ROLE OF IMMIGRATION IN THE DEPARTMENT OF HOMELAND SECURITY PURSUANT TO H.R. 5005, THE HOMELAND SECURITY ACT OF 2002

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

JUNE 27, 2002

Serial No. 91

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://www.house.gov/judiciary

U.S. GOVERNMENT PRINTING OFFICE

80–455 PDF WASHINGTON : 2002

For sale by the Superintendent of Documents, U.S. Government Printing Office
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ROLE OF IMMIGRATION IN THE DEPARTMENT OF HOMELAND SECURITY PURSUANT TO H.R. 5005, THE HOMELAND SECURITY ACT OF 2002

THURSDAY JUNE 27, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION,
BORDER SECURITY, AND CLAIMS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 3:07 p.m., in Room 2237, Rayburn House Office Building, Hon. Elton Gallegly [Member of the Subcommittee] presiding.

Mr. GALLEGLY. We call to order the Subcommittee on Immigration, Border Security, and Claims. I come as a spokesperson on behalf of the Chairman. As many of you I am sure are aware, there is a lot of things going on on the floor right now, and until I get at least one Member from the minority side we won't be able to technically move ahead with the hearing. I apologize and appreciate your patience, and we will get started just as quickly as we can under the laws that govern our operation here.

So I appreciate your patience, and until such time as we do have one more Member here the Subcommittee will stand in recess.

[Recess.]

Mr. GALLEGLY. Call to order the Subcommittee on Immigration, Border Security, and Claims.

On June 6, the White House released its plan to create the Department of Homeland Security, and the President addressed the Nation asking Congress to enact such a plan. The White House sent its proposed bill to create the Department of Homeland Security to Congress on June 18. On June 24, Representative Armey introduced a bill H.R. 5005, which is identical to the Administration's proposed bill. H.R. 5005 was referred to the Committee on the Judiciary, which has concurrent jurisdiction over the bill until July 12, 2002.

The bill would transfer the functions of many agencies into the Department of Homeland Security, including immigration functions. Despite the submission of the Administration's bill and analysis of the bill, immigration questions remain relating to this new Department of Homeland Security. The bill would transfer the INS to the new department, but does not describe how the INS would be structured within the department.

The authority of visa issuance in the Administration's bill is unusual. The authority is given to the new department, but the employees remain in the State Department. This seems to be a hybrid of a structure or perhaps a compromise between the State Department, which does not want to give up its visa issuance authority. It is unclear why such a system was crafted this way. Another option is to move the visa office to the Department of Homeland Security.

All of these issues will be explored at Thursday's hearing to assist the Committee in drafting the appropriate legislation for an effective immigration system within the Department of Homeland Security.

Today, we have five witnesses to testify before our Subcommittee, and at this time I will open the hearing to Grant S. Green, who is the Under Secretary of Management of the Department of State.

Prior to this role, he was Chairman and President of Global Marketing and Development Solutions. He also served as Assistant Secretary of Defense. During the Reagan administration, Mr. Green served as Special Assistant to the President for National Security Affairs, and Executive Secretary of the National Security Council. He is an Army veteran who served in Vietnam. He has earned his Master's Degree from George Washington University and his Bachelor's Degree from University of Arkansas.

Welcome, Mr. Green.

STATEMENT OF THE HONORABLE GRANT S. GREEN, UNDER SECRETARY FOR MANAGEMENT AND RESOURCES, DEPARTMENT OF STATE

Mr. GREEN. Thank you, sir.

Mr. Chairman, Members of the Subcommittee, I am pleased to be here to comment on what is certainly the most far-reaching and comprehensive Government reorganization proposal in many years.

Events of September 11 have brought a vigorous and determined response from the people and the Government of the United States, but we have got to do better. The Department of State has and will continue to play a vital role in this effort, and we fully support the President's proposal.

Although INS has always had the final decision on who actually enters the United States, the authority to make the crucial visa decision has long been legally vested in consular officers of the Foreign Service. The Secretary's legal authority to supervise this function is established in the Immigration and Nationality Act of 1952, which requires State to coordinate with the Attorney General and those agencies of the Department of Justice that work for him; namely, the INS and the FBI. The reorganization proposal would transfer to the new Homeland Security Secretary both the current authority of the Attorney General and the authority of the Secretary of State to establish regulations related to the granting and the refusal of visas by consular officers, and to administer and to enforce the laws regarding the issuance and the denial of visas.

The new Secretary of Homeland Security will exercise this authority over consular officers through the Secretary of State. Because visa decisions abroad are important to carrying out the for-

eign policy, the President's proposal ensures that the Secretary of State will retain the authority to deny visas on foreign policy grounds.

While we know that visa policy is integral to the protection of the United States from terrorists, I think it is important to say very explicitly why this is so. The 19 terrorists who attacked the U.S. on September 11 traveled to the United States on legally issued visas and proceeded on their deadly mission undeterred by U.S. authority. There was no way without prior identification of these people as terrorists through either law enforcement or intelligence channels and the conveyance of that knowledge to consular officers abroad that we could have known their intention when they applied for a visa or when they entered the U.S. This disciplined terrorist organization made use of people with few known prior terrorist associations, clean records, and evidence of economic solvency that they knew they would need to pass review by visa or port of entry immigration officers.

Identification by intelligence and law enforcement and the sharing of that data with consular officers abroad is an absolutely critical component of fighting terrorism through the visa process. We believe we have come a long way in a short time toward the comprehensive data sharing we must have to prevail in this area. Executive orders and the recent PATRIOT Act require and reinforce such sharing, and our files on potential terrorists are far better now than they have ever been in the past.

We believe a new Department of Homeland Security empowered to provide to consular officers abroad all the information that the U.S. Government knows from whatever source is the most essential element in assuring the denial of visas to those who would harm us. The Secretary of State fully supports the creation of this department with this authority to ensure full data sharing.

As I said, knowing who a potential terrorist is will do little good if we don't have a reliable system to pass that information to consular officers. Here, our progress has been exponential since the first attempt on the World Trade Center in 1993. Our consular look out and support system provides consular officers anywhere in the world access to the best information on people we do not want in the U.S. We have invested and will continue to invest heavily in improving its speed and comprehensiveness. It uses the most advanced foreign language algorithms to ensure that transliteration and common names are not overlooked, and it prevents any visa from being printed until our name check system, including interagency consultations, have been cleared.

We firmly believe that the specialized skills and the training of the Foreign Service will complement and strengthen those of the new Department of Homeland Security to prevent potential terrorists from entering the country.

In creating the new department, it is also important to recognize that visa policy plays a vital role in advancing foreign policy goals of the United States, which also support homeland security. Our visa policies advance our economic interests, protect the public health, promote human rights and democratic values. Visa applicants will find that our laws promote religious freedom, oppose forced abortion and sterilization, and force the reciprocal treatment

of diplomats, insist upon the fair treatment of American citizens and property, and penalize the enemies of democracy around the world.

Finally, the war against terrorism is a world war that cannot succeed without cooperation by our friends and allies who are also threatened by many of the same terrorists. We have seen the success that a determined United States can have in forging a coalition and in obtaining diplomatic, military, law enforcement, and intelligence cooperation from abroad. This, in addition to identifying and denying admission to terrorists, demonstrating that the United States remains open to our friends and partners in the war on terrorism, is a crucial element in winning and maintaining the support from abroad that we need to prevail.

Thank you, Mr. Chairman. I am prepared to answer any questions.

[The prepared statement of Mr. Green follows:]

PREPARED STATEMENT OF GRANT GREEN

Mr. Chairman and members of the Committee, I am pleased and grateful to you for inviting my comments on what is certainly the most far reaching and comprehensive US government re-organization proposal since the Second World War. The horrific events of September 11, 2001 have brought a vigorous, determined, and effective response from the people and government of the United States, but also the knowledge that we must do better. This proposal is a significant down payment on the absolute obligation we have to do everything in our power to protect our country and its people from terrorism. The Department of State has and will play a vital role in this effort, and we fully support the President's proposal.

Although INS has always had the final decision who actually enters the US, the authority to make the crucial visa decision has long been legally vested in consular officers of the Foreign Service of the United States, reporting to the Secretary of State. The Secretary's legal authority to supervise this function is established in the Immigration and Nationality Act of 1952, which requires State to coordinate with the Attorney General and those agencies of the Department of Justice—principally the INS and the FBI—that work for him. The proposal you have before you would transfer to the new Homeland Security Secretary both the current authority of the Attorney General and the authority of the Secretary to establish regulations relating to the granting and refusal of visas by consular officers and to administer and enforce the laws regarding the issuance and denial of visas by consular officers. The new Secretary of Homeland Security will exercise this authority over consular officers through the Secretary of State. Because visa decisions abroad are important to carrying out our foreign policy, the President's proposal ensures that the Secretary will retain the authority to deny visas on foreign policy grounds.

While it is intuitively obvious to us all that visa policy is integral to the protection of the United States from terrorists, I think it important to say very explicitly why this is so. The nineteen terrorists who attacked the US on 9/11 traveled to the United States on legally issued visas and proceeded on to their deadly mission undeterred by US authorities. Why did we not recognize who they were and what they planned to do and refuse those visas or subsequent entry when they arrived? There was no way, without prior identification of these people as terrorists through either law enforcement or intelligence channels *and the conveyance of that knowledge to consular officers abroad*, that we could have known their intention. This disciplined terrorist organization made use of people with few known prior terrorist associations, clean records, and evidence of economic solvency that they knew would be needed to pass review by visa or port of entry immigration officers.

