarity of purpose to border and interior law enforcement. DOJ would be able, in turn, to focus on remedying the administrative problems with the service and non-border enforcement functions of INS.

Option: Locating All of INS in a DHS Directorate of Immigration Affairs (DIA)

Some observers contended that INS's dual missions of providing immigrant services and enforcing immigration law are intertwined for good reasons, as reflected in the Senate substitute amendment (S.Amdt. 4471) to H.R. 5005. While INS's two core functions were clearly delineated at the policy-making level, some believed that splitting the two functions could exacerbate problems with the front line implementation of the competing service and enforcement policies. Immigration inspectors must examine citizens as well as aliens seeking entry into the country while they facilitate tourism and commerce. For example, the immigration inspector must make an immediate determination whether an alien lacking proper documents is eligible to request asylum before an asylum officer or should be excluded and immediately returned. In the case of an asylum seeker, a decision to reject entry may send that person back to a dangerous situation, and that action has implications under international law.

Another area of concern, according to some opponents of splitting the functions and placing them in different departments, is the potential for differing interpretations and implementation of the law and legal opinions that may emerge from a new department. Some contended that INS's old organizational structure was fraught with poor communication between the two functions and between management and field staff as well as between division and field offices. Such a structure, according to some, gave way to various interpretations of statute and INS policy.

Others have argued that functions and activities some call "duplicative" and "competing policy priorities" are actually "checks and balances." Those holding the latter view are more likely to support internal reforms of INS rather than efforts to transfer or dismantle the agency. They warned that splitting the enforcement functions from the service functions would create an enforcement arm that is insensitive to service concerns and a service branch that neglects its law enforcement responsibilities.

Option: Keeping INS in DOJ

Many of the arguments in favor of placing INS in a new DHS under a DIA are echoed in keeping INS in DOJ. However, there are several arguments that are unique to keeping INS in DOJ, as described below.

If the immigration-related problems exposed by the September 11 terrorist attacks are largely those of intelligence sharing and other coordination activities, some challenged whether transferring INS would deal with these problems. Other problems such as weak management controls and antiquated systems, they warned, would simply be conveyed to the new department. Since DOJ was initiating reforms to remedy these problems, some maintained that DOJ is likely to be more expeditious in completing these reforms.

Some who are opposed to transferring all or part of INS from DOJ question how immigration enforcement and service functions would fit under the mission of the new department. They expressed concerns that it may lead to significant shifts in U.S. immigration policy that would be more restrictive and less responsive to the needs of business and families in the United States. They maintained that because DOJ has traditionally balanced the competing priorities of protecting individual liberties and civil rights with enforcing public safety and domestic security, DOJ remains the most appropriate department to oversee INS with its dual missions. The proposed department, on the other hand, will focus on homeland security and, according to some, may not give sufficient priority to INS's immigrant adjudications and benefits function and its humanitarian responsibilities. They argued further that the authority to enable legal permanent residents to naturalize should remain exclusively with the Attorney General because of the rights and privileges conferred with citizenship (e.g., voting in elections and serving on juries).

A question posed by this argument is how much of the current authority vested in the Attorney General would be transferred to the new department head, particularly with regard to recent policies on the detention of noncitizens in response to the events of September 11, 2001. Several proposals that would have separated the two functions under DOJ's jurisdiction, with both bureaus or agencies reporting to the same person, would have maintained a shared general counsel. However, a shared general counsel with INS's immigrant service function was absent from both the Bush Administration's proposal and the House-passed version of H.R. 5005, which would have placed the immigration enforcement functions along with other agencies that have border security-related functions. Such a new department, it is argued, may not be equipped to handle the jurisprudence component of immigration policy. This argument is most clearly evidenced in the debate over the transfer of EOIR. Those expressing this concern prefer that the Attorney General retain the authority over immigration law and policy.

Implementation and Oversight in the 108th Congress

On January 30, 2003, the Administration submitted its "Reorganization Plan Modification for the Department of Homeland Security." The Plan calls for the Bureau of Border Security to be renamed the Bureau of Immigration and Customs

Enforcement and headed by an Assistant Secretary. The Bureau will include the Customs Service's interior enforcement program; the Federal Protective Service; and INS' investigations, detention and removal and the intelligence programs. The Customs Service will be renamed the Bureau of Customs and Border Protection and headed by the Commissioner of Customs. The Bureau will include the Customs Service's inspection program, INS border patrol and inspection programs and the agricultural inspections function of the Agricultural Quarantine Inspection program. The Plan will take effect on March 1, 2003.