I cannot emphasize strongly enough that identification by intelligence and law enforcement and the sharing of that data with consular officers abroad is a critical component of fighting terrorism through visa policies. We believe we have come a long way in a short time towards the comprehensive data sharing we must have to prevail in this area of the war against terrorism. Executive orders and The USA Patriot Act require and reinforce such sharing, and our files on potential terrorists are far better now than they have ever been in the past. We believe a new Department of Homeland Security empowered to provide to consular officers abroad all the information that the US Government knows from whatever source is the most es-

sential element in assuring the denial of visas to those who would harm us. The Secretary of State fully supports the creation of this Department with this authority to ensure full data sharing. It will empower officers of the Foreign Service to protect our country using the tools and systems we have long worked to develop.

As I said, knowing who a potential terrorist is will do us little good if we don't have a reliable system to pass that knowledge to consular officers wherever they might be approached by a terrorist for a visa. Here our progress has been exponential since the first attempt on the World Trade Center in 1993. Our Consular Lookout and Support System (CLASS) provides consular officers anywhere in the world access to the best information on people we do not want in the US. We have invested and will continue to invest heavily in improving its speed and comprehensiveness. It uses the most advanced foreign language algorithms to ensure that transliteration and common names are not overlooked, and it prevents any visa from being printed until our name-check system—including any required interagency consultations—has been cleared. The specialized skills and training of the Foreign Service will work hand in glove with the new Department of Homeland Security to deny visas to potential terrorists.

In creating the new Department it is also important to recognize that visa policy plays a vital role in important foreign policy concerns of the United States which in many ways also support our Homeland Security. Our visa policies advance our economic interests, protect the public health, promote human rights and democratic values. Someone seeking a US visa will find that our laws promote religious freedom, oppose forced abortion and sterilization, enforce the reciprocal treatment of diplomats, insist upon the fair treatment of American property, and punish the enemies of democracy around the world.

Finally, the war against terrorism is a world war that cannot succeed without cooperation by our friends and allies who are also threatened by the same terrorists. We have seen the success that a determined United States can have in forging a coalition and in obtaining diplomatic, military, law enforcement, and intelligence cooperation from abroad. We must be mindful of the need to strengthen these partnerships and to win not only the overt war against terrorists, but the equally important hidden war for freedom and democracy that rages between fanatics who would employ terror to crush these ideals and the large majority of humanity that seeks the same freedoms as their own. Demonstrating that the United States remains open to our friends and partners in the war on terrorism and welcoming society is a crucial element in winning and maintaining the support from abroad that we need to prevail.

In summary, there is no antagonism between the goals of identifying and denying admission to the US to terrorists and welcoming our friends to join us at home and abroad in this fight.

Mr. GALLEGLY. Thank you, Mr. Green. What we will do is we will take testimony from all witnesses, and then we will move into the question series. Well, I see that we are now joined with our esteemed—would you like me to——

Mr. GEKAS. Please continue.

Mr. GALLEGLY. Very well. I will follow you anywhere, Mr. Gekas.

Our next witness is Mr. John Ratigan. He is an Immigration Consultant with the law firm of Baker & McKenzie. He served 25 years with the State Department as a Foreign Service Officer, working in the U.S. Embassies in Singapore, Cairo, Toronto, and Seoul. Mr. Ratigan began his career as Vice Consul in Tehran, Iran.

He also directed the training of State Department visa and consular officers at the Foreign Service Institute from 1987 to 1989.

Welcome, Mr. Ratigan, and we look forward to your testimony.

STATEMENT OF JOHN R. RATIGAN, IMMIGRATION CONSULTANT, BAKER & McKENZIE

Mr. RATIGAN. Thank you, Mr. Chairman and Members of the Subcommittee. Thank you for the opportunity to testify today.

The views I will express are entirely my own and do not reflect the views of the firm that I work for nor any of its clients.

I will focus my testimony on title IV of the draft legislation and particularly on the visa function, the overseas portion of the immigration process, on who should direct and be responsible for the visa function and how it should be staffed.

The visa function should be transferred from the Department of State to the Department of Homeland Security. Once at DHS, it should be incorporated into the Immigration and Naturalization Service to form a single, unified Government entity responsible for the formulation and implementation of U.S. immigration policy. This proposal may seem radical or dramatic to some, but I believe it is in fact a rational and sensible change that would finally, 50 years after the passage of the Immigration and Nationality Act, give the United States a single policymaking and implementing body in the field of immigration.

The reasons for making this change are several. First, it provides a more rational structure. Unifying U.S. immigration policy formulation and implementation under one roof will put an end to the awkward and inefficient structure of shared authority with State and INS. The U.S. instead would follow the model established by Australia and Canada, both of whom have unitary immigration services, well respected for efficiency and professionalism. Both the Canadians and the Australians have experimented in the past with dividing immigration functions among various bureaucracies, and about 10 years ago both settled on the structure of a unitary organization outside of the Foreign Affairs Ministry.

Second, it will improve internal communication. Uniting all immigration functions in a single organization cannot help but improve communication and coordination among the offices and the individuals performing that work.

Third, it should improve case handling for applicants. These applicants often suffer the inefficiencies of the current divided system when they must change from one processing organization to the other, which often requires itself several months, the change does, and requires applicants to learn an entirely new set of procedures. The paper processing itself must be improved, but a unitary system should break down the jurisdictional walls.

Fourth, it will make the Immigration Service more attractive as a profession. Adding several hundred overseas positions, and perhaps even more than that, to the INS will thus make it a truly global rather than a national organization with a few overseas offices, and will certainly make INS more attractive as an employer and effective as a recruiter. Again, the Canadian and Australian Immigration Services are the model.

Fifth, the Department of State has in the past accorded a lower priority to fraud and security matters. The State Department's concern with the impact of the visa process on bilateral relations with the host country has caused it to stress the public relations aspects of the visa process. For a decade or more, the principal message from Washington to consular officers abroad has been that the role of the consular officer was to, "facilitate and promote international travel and the free movement of people of all nationalities to the United States." State has also downgraded its anti-fraud activities in recent years.

It should be noted, Mr. Chairman, that the State Department has a very large financial stake in this decision. With the MRV fee now at $65 per application, and with roughly, by the best figures available to me, roughly six to seven million applications each year, the Department would lose approximately $400 million annually in nonappropriated funds if the visa function were transferred.

The visa function should continue to be staffed principally by State Department officers, however. I think that the visa operations should be supervised by DHS personnel, but the majority of the line visa officers should continue to be, as they are now, junior officers from the State Department. These officers in their first and second tour are highly capable, highly motivated, and highly productive.

There is a justifiable fear, Mr. Chairman, that moving the State Department's visa function into DHS will create a vast enforcement minded monolith devoted to the refusal of visas and reflecting a paranoid siege mentality. Maintaining its responsiveness will be a major challenge for the new organization, one that it will have to work on. The most important improvement that DHS can provide is to ensure a reliable system by which today's visa applicants can be matched up with the best information available to the Government about them.

The provisions of title IV of the draft legislation are confusing and ambiguous in key areas. My statement offers several comments in that area. I will not go into details except to say that title IV should not be hesitant to make a full, firm transfer of the visa function from State to DHS, leaving little residual role for the State Department. This would include the transfer of relevant personnel and assets, direct issuance of regulations, and such provisions as may be needed to permit State Department junior officers to be supervised directly by DHS personnel with appropriate input from State.

Thank you, Mr. Chairman, and Members of the Subcommittee.

[The prepared statement of Mr. Ratigan follows:]

PREPARED STATEMENT OF JOHN RATIGAN

Good afternoon, Mr. Chairman and members of the Subcommittee. Thank you for the opportunity to testify today. My experience in immigration covers 30 years, including 25 years as a State Department Foreign Service Officer, specializing in immigration and visa matters. During that time, I served as the Consul General or supervisory consular and visa officer in Singapore, Republic of Singapore; Cairo, Egypt; Toronto, Canada; and Seoul, Korea. I also served two and a half years on detail from the State Department as Counsel to the Senate Immigration Subcommittee. Since my retirement from the State Department in 1997, I have worked as an immigration consultant; I am currently with Baker & McKenzie here in Washington. The views I will express today are entirely my own and do not reflect the views of the firm I work for nor any of its clients.

I will focus my testimony on Title IV of the draft legislation, and particularly on the visa function—the overseas portion of the immigration process—on who should direct and be responsible for the visa function and how it should be staffed.

A. THE VISA FUNCTION SHOULD BE DIRECTED BY THE DEPARTMENT OF HOMELAND SECURITY.

The visa function should be transferred from the Department of State ("State") to the Department of Homeland Security ("DHS"). Once at DHS, it should be incorporated into the Immigration and Naturalization Service, to form a single, unified government entity responsible for the formulation and implementation of U.S. immigration policy.

This proposal may seem radical or dramatic to some. I believe it is, in fact, a rational and sensible change that would finally—50 years after the passage of the Immigration and Nationality Act—give the United States a single policy-making and implementing body in the field of immigration.

The reasons for making this change are several.

1. It Provides a More Rational Structure.

Unifying U.S. immigration policy formulation and implementation under one roof will put an end to the awkward and ungainly structure which has been in place for the past 50 years, since the passage of the Immigration and Nationality Act in 1952. Under the current structure, there are now two administrative organizations—State and the Immigration and Naturalization Service ("INS")—each of which maintains control over its own turf, and neither of which regards itself as being fully responsible for immigration successes or failures.

By uniting the overseas (State) and the domestic (INS) elements of the immigration process under DHS, the United States will follow the model set by Australia and Canada, both of whom have unitary immigration services, well respected for efficiency and professionalism.

Under the current system, as I say, while responsibility is shared, leadership is not sought. The culture at State has been, for at least 30 years, that State is not an immigration organization, it is a foreign policy organization. Therefore State does not take the initiative to suggest legislative changes in the immigration field. The view is, as best as I can determine, that the State Department's political capital on the Hill should be saved for foreign policy and budgetary matters.

The culture at INS, as I have been able to observe it, has been to regard itself primarily as an implementing agency, rather than as a formulator of policy. Most legislative changes of the past 20 years have originated in the Congress, not with either State or INS. Congress, to an unusual degree, continues to set the direction of immigration policy.

I believe that the joining of the domestic and overseas functions under a single authority carries potentially more significant benefits to the organization than does, for example, the separation of the enforcement and benefits functions. This move establishes a structure that at least gives us the possibility of developing an Immigration Service of the caliber of the Australians' and the Canadians'.

2. It Will Improve Internal Communication.

Uniting all immigration functions in a single organization cannot help but improve communication and coordination among the offices and individuals performing that work. As a State Department visa officer, you were at the end of a long thread reaching back to a Washington office (State) that got its instructions from another Washington office (INS) which in turn passes those instructions on to you. In some cases, one Washington office didn't feel the need to coordinate with the other Washington office at all.

Having all visa/immigration personnel on the same e-mail system, reading the same internal memos and directions, can not help but dramatically improve communication and coordination.

A single organization should also improve communication with other agencies, who will now have a clearer view of the risks of sharing or not sharing their information with the Immigration Service.

3. It Should Improve Case Handling for Applicants.

Visa applicants often suffer the inefficiencies of the currently divided system when they must change from one processing organization to the other. When they are the beneficiary of an approved immigrant petition, for example, and want to pick up their visa at an Embassy or Consulate overseas, the service provided by the State Department is efficient once the work is begun, but the delay in moving from INS to State jurisdiction can take several months.

Similarly, a visa applicant at an Embassy who must obtain a waiver of ineligibility from INS can suffer waits of many months as paper moves between the two bureaucracies.

The paper-processing itself must be improved, but a unitary system should break down the jurisdictional walls.

4. It will make the Immigration Service more attractive as a Profession.

The INS at present is not a highly appealing organization to work for. Recruiting can be difficult and current officers are reported to be leaving for better-paying or more attractive jobs in other agencies or departments. Adding several hundred overseas positions—and perhaps more than that—to the INS, and thus making it a truly international rather than national organization, will certainly make it more attrac-

tive as an employer. It will also increase the variety available to immigration officers, and should increase its appeal to federal job-seekers.

Again, the model is the Canadian and Australian immigration services, which are able to attract skilled professionals who take pride in their association with their employer.

5. The Department of State has in the past accorded a lower priority to Fraud and Security Matters.

The State Department's concern with the impact of the visa process on bilateral relations with the host country has caused it to stress the public relations aspects of the visa process. For a decade or more, the principal message from Washington to consular officers abroad has been that the role of the consular officer was to "facilitate and promote international travel and the free movement of people of all nationalities to the United States." (Volume 9 (Visas) of the Foreign Affairs Manual, at section 41.31 Note 1.)

It was not difficult for officers to translate that language into an encouragement to issue visas, and not to be overly concerned about enforcement-related issues such as fraud, except where an applicant's prior conduct led to clear visa ineligibilities under the Act.

That message was underscored four to five years ago, when the Office of Fraud Prevention Programs in the Consular Affairs Bureau was abolished and its officers were disbursed among other Offices within Consular Affairs. It was widely believed at that time that the "reorganization" was designed to marginalize Fraud Prevention and diminish its role in policy formulation, especially in regard to instructions for the issuance or denial of visas.

The State Department's interest in "facilitating travel" would seem to be at odds with the current sense that we must now regard the visa function as playing a central role in our national security.

B. THE VISA FUNCTION SHOULD CONTINUE TO BE STAFFED PRINCIPALLY BY STATE DEPARTMENT OFFICERS.

I recommend that each U.S. visa operation abroad would have one or two supervisors from DHS. Small posts such as those in Africa might have no supervisors, but rather a "circuit-riding" DHS supervisor based in the region.

The majority of visa officers would continue to be, as they are now, junior officers from the State Department. This arrangement might be only transitional, until DHS can recruit and train its own officers. DHS could find that this arrangement works well, however. These junior officers, in their first or second tour, are highly capable, highly motivated, and highly productive. While their visa adjudications can be inconsistent from one officer to another, they often possess strong language skills and have a deep interest in foreign cultures that drew them to join the State Department in the first place.

The Foreign Service Officers might be supplemented by U.S.-based or locally-based American personnel hired by DHS.

It is often said that junior State officers are demoralized by adjudicating visas and eager to move on to other more mainstream State Department work. The work in high volume posts is difficult and often unrelenting, but the young officers perform their work with a positive outlook, to their credit, and do it better than anyone else I can imagine. Visa interviewing also provides these officers with useful training for their future careers in the Foreign Service, as visa interviewing affords valuable insights into the operations of foreign cultures and economies.

The junior officers' professional development within and ties to the State Department could be maintained by Homeland Security and State Department officers sharing in the performance evaluation of them.

C. RESPONDING TO THE CONCERNS OF THE DEPARTMENT OF STATE.

The press has reported that the State Department would like to have its consular officers continue to handle the interview and issuance/refusal functions. There is a traditional view within State that importing INS officers to conduct visa interviews would create public relations problems, as there could be a lack of sensitivity to local cultures as well as difficulty in maintaining control of officers responding to a Department other than State.

The arrangement of having junior Foreign Service Officers administer the visa functions under the direction of DHS supervisors should meet many of these concerns. There might well be moments of tension between senior Embassy managers and DHS supervisors, but I am optimistic that, after some adjustment period, the DHS personnel would come to appreciate local sensitivities and Mission needs.

Other government Departments, including Defense and Justice, have shown their ability to adapt when assigned to Embassies and Consulates overseas.

It should be noted that the State Department has a financial interest in the visa function as well. The Machine Readable Visa ("MRV") fee of formerly $45, now $65, per visa application is a significant source of non-appropriated funds. With State issuing roughly six to seven million visas per year, it could represent future revenues of as much as $400 million annually to the State Department. State might well contend that if its officers are to continue to administer the visa function, it should continue to receive some or all of those MRV fees. In any case, it will be concerned at the possible loss of such a significant source of funding.

D. THE NEW, UNIFIED IMMIGRATION SERVICE SHOULD TAKE STEPS TO AVOID BECOMING AN UNRESPONSIVE, ENFORCEMENT-MINDED MONOLITH.

Immigration advocates and other observers are likely to express the justifiable fear that moving the State Department's visa function into DHS will create a vast, enforcement-minded monolith, devoted to the refusal of visas and reflecting a paranoid, "siege mentality." What steps can be taken to avoid both the mindset and the reality?

The new entity will constantly have to bear in mind, and should be regularly reminded, that 99-plus percent of travelers to the United States are not terrorists, and have not the slightest interest in bringing harm to the United States. Some may desire to work here without authorization, but very few intend to harm us or our institutions. Business, tourism and education, to name only three, depend on the smooth functioning of our immigration and border control systems. DHS can not afford to lose their confidence.

The new entity must therefore make it a high priority to resolve cases of possible terrorists, criminals or other malefactors not only accurately but quickly. Many of these cases turn out to be simply cases of mistaken identity, when someone has the same or similar name as someone else, perhaps coupled with some similarity in nationality or date of birth. To resolve those cases quickly and accurately, DHS should establish an operations center which would have access to the best information available to the Federal government. The critical failure in the issuance of visas to persons who turn out to be terrorists has been the inability to match up current applicants with the information available about them.

Increasing the profile of national security issues in visa adjudications also threatens to add "national security" to the list of justifications for unresponsiveness or delays in adjudication. The rationale for including immigration in DHS is of course to enable INS to get these adjudication decisions right in cases where probable cause exists. But DHS must avoid reaching for the "national security" justification when it is not really merited. Maintaining its responsiveness will be a major challenge for the new organization, one that it will have to work on. One possible approach to achieve this objective would be to require periodic consultations on the visa-issuance function between DHS and an inter-agency task force that would include the Department of State and perhaps the Department of Commerce.

E. COMMENTS ON TITLE IV AS DRAFTED.

The provisions of Title IV of the draft legislation are confusing and ambiguous in key areas. Some brief comments:

1. Section 403(a)(1) gives the Secretary of DHS "exclusive authority, through the Secretary of State, to issue regulations," etc. The ambiguity of giving power to one Cabinet secretary to act through another Cabinet secretary is self-evident. Questions of veto power and dispute resolution immediately come to mind. It is not clear to me why the regulations should be issued through the Secretary of State at all. If Congress wishes State to have a role in the formulation of visa regulations)—which I would see no need for—then, I would suggest wording such as "exclusive authority, in consultation with the Secretary of State where appropriate, to issue regulations, etc."

2. While Section 403(a)(1) gives the Secretary of DHS "exclusive authority . . . to issue regulations . . . , administer, and enforce the [Immigration and Nationality Act]," it fails to transfer any personnel or assets of the State Department for that purpose. The State Department's Visa Office contains all the expertise required to carry out that mandate, however, as it applies to the visa function. If DHS is not to start from scratch, some or all of the personnel supervised by the Deputy Assistant Secretary of State for Visa Services should be transferred to DHS.

3. If the language of section 403(a)(1) is intended to mean that DHS personnel can supervise or direct the activities of diplomatic and consular officers only "through the Secretary of State," then I would suggest that such a relationship will

prove very difficult if not impossible to sustain. If the State Department's junior officers are to administer the visa function, DHS officers must be free to supervise them directly. The Embassy's senior executives should in turn make their policy concerns known directly to the Homeland Security supervisors. If that relationship ultimately proves unsatisfactory, the Ambassador can demand the removal of the uncooperative officer. I believe that State can ensure that its junior officers remain responsive to State concerns by giving senior State officers a role in the performance evaluations of the junior officers.

4. Section 403(b) can be read at first glance to give the Secretary of State broad authority to refuse visas: its exact meaning as currently drafted is ambiguous. The accompanying analysis indicates that the intention was to "preserv[e] the Secretary of State's traditional authority to deny visas to aliens based upon the foreign policy interests of the United States." Assuming that is indeed the intent, I would suggest that the language be amended to specify that established authority, such as, "The Secretary of State will have exclusive authority to refuse a visa to an alien under section 212(a)(3)(C) of the Immigration and Nationality Act."

5. Finally, in section 401(3), regarding the responsibilities of the Under Secretary for Border and Transportation Security, just to remove any doubt on the point, I would include authority over the refusal of visas as well as the granting of them. I would also suggest the removal of the words, "or lawful permanent residents," as the Immigration and Nationality Act contains some provisions regarding the entry of lawful permanent residents.

In summary, I would recommend that Title IV of the draft legislation be amended to:

- Reflect a unitary immigration structure, in which domestic and foreign immigration functions are handled by a single entity, the Department of Homeland Security;
- Authorize the direct issuance by DHS, without passage through the State Department, of regulations regarding the visa function, with such participation by the State Department in the regulation-writing process as Congress deems appropriate;
- Transfer relevant personnel and assets from the State Department to DHS to enable it to carry out the responsibilities described above;
- Authorize, if necessary, junior State Department officers to be directly supervised by DHS personnel in the implementation of the visa function abroad.

Mr. GALLEGLY. Thank you, Mr. Ratigan.

Our next witness is Mark Krikorian. Mr. Krikorian is Executive Director of the Center for Immigration Studies, a research organization which examines and critiques the impact of immigration on the United States. He is highly published and interviewed on various immigration issues.

Mr. Krikorian holds a Master's Degree from Fletcher School of Law and Diplomacy, and a Bachelor's Degree from Georgetown University.

Welcome, Mr. Krikorian.

STATEMENT OF MARK S. KRIKORIAN, EXECUTIVE DIRECTOR, CENTER FOR IMMIGRATION STUDIES

Mr. KRIKORIAN. Thank you, Mr. Chairman, and Mr. Chairman.

The Homeland Security Act of 2002 would add to the President's Cabinet the Department of Homeland Security, including, among other things, the Immigration and Naturalization Service. Given the new department's stated mission, it is clear that the enforcement and inspection elements of the INS would be included. But what of the other immigration functions, such as adjudicating applications for permanent residency, for citizenship, for amnesty; in other words, the service function of the INS? Should that also be included in the new department?

The answer must be yes. That is certainly the explicit view of President Bush and of Governor Ridge. And President Franklin Roosevelt would also have agreed.

In 1940, as war neared, the INS was moved from its home in the Department of Labor to the Department of Justice, the body then tasked with ensuring homeland security, and the reason for that was, in President Roosevelt's own words, reasons of national safety.

Given the stated intention of Islamic terrorists to use weapons of mass destruction against our own people, the direct threat to our homeland is even greater in this war than it was in World War II. The central reason that it is important to keep service and enforcement under the same umbrella, however they might be organized, is that the provision of what the INS calls immigration benefits, employment authorization documents, green cards, asylum, citizenship, is inherently two-sided. It consists both of a welcome for legitimate applicants and the enforcement of the law against those who do not qualify. Only by placing immigration services within the new department will those charged with providing those services be likely to fully appreciate their importance in ensuring homeland security and to have the necessary tools to do so.

As is also the case, I would argue, with the visa function of the State Department. This is not merely theoretical speculation. The Center for Immigration Studies has examined the immigration histories of the 48 foreign-born al Qaeda operatives who have been convicted or pled guilty or killed themselves in the United States over the past 10 years. We did a publication which all of your offices have, but I can supply extras if you would like.

We found that the terrorists used almost every conceivable means to enter the United States. Now, it is true that some had little, if any, contact with the INS service personnel, such as those who came in as tourists or who were illegal aliens. However, fully one-third of the terrorists were lawful permanent residents or naturalized citizens. An additional three were applicants for asylum. And, in fact, before September's attacks the majority of the Islamic terrorists in the United States were either legal residents or naturalized citizens, and thus had extensive contacts with the Immigration Service's service personnel.

In other words, the process of screening non-citizens doesn't end when the State Department issues a visa. It doesn't end even when the foreign citizen is cleared by customs and immigration inspectors. Even when they are in the country, we need to make it as difficult as we can for terrorists to operate, and a major part of that effort rests on the shoulders of the Immigration Service's division of the I NS.

Whom we give green cards or citizenship to, then, is a homeland security issue. Citizenship is the most desirable for terrorists, of course, because it makes an immigrant—as it should—into one of us, able to come and go freely, work at any job, can't be deported. They enjoy the full protection of the Constitution. Six al Qaeda terrorists were naturalized U.S. Citizens, including Ali Mohammed, who wrote al Qaeda's handbook, and Khalid Abu al-Dahab, who was an important fund-raiser and recruiter for al Qaeda. And the recruitment of naturalized citizens by al Qaeda is a conscious strategy. When Dahab and Ali Mohammed went to Afghanistan in the

mid-1990's, Osama bin Laden himself is reported to have emphasized the importance of recruiting as many Muslims with American citizenship as possible.

Whom we grant green cards is also a security issue. While they are not as desirable for terrorists as citizenship, they are, after all, a step toward citizenship, and in the meantime they allow one to work and live permanently in the United States with very few restrictions, and it allows one to come and go in and out of the United States without many of the restrictions that apply to non-immigrants, not to mention illegal aliens.

We see the importance of that in the case of Mahmud Abouhalima, one of the leaders of the first World Trade Center attack, who received a green card under the 1986 amnesty. It was only after he became a permanent resident that he was able to come and go freely, to get terrorist training in Afghanistan and then to come back.

In all, 11 of the terrorists have been green card holders. The contact such people have had with INS service personnel represented repeated opportunities to uncover their terrorist conspiracies. The vital improvements we seek in gathering and sharing intelligence on terrorists are only likely to reach their full potential if those who consider the applications for residency, citizenship, et cetera, come to see their role as central to security and use those new intelligence tools, and that is not going to happen if immigrant services are housed outside this new department.

And this discussion of the role of INS services in tripping up terrorist conspiracies doesn't even take into account the widespread fraud that terrorist—immigration fraud that terrorists have perpetrated. For instance, several of the terrorists have engaged in fraudulent marriages to American citizens. Also, one, such as Sheik Omar Abdel Rahman, gave false information, fraudulent information in his application for permanent residence.

The General Accounting Office has found that such fraud is pervasive and significant in their words, and quoting various officials within INS, described fraud—immigration benefit fraud as rampant, out of control, and one official estimated it accounts for 20 to 30 percent of all applications. And the acting head of the INS—then acting head of the INS Immigration Services Division testified before this Subcommittee 3 years ago that immigration benefit fraud has increased and has facilitated the activities of terrorists and criminals.

Lastly, there is the important question, which I suspect the next two witnesses will address, of whether the quality of service provided to immigrants would suffer if all of the functions of the INS were moved into the new department.

In my opinion, placing all of INS in the new department actually makes sense for immigrants. It is very important that those charged with enforcing the immigration law understand the rights of immigrants and foreign visitors. But if enforcement is placed in an entirely different executive department, it is much more likely that those charged with enforcement possibly ride roughshod over the rights of non-citizens. There is also the very real danger that immigrant services would be even less adequately resourced and

staffed than they are now and relegated to the kind of secondary role we see now with visa issuing in the State Department.

So it would seemed to me that it would be important for us not to neglect the expeditious and professional provision of services to people we have invited to live and visit among us, and separating enforcement and services into two entirely different executive departments will inadvertently cause this to happen, worsening an already bad situation with regard to immigrant services.

[The prepared statement of Mr. Krikorian follows:]

PREPARED STATEMENT OF MARK KRIKORIAN

H.R. 5005, the Homeland Security Act of 2002, would add to the president's cabinet a Department of Homeland Security, including, among other things, the Immigration and Naturalization Service (INS). Given the stated mission for the department of preventing terrorist attacks within the United States and reducing our country's vulnerability to terrorism, it is clear that the enforcement and inspection elements of the INS must be included in such a new department. After all, the Border Patrol, INS investigators, and inspectors at land, sea, and air ports of entry are America's last line of defense in this new kind of war, where the "home front" is no longer a figure of speech, as it was in the past, but instead the most important front of all.

But what of the other immigration functions, such as adjudicating applications for permanent residency or citizenship or asylum? Should they also be included in this new Department of Homeland Security? The answer must be yes.

That certainly is the view of President Bush, who said in his message to Congress about this measure: "The Secretary of Homeland Security would have the authority to administer and enforce all immigration and nationality laws . . ." Gov. Ridge likewise told the Senate just yesterday, "To make the system work, the right hand of enforcement must know what the left hand of visa application and processing is doing at all times."

Given his actions on the eve of World War II, it would appear that Franklin Roosevelt would also agree. The precursor of the INS was established in the Treasury Department in 1891 and moved to the new Department of Commerce and Labor in 1903. But in 1940, as war neared, the INS was moved to the Department of Justice, the body then tasked with ensuring homeland security. Immigration scholar Vernon Briggs has written of the move that "It was feared that immigration would become a way of entry for enemy spies and saboteurs," and President Roosevelt himself said the change was made for reasons of "national safety." A history of the INS describes its war-related duties: "Recording and fingerprinting every alien in the United States through the Alien Registration Program; . . . constant guard of national borders by the Border Patrol; record checks related to security clearances for immigrant defense workers . . ." Given the stated intention of Islamic terrorists to acquire and use weapons of mass destruction, today's direct threat to our homeland is even greater that the threat posed by Nazi Germany and Imperial Japan six decades ago, and thus the reorganization of our homeland security effort must not be less comprehensive.

Nor are any of the various proposals to separate the enforcement and service functions of the current INS inconsistent with moving both immigration functions to the new department. As Gov. Ridge recently said of the INS, "If you're going to change the culture, it's not a bad idea to put it in another new department and then bifurcate it." Whether the INS stays unified but simply clarifies its chains of command—the Clinton and Bush administrations' original approach—or is broken into two separate bureaus within a single department—the approach endorsed by this House—all its functions can and should move together to the new department.

But why is this important? The central reason is that the provision of what the INS calls "immigration benefits"—employment authorization documents, permanent residency, asylum, or citizenship—is inherently two-sided. It consists both of a welcome for legitimate applicants and the enforcement of the law against those who do not qualify. Only by placing immigration services within the new Department of Homeland Security will those charged with providing those services be likely to fully appreciate their importance in ensuring homeland security.

This is not mere theoretical speculation. The Center for Immigration Studies has examined the immigration histories of 48 foreign-born al Qaeda-linked operatives who took part in terrorism within the United States over the past decade (the report is on line at http://www.cis.org/articles/2002/terrorism.html). We found that these

terrorists used almost every conceivable means to enter the United States. At the time of their crimes, one-third of these terrorists were here on temporary visas, primarily as tourists, and thus would have little if any interaction with INS's service personnel. An additional one-fourth were illegal aliens, and thus subject, at least theoretically, to INS enforcement activities. However, fully one-third of the terrorists were Lawful Permanent Residents or naturalized citizens, and an additional three were applicants for asylum.

An examination of the history of these enemy agents shows extensive contacts with the INS's immigrant-services personnel and highlights the law-enforcement element of providing immigration benefits. And, in fact, prior last September's attacks, the majority of the militant Islamic terrorists over the last decade had been persons living legally in the United States as permanent residents or as naturalized citizens, and thus had extensive contacts with INS's immigrant-services personnel.

Whom we give citizenship to is a homeland security issue. Citizenship allows an immigrant, as it should, to come and go freely and to work at any job; it forecloses the possibility of deportation and bestows all the protections of the U.S. Constitution. Six al Qaeda terrorists were naturalized U.S. citizens, including some of the worst. For example, El Sayyid Nosair, who assassinated Rabbi Meir Kahane in 1990 and is one of the earliest militant Islamic terrorists in the United States, is a naturalized U.S. citizen. He was later convicted as part of the larger conspiracy to bomb landmarks around New York City. Nidal Ayyad, a chemical engineer who provided the explosive expertise for the first World Trade Center bombing in 1993, was also a naturalized U.S. citizen. Egyptian-born Ali Mohammed, who is widely regarded as having written al Qaeda's terrorist handbook detailing how to pick targets and operate in the West without detection, and who was involved in terrorism as far back as the 1993 World Trade Center bombing, is also a naturalized U.S. citizen. And Khalid Abu al Dahab, described as "a one-man communications hub," shuttling money and fake passports to terrorists around the world from his California apartment, is another naturalized American citizen.

The recruitment of naturalized citizens is a conscious al Qaeda strategy. A report in the November 21, 2001, *San Francisco Chronicle* quoted an Arabic-language newspaper account of a confession by Dahab; according to the *Chronicle*, "Dahab said bin Laden was eager to recruit American citizens of Middle Eastern descent." When Dahab and fellow terrorist and naturalized citizen Ali Mohammed traveled to Afghanistan in the mid-1990s to report on their efforts to recruit American citizens, "bin Laden praised their efforts and emphasized the necessity of recruiting as many Muslims with American citizenship as possible into the organization."

Whom we grant green cards to is also a security issue. Not only is it a step toward citizenship, it allows one to live and work permanently in the United States with few, if any restrictions. It also allows one to leave and return to the United States without the restrictions that apply to nonimmigrants, not to mention illegal aliens.

Consider the case of Mahmud Abouhalima, one of the leaders of the first World Trade Center bombing, who became a legal resident after falsely claiming to be an agricultural worker, allowing him to qualify for a green card as part of an amnesty passed by Congress in 1986. It was only after he became a permanent resident that he was able to come and go freely and make several trips to Afghanistan, where he received the terrorist training he ultimately used in the 1993 World Trade Center bombing. Had he been prevented from receiving a green card he would not have been able to leave the United States and then return as a trained terrorist. His receipt of a green card greatly facilitated his terrorism and was an important factor in al Qaeda's being able to stage the 1993 attack. In all, 11 LPRs have been convicted or pled guilty to their involvement in terrorism.

The frequent contacts such people had with INS service personnel represented repeated opportunities to uncover their terrorist conspiracies. The vital improvements we seek in gathering and sharing intelligence on terrorists are only likely to reach their full potential if those who consider applications for residency, citizenship, etc., come to see their role as central to homeland security and use those new intelligence tools—and that cannot happen if immigrant services are housed outside the new Department of Homeland Security.

The role of INS's services division in tripping up terrorist conspiracies doesn't even take into account widespread immigration fraud by the terrorists. For instance, several terrorists have engaged in fraudulent marriages to American citizens, such as Dahab, as well as Fadil Abdelgani, who took part in the plot to bomb New York City landmarks. Also, terrorists have provided false information on their applications for permanent residence, such as Sheik Omar Abdel Rahman, who inspired several terrorist plots.

In January of this year, the General Accounting Office reported that such immigration benefit fraud is "pervasive and significant." (http://www.gao.gov/new.items/

d0266.pdf) It found that INS officials were well aware of this problem; anti-fraud officials in Los Angeles said that immigration benefit fraud is "rampant across the country," a Miami fraud unit official stated that fraud is "out of control," while a Nebraska Service Center official told GAO that fraud is probably involved in about 20 to 30 percent of all applications filed.

The acting head of the INS's Immigration Services Division testified before this subcommittee three years ago that immigration benefit fraud had increased in both scope and complexity in recent years and that exploitation of the benefit petition process by criminals and criminal organizations had generated serious concerns. He stated that criminal aliens and terrorists manipulate the benefit application process to facilitate expansion of their illegal activities.

Interactions with the INS's service personnel need to be seen for what they are—not only opportunities to grant benefits to legitimate applicants, but also opportunities to weed out terrorists, criminals, and others who mean us harm. This homeland-security aspect of immigration services is essential, and is unlikely to be carried out properly if the INS's functions are split among different executive departments.

Finally, there is the question of whether the quality of service provided to immigrants would suffer if all immigration functions were moved to the new homeland security department. Placing all of INS in the new department makes sense for immigrants and nonimmigrants alike. It is very important that those charged with enforcing the immigration law understand the rights enjoyed by immigrants and foreign visitors. But if enforcement is laced in an entirely different executive department from services, it is much more likely that those charged with enforcement might ride roughshod over the rights of non-citizens. There is also the very real danger that immigrant services might not receive adequate resources if they were to be separated so completely from enforcement. Given the large number of al Qaeda terrorists who have violated immigration laws, it is understandable that money would be more likely to flow to immigration law enforcement, but we should not allow the war to become a reason for neglecting our responsibility for the expeditious and professional provision of services to people we have invited to live or visit among us. Separating the two may inadvertently create this possibility.

Mr. GALLEGLY. Thank you, Mr. Krikorian. You have heard the buzzer. Perhaps we can get one more witness to testify. If someone would like to go vote and come back. Mr. Chairman, what is your—so we can keep this going? We kept witnesses waiting.

Mr. GEKAS. I think that is an excellent suggestion.

Mr. GALLEGLY. And then someone could relieve us, and that way we can keep the hearing going.

With that, our next witness, Kathleen Walker, is testifying on behalf of the American Immigration Lawyers Association. Ms. Walker practices immigration law in El Paso, Texas, where she has focused on border issues for over 16 years. She has served as a board member of the Border Trade Alliance. She chaired AILA's State Department Liaison Committee for the past 3 years, and is a member of the organization's Border Issues Committee.

Welcome, Ms. Walker.

STATEMENT OF KATHLEEN CAMPBELL WALKER, AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA)

Ms. WALKER. Thank you so much. Mr. Chairman and distinguished Members of the Subcommittee, it is indeed an honor and privilege to have the opportunity to present testimony before you today on behalf of the American Immigration Lawyers Association. We were established in 1946, a non-profit organization, of about 8,000 attorneys and law professors representing individuals regarding immigration laws in the United States.

We are very concerned about the homeland security bill. We worked very hard on the border security bill as well, with our goal of improving national security, maintaining our trade in inter-

national commerce in an effective manner, and at the same time ensuring that people are able to enter this country and they would be welcomed when they applied versus being seen as threats when they applied. We do not believe that terrorism is in any way the equivalent of the word "immigration," and we know that this Subcommittee is very sensitive to that fact.

What we would like to see is that we take the time to consider the various aspects of moving these boxes and moving these agencies into this new Office of Homeland Security. We certainly appreciate the Administration's efforts in attempting to improve our national security through the better coordination of Federal agencies' activities. We want to see those goals achieved.

I am here because I am the border person for AILA, basically, and after 16 years I have seen the border coordination initiative fail. I have seen unified port management fail. But maybe they don't fail because of lack of a good idea, but because of the staffing, the management, the infrastructure, the funding, the coordination, the carry-through that we don't typically have. Whether that is outside of the Office of Homeland Security or inside the Office of Homeland Security with a new label, that is not going to be resolved without follow-through and effectively reorganizing a dysfunctional agency, meaning the Immigration and Naturalization Service.

So we would hope that Senate bill 2444, and of course the guidance provided in the House bill as well, will be utilized in restructuring the INS and making it functional.

In addition to that, we would hope to take the opportunity to make legality the norm for immigration in the United States. And what I mean by that is that we have willing employers and willing workers for labor needs that are not satisfied which serve as a magnet for illegal immigration. We would like to see legality as the norm tied to the reality of that magnet and, in addition to that, an opportunity for those in the United States to earn and regularize their status, to allow them to be participants, full participants in our society.

As far as the Office of Homeland Security, we would hope that immigration would stay outside of the Homeland Security Office initially. But if it is to go inside that office, we would propose a fifth prong. We would take or hope to propose to take the Border and Transportation Security Department and split it between transportation and commercial goods security, and then take the focus, the pivotal focus of immigration, our Nation of immigrants, and focus on the importance of that issue with an Immigration Services and Security Office.

Under that office, we would propose immigration services, adjudications and secondary inspections, border security, border patrol primary inspections, interior security, investigations, detentions, and removal, and as a part of that, in each subset, information coordination, because that is pivotal. Let's face it. If the various databases are not properly integrated and you do your search, how are you going to know the mens rea of the individual in front of you? We have no scentometer. We have no crystal ball that's functional. So to have a personal interview expect that that is going to result in the determination of whether someone is a terrorist I think is

a lie to the American public. We need to realize what the reality is.

As far as some other suggestions is an Office of Civil Rights, again to emphasize the importance of the issue of civil rights within our country and its importance under the Constitution. That would be, we would propose, under the Office of the Secretary.

In addition to that, we would propose the executive office for immigration review. It has been a bad practice to have the boss be the boss of both the prosecutor as well as the judge. And so what we would propose at this juncture is an independent agency to try to improve the public perception that indeed this process is something we can put faith and confidence in.

Finally, as to the very difficult subject which the other distinguished Members have addressed here at the table as to visa processing, after 3 years of work with the Department of State visa office here, and then in addition to that 16 years just doing consular-type work, the Secretary of State actually does manage to do a good job through the visa office. And as to these 19 that are listed, they went through something called the class system, which is a database conducted for each applicant for admission. The opportunity was there and the database failed.

Now, is that a failure of the Secretary of State's group or not? I would suggest not. And if we need to have the flexibility to protect U.S. citizens abroad, to achieve treaty negotiations that are successful for us in the United States, and to also improve our competition in the global marketplace, we believe that we can put faith and confidence in the Secretary of State of utilizing diplomacy in addition to visa policy together.

So in conclusion, we would just like to see that we have a full debate on this issue, that we consider our goals here, which are we have to manage to encourage tourism and trade in our country, to show that we are still a vibrant nation welcoming people to come here, and at the same time use our technological capacity to improve our ability to check our databases on those applicants that would be risks or not.

Thank you so much.

[The prepared statement of Ms. Walker follows:]

PREPARED STATEMENT OF KATHLEEN CAMPBELL WALKER

Mr. Chairman and Distinguished Members of the Subcommittee:

My name is Kathleen Campbell Walker. I am honored to be testifying today before you on behalf of the American Immigration Lawyers Association (AILA). AILA is the national bar association of nearly 8,000 attorneys and law professors, who represent the entire spectrum of individuals subject to our immigration laws. I am a member of AILA's Executive Committee, was privileged to chair AILA's State Department Liaison Committee for the last three years and also am a member of that organization's Border Issues Committee. I also practice immigration law in El Paso, Texas, where I have focused on border issues for over 16 years. In addition, I serve on the Texas State Comptroller's Border Advisory Council, and have served as a board member of the Border Trade Alliance as well as a member of the Executive Committee of the Texas Border Infrastructure Coalition. I worked for four years as President of the El Paso Foreign Trade Association to establish the first Dedicated Commuter Lane using Secure Electronic Network for Travelers' Rapid Inspection (SENTRI) technology in the state of Texas. I thus bring to the table practical experience regarding the challenges of border security and cross-border and cross-agency issues that I hope will be of use to the Committee.

INTRODUCTION

Before presenting specific immigration proposals in the context of the proposed Department of Homeland Security, the following points need to be emphasized.

- *Congress has the important responsibility of reviewing and modifying, as necessary, the President's Homeland Security Department initiative that would implement the most far-reaching changes to the organization of our government since the Second World War.* In fact, every American who seeks to make our nation safer also shares this responsibility. Questions about how best to address our security concerns must not be labeled as "special interest" griping or defending the status quo because too much is at stake to stifle or discourage debate, and all of us want the best system developed and implemented. In fact, the process by which we debate and create a Homeland Security Department will be as indicative of the state of our democracy as the final Homeland Security Department that becomes law. AILA thus welcomes the opportunity to testify on this important issue.
- *AILA cautions the Committee, and Congress as a whole, to proceed deliberately and carefully.* While many have urged that the formation of this new Department become law before the end of this Congressional session, we believe that getting it right is more important than proceeding quickly. And if getting it right takes more time, then Congress and the Administration should take the time needed to get it right. We cannot afford the mistakes and oversights to which a hasty examination and debate could easily lead.
- *We as a nation need to enhance our security without harming our internationally based economy, our dedication to respecting individual rights preserved by the Constitution, and our tradition as a nation of immigrants. AILA strongly supported the passage of the Enhanced Border Security and Visa Reform Act (P.L. 107–173) (Border Security Act) because that measure achieves an appropriate balance between these concerns.* The Border Security Act is premised on two facts. First, enhancing our intelligence capacity is key to our increased security. The face of terrorism is not tied to one nationality, religion, or ethnic group. The horrific terrorist action in Oklahoma is an ever-present reminder to us of that painful fact. Any changes in federal policies and procedures must allow our federal agencies timely access to valuable and reliable intelligence. In fact, the most important mission of the proposed Homeland Security Department is to further enhance our intelligence capacity and ensure interagency sharing of information. Our government has come a long way since September 11, with federal agencies now sharing data more frequently than in the past. However, more needs to be done, and failure to do a better job of intelligence gathering and coordinating the sharing of information will mean that we have failed to enhance our security.

  Second, the Border Security Act recognizes that our most effective security strategy is to keep out those who mean to do us harm, while admitting those who come to build America and make our country stronger. Immigration is not a synonym for terrorism. The problem here is terrorists, not immigrants. We need to isolate terrorism, not America.

  The Border Security Act's provisions reflect two important understandings about our country and our needs—namely, that we are a nation of immigrants, and that we must undertake any reforms in ways that do not destroy our economy and commerce. The U.S. is an integral part of the world economy, with global business, tourism, and migration serving a pivotal role in our economic prosperity. As we take important and needed steps to enhance our security, we must seek to ensure the efficient flow of people and goods across our borders. If we do not, we risk both chaos at our borders and the destruction of our economy, and along with it, the ability to pay for our national security. "Fortress America" is an undesirable and impractical solution that repudiates our history and our economic and social needs as well as the current reality of our global economy.

  Nearly 500 million entries occur annually by people who come to the U.S. as tourists, business people, students, or to visit with their families. Less than one million annually settle here as immigrants. Living in a border community as I do underscores on a daily basis the imperatives this flow creates, and the necessity of balancing our security needs with the fact that we are a nation of immigrants and that we must continue to facilitate the free flow of people and goods. In fact, our best protection is to focus our security resources where they are most needed. We must be able to identify and separate low risk travelers and facilitate their entry. Such measures are more ef-

fective and more easily implemented than measures that focus on persons after they enter the U.S. We need to make sure that we use our resources in the most effective way possible to keep out those who seek to do us harm, not those seeking to come to our country for the reasons that people have always come here, including escaping persecution, desiring to be reunited with their families, working legally in the U.S., investing or conducting business in the U.S., or visiting this country as tourists.

- *The bureaucratic restructuring created through the Homeland Security Department cannot take the place of either a comprehensive homeland security strategy or the need to reform outmoded immigration laws.* While the Bush Administration's proposal seeks to reorganize government, it is silent on the policies necessary to enhance our security, and the costs of such policies. Nowhere are such policies more needed than at our nation's ports of entry. And nowhere is there a greater call for change than in reforming our immigration laws to enhance our security, support our economy and American businesses, and reunite families. I will discuss both issues in more detail later in this testimony.
- *In the current environment, it is especially important to reaffirm that this nation's strength and future reside in our unity as a nation, our diversity, and the democratic principles upon which our country is based.* It is also important to remember that U.S. immigration policy is based on a number of values that relate to the core social and economic principles upon which our nation was founded. These values are complementary and interweave to create the rich fabric that is beneficial to all Americans. Among the most important values are: the unification of American families; employment-related immigration to keep America strong in a global economy; asylum protection for refugees fleeing persecution; naturalization based on allegiance to the principles contained in our Constitution and laws; immigration courts that are independent, impartial, and include meaningful checks and balances; and immigration policy that is implemented through a well-regulated system based on law, with fair, uniform, and predictable requirements.

  As the current situation calls out for change in the direction of more effective means of deterring terrorism, we must not lose sight of these fundamental values of this nation of immigrants. As we seek to create new means to isolate terrorists, we must take care not to isolate America in the process.

THE BUSH ADMINISTRATION'S PROPOSED HOMELAND SECURITY DEPARTMENT

The Bush Administration has proposed a major restructuring of the federal government that would realign government activities into a single cabinet-level homeland security department whose primary mission is to detect and deter terrorism. The new Department of Homeland Security would be divided into four divisions: Border and Transportation Security; Emergency Preparedness and Response; Chemical, Biological, Radiological and Nuclear Countermeasures; and Information Analysis and Infrastructure Protection. (The FBI and CIA would remain as independent agencies.) While proposing this massive structural reform, the Administration is silent about the comprehensive homeland security strategy that needs to accompany this bureaucratic restructuring.

AILA will focus its comments on the immigration aspects of this proposal. The Border and Transportation Security division, as proposed, would subsume our nation's immigration function. Along with all of the INS (enforcement and immigration services), and the Executive Office for Immigration Review (EOIR), currently part of the Justice Department, this division would include visa processing (from the Department of State), the Customs Service (from the Treasury Department), the Coast Guard and the Transportation Security Administration (from the Transportation Department), Animal and Plant Health Inspection Service (from the Agriculture Department), and the Federal Protective Service (from the General Services Administration). While under the Administration's proposal, the Coast Guard and the Secret Service would retain their independent identities and agency titles, the proposal indicates that the other "units," including the INS, would be "integrated into the new organization, ensuring that there is one clear organization built on divisions with clear mission statements and lines of authority."

The Administration has indicated that this proposal is consistent with the President's "long-standing proposal to reorganize our immigration system to focus on enforcement and administrative functions separately. Under this proposal, the enforcement and administrative functions would be separated within the new Department to ensure that those on the enforcement side are free to focus on enforcement, while those on the services side are free to reform and improve the way we treat those

who are seeking to immigrate legally to this country." However, it is questionable whether an agency whose overall goal is counter-terrorism and security will be able to properly fulfill the responsibility of providing timely and efficient immigration services that respect our laws.

The current structure and functioning of the INS only reinforces this concern. As a consequence of how INS is currently organized, an enforcement mentality is often reflected in inappropriate ways in adjudication decisions. The negative consequences of an unbalanced enforcement emphasis at our ports of entry were clearly evident even prior to September 11. For example, in recent years, adjudications by inspectors at ports of entry under the North American Free Trade Agreement (NAFTA) have become more inconsistent and less commerce-oriented due to a perceived need to make entries to the U.S. in Trade NAFTA status more restrictive. The result has been not the prevention from entry of terrorists, but the prevention from entry of legitimate business people attempting to carry out economy-fueling trade.

Even more troubling is the fact that the inspectors performing these adjudications at the ports of entry also have nearly carte blanche authority to deny someone entrance into the U.S. and to order "expedited removal." In an expedited removal situation, there is no right of legal representation, and the inspector's decision, usually made on the spot, is not subject to appeal or scrutiny. However, as a result of this quick decision, the individual is barred from reentry for five years. Often individuals do not even understand what has happened to them if expedited removal authority is invoked. If the enforcement element of inspections is further accentuated and enhanced, the possibility of fair and efficient adjudications becomes even less likely. Such power housed within a security agency can only lead to further erosion in fair and informed decision-making.

Furthermore, immigrants and their U.S. citizen and legal permanent resident family members are deeply troubled by the notion that the admission to the U.S. of their loved ones would be viewed primarily through the lens of security and enforcement, thereby equating immigration with terrorism.

Finally, this proposal subsumes many non-security functions that many fear will not get the attention they merit in a department so focused on security.

Under the Administration's plan, visa processing would be brought within the Border and Transportation Security division so that the "new Department would consolidate the legal authority to issue visas to foreign nationals and admit them into the country. The State Department, working through U.S. Embassies and consulates abroad, would continue to administer the visa application and issuance process." Thus, while the State Department would continue to issue and process visas, this proposal "will unify the policy authority on who can receive visas in the new Department." This proposal raises concerns about how such a division would operate and impact the process of granting visas.

In addition, this proposal will likely lead to Congress reorganizing itself to "match" the agency line-up created by the new department. However our immigration function is restructured, it is vitally important that the Committee with expertise on immigration, the Judiciary Committee of the House and Senate, retain jurisdiction over our immigration function.

While the Administration reportedly did not consult Congress in developing this proposal, much of it appears to mirror provisions in S. 2452/H.R. 4660 introduced in the Senate and House by Senator Lieberman and Representative Thornberry, respectively. AILA had opposed the Lieberman bill because its approach to immigration is deeply flawed. The proposed changes to the INS in that measure run counter to the effective reorganization contained in the bipartisan Senate INS reorganization bill (S. 2444), introduced by Senators Edward Kennedy (D-MA) and Sam Brownback (R-KS).

HOW OUR IMMIGRATION FUNCTION CAN BEST CONTRIBUTE TO OUR NATIONAL SECURITY

Our immigration function can best contribute to our national security needs in two ways: first, by being effectively, efficiently and fairly reorganized, and reorganized outside of the Department of Homeland Security. Secondly, Congress and the Administration need to support changes in our laws that would make legality the norm. This latter issue will be discussed at the end of this testimony.

Reorganizing our Immigration Function: AILA believes that reorganizing our immigration function and maintaining this function outside of the proposed Department of Homeland Security would achieve two results: a more effective, efficient and fair immigration process and enhanced national security. AILA greatly appreciates the hard work of members of the House Judiciary Committee, and in particular the subcommittee, who have focused on the need to restructure the INS. While their efforts have contributed much to the debate on how best to reform the INS, AILA be-

lieves that S. 2444, introduced by Senators Kennedy and Brownback, provides the best roadmap for reform.

AILA supports maintaining our immigration function outside of the proposed Homeland Security Department for the following reasons:

- *Our nation's immigration function needs to receive higher priority and more authority and resources, not less.* Given the importance of immigration, AILA believes that our immigration function, as is the case with the FBI, needs to remain separate from this newly proposed, large federal bureaucracy. In fact, to achieve maximum efficiency and effectiveness, our immigration function must be given higher prominence within our government. The best way to achieve this end is to effectively reorganize the INS (as structured in S. 2444) and implement mandated cooperation between the reorganized INS and the new Homeland Security Department.
- *Moving our immigration function into a Homeland Security Agency repudiates our tradition as a nation of immigrants and reflects a fundamental (and inaccurate) shift in how our nation views and treats immigrants.* Placing our immigration function within a department whose mission is to "prevent terrorist attacks within the United States; reduce the vulnerability of the United States to terrorism; and minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States" repudiates our tradition as a nation of immigrants and the history that has made us strong. In fact, placing our immigration function within a Homeland Security Department sends the signal that immigrants are to be feared and not welcomed as economic, cultural, social and political assets.
- *Immigration services and processing would fare poorly in the proposed new department.* Under the Bush Administration's proposal, immigration services would compete for funding with entities including the Coast Guard, Customs, the Border Patrol, and Transportation Security. The services budget and policies would not fare well, resulting in a service function in worse shape than it is now and increasing backlogs. In addition, given the new department's mission, enforcement and adjudications concerns would not be balanced, leading to a reduction in the admissions into the U.S. of legal immigrants and non-immigrants (close family members of U.S. citizens and legal permanent residents, and needed workers for U.S. businesses) and refugees and asylum-seekers, with negative consequences to our economy and society.
- *Placing our immigration function within the new department leads to concerns about civil rights.* The new department's mission suggests that the important balance between security and due process protections and guarantees would not be maintained. It is too easy for civil liberty considerations to be downplayed within a Homeland Security Department concerned with enforcement and national security.

Given these concerns, AILA strongly supports reorganizing the Immigration and Naturalization Service (INS) and keeping the INS independent of, but coordinated with, the proposed Homeland Security Department. AILA also strongly supports the reorganization plan developed in the bipartisan S. 2444, the Immigration Reform, Accountability, and Security Enhancement Act of 2002.

No matter where the immigration function is placed—within or outside of the proposed Department of Homeland Security—S. 2444 should provide the road map for any reforms undertaken.

IMMIGRATION IN A HOMELAND SECURITY DEPARTMENT

AILA strongly supports reorganizing our immigration functions (as restructured in S. 2444) and maintaining these functions as an entity outside of the proposed Homeland Security Department. Such a reorganization and placement best meets our security, family reunification, and business needs and best fulfills our international obligations with regard to refugees and asylees.

If Congress and the Administration opt to include our nation's immigration functions within the proposed new homeland security department, we urge that S. 2444 be used to guide how immigration is organized within the new department. In that regard, we propose that three subdivisions should be formed headed by a strong leader with the title of Undersecretary. AILA also strongly believes that the care and custody of unaccompanied alien children should be transferred to the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services.

Establish an Undersecretary for Immigration Services and Security: The primary responsibilities of the Undersecretary for Immigration Services and Security would be to secure our borders, prevent the entry of terrorists, and administer the Cus-

toms laws of the United States; administer the immigration and naturalization laws of the United States, including establishing the rules governing the granting of visas and other forms of permission to enter the U.S. to individuals who are not citizens or lawful permanent residents; enforce our immigration laws within the interior of the United States; ensure oversight of our immigration laws and the protection of civil and due process rights in carrying out these responsibilities; and ensure the speedy, orderly, and efficient flow of lawful traffic and commerce in carrying out these responsibilities. Given these responsibilities, this Undersecretary must have experience in both enforcing U.S. immigration law and adjudicating immigration benefits.

A Strong Leader is Needed: It will be very important to follow the model outlined in S. 2444 and appoint an Undersecretary, a high-level person with clout to be in charge of these functions. A successful reorganization of our immigration functions hinges on the appointment of a high-level person with line authority. Such an official would improve accountability by fully integrating policy making with policy implementation, ensuring direct access to high-level officials within the executive branch, attracting top management talent, having authority both horizontally and vertically, and leading the efforts of the subdivisions. It is vitally important that one person at the top articulate a clear, coherent, and unified immigration policy within the government, to Congress, and to the world.

Given this country's urgent need to maintain and upgrade its security, it is now more pressing than ever to place one person in charge who is accountable so that our laws are implemented quickly and fairly, rather than developing rival bureaucracies that will balkanize immigration policy. Even before the proposal for a Homeland Security Department was made, a consensus had been reached that separating the enforcement and adjudications functions will lead to more clarity of mission and greater accountability, which, in turn will lead to more efficient adjudications and more accountable, consistent, and professional enforcement. However, coordination of these functions is as important as separation, and is key to a successful reorganization because enforcement and adjudications are two sides of the same coin. Almost every immigration-related action involves both enforcement and adjudicatory components. Only through such coordination will we achieve consistent interpretation and implementation of the law, clarity of mission and, in turn, more efficient adjudications and more effective, accountable, consistent, and professional enforcement. Such coordination cannot be achieved merely by creating a shared database. Inconsistent policies and interpretations of the law, the lack of a common culture and, most importantly, the absence of someone in charge who can resolve differences, can turn routine questions into Kafkaesque nightmares.

S. 2444 is the Appropriate Model for Structuring an Immigration and Border Security Division. S. 2444 provides for the necessary person in charge and coordination, which is why AILA urges that it be used as the model for organization of immigration functions within a Homeland Security Department. The other congressional proposal, H.R. 3231, does not create a strong person in charge and does not provide for adequate coordination. While H.R. 3231 separates enforcement and adjudications by creating two separate Bureaus, there is little coordination between the two, save a General Counsel placed in a weak suboffice. This coordination is largely lacking because there is no high level official given sufficient authority over the two bureaus who would be able to integrate shared information systems, policies, and administrative infrastructure, including personnel and training. The divisions would likely end up working at cross-purposes, with the leaders from each sending conflicting messages on policy matters pertaining to complex laws.

Such an absence of coordination could lead to inconsistent opinions and policies, and result in each bureau implementing laws differently, thereby creating ongoing difficulties. The absence of coordination would exacerbate these concerns even more and raise additional questions. For example, since border inspections combine both adjudications and enforcement functions, how would the many different activities that take place at our ports of entry be handled? These activities can include officials adjudicating asylum eligibility, granting final admission as a legal permanent resident based on an immigrant visa, issuing entry documentation, interdicting those ineligible to enter the United States, and assisting in the interdiction of those engaged in trafficking activities.

Given the structure of H.R. 3231, these functions would not be organized, integrated or coordinated. Furthermore, how will Congressional staff be able to efficiently handle requests for assistance on immigration matters? Without adequate coordination, staff would be forced to deal with two separate bureaus that implement different policies and practices, making their jobs much more difficult and time-consuming.

To Accomplish these Goals, AILA Supports the Creation of Three Subdivisions Within the Proposed Immigration and Border Security Division. These subdivisions would be:

1. Border Security Subdivision: This subdivision would include the United States Customs Service (now in the Department of Treasury), border functions of the Coast Guard (now in the Department of Transportation), the Animal and Plant Health Inspection Services (now in the Agriculture Department), primary Inspections, and the Border Patrol (both currently in the INS/Justice Department). Of particular concern are the two functions now housed at the INS, inspections and the Border Patrol.

   Inspections: Inspections is of particular concern because it is the immigration function in which adjudications and enforcement most closely intersect. As such, it has never been viewed as an enforcement function, but rather, one that brings together enforcement and adjudications because inspectors determine (i.e., adjudicate) who is eligible to enter the U.S. The INS currently inspects all persons seeking admission or permission to transit through the United States at air, land and sea ports of entry. Inspectors determine if applicants qualify for admission and, if so, under what status. Applicants include people seeking safe haven, tourists on vacation, needed workers coming to join their U.S. employers, and family members reuniting with their U.S. citizen or legal permanent resident relatives. While inspections must function to keep out the people who mean to do us harm, inspectors must also allow entry into this country of people who help build up America and are central to who we are and to our country's continued economic vitality.

   The INS inspects more than half a billion entries each year. (This number includes all categories of temporary visitors, green card holders, and U.S. citizens, and multiple crossings by the same individual.) The percentage of those who are found to be inadmissible is just over 1/10 of one percent. (Source: INS Monthly Statistical Report, July 2001.) More than 80 percent of all inspections are done at land borders (more than 400 million). Air inspections are second with just under 80 million annually. (Source: INS Inspections Statistics). 80 percent of land border inspections are same-day trips. (Source: North American Trade and Travel Trends). Approximately 800,000 border crossings are made daily between the U.S. and Mexico; approximately 260,000 cross each day between the U.S. and Canada. (Source: North American Trade and Travel Trends.)

   In 2000, international travelers spent $82 billion in the U.S., not including passenger fares. This activity supports one million U.S. jobs in the tourism industry.

   To categorize the inspections function as being strictly enforcement-related painfully ignores one of the most pivotal functions of inspections-adjudications. Thus, it is important to separate out primary inspections that would be part of the new border security division, from secondary inspections, which should become part of the immigration services division (see below).

   Border Patrol: The Border Patrol, as the mobile uniformed branch of the INS, has as its mission the detection and prevention of smuggling and illegal entry of aliens into the United States, with primary responsibility between the ports of entry. Border Patrol agents perform their duties along, and in the vicinity of, the 8,000 miles of U.S. boundaries. It is important that the Border Patrol implement the law consistently and fairly. The Border Patrol has significant authority to detain or release someone and has been subject in the past to allegations of civil rights violations

   How to deal with our Ports of Entry-Unified Port Management: Border communities for years have dealt with the apparent inability of the agencies staffing our ports of entry to coordinate staffing, infrastructure needs, policies, and procedures. This lack of coordination has had a negative impact on border economies due to reduced efficiencies in the cross-border flow of people and goods. The September 11 attacks heighten concerns over how such a lack of coordination would weaken our national security. Unfortunately, the Border Coordination Initiative (BCI) launched in 1998 that focused on interagency enforcement coordination insufficiently addresses our national security concerns. In many areas, the Port Quality Improvement Committee meetings that the BCI mandated have not changed the status quo with regard to coordination and accountability. The September 11 attacks have underscored the need to change the status quo in order to achieve border security.

While the proposed Department of Homeland Security does not focus on how our ports of entry would be managed, the proposal assumes that entities under one command would coordinate and cooperate, and that policies and procedures, as well as staffing and infrastructure needs, would be approved and coordinated by a central management body. However, such an initiative will fail if it does not uphold the important balance between enforcement and adjudications in the context of INS inspections (and thus the division maintained here between primary and secondary inspections). Furthermore, Congress and the Administration must adequately fund and staff our ports of entry, and each port must be held accountable for its performance. No advancement in grade should occur unless performance merits such advancement in conjunction with continuing training achievement. Regular training must be timely provided and required. Adequate support staff must also be provided, and precious supervisory and adjudicative time must no longer be wasted on clerical functions, including fee intake. As a very simplistic example, it makes sense to test the use of ATM-like machines to intake fees and issue more secure I–94s (Arrival/Departure Record).

Furthermore, The Border Patrol and the Coast Guard must coordinate their staffing, infrastructure, enforcement and security policies and procedures. These policies and procedures must be consistent with those implemented at our ports of entry in order to create a more secure border environment that reflects consistent application of our laws

2. *Immigration Services Subdivision:* AILA is most concerned with placing immigration services within the new department. If immigration services are included in the Homeland Security Department, it is vitally important that the important work that the INS has done by, for example, granting citizenship and legal residency to hundreds of thousands of hard working people and relatives of U.S. citizens and legal permanent residents not be lost. In fact, immigration is and needs to be about more than internal security: It also is about recognizing that immigration and immigrants strengthen our country, and without immigration our country will be less vibrant and strong.

Various GAO studies have illustrated that the current provision of services provided by the INS to its "customers" is woefully behind the times. A new "corporate culture" needs to be instilled in the Immigration Services Division that trains personnel to provide U.S. petitioner family members and businesses, along with foreign-born beneficiaries, with the service that they deserve under our laws. The improvement of services, and the achievement of timely adjudications, will reduce the current backlogs and will provide much-needed relief to those who have been waiting in line for years to unite with family members or provide needed skills to U.S. businesses. The assurance that the paths to legal immigration provided under our nation's laws can be achieved without lengthy delays will further reduce the incentive to circumvent the law, reducing illegal immigration to our country.

With these important concerns in mind, this subdivision would include services and adjudications and secondary inspections, which are now in the INS/Justice Department. Service and adjudication functions would include: adjustment of status, naturalization, adjudication of immigrant and non-immigrant visa applications, issuance of work permits, and asylum and other humanitarian cases, and "well-founded fear" screening of political asylum applicants.

Secondary inspections at ports of entry should also be part of Immigration Services. Primary inspection is where an applicant for entry into the United States is initially reviewed to see if there is any enforcement or eligibility reason to refuse entry. It is not uncommon for questions to arise as to whether the individual meets the criteria for entry. For example, it may not be clear whether an individual seeking entry for business is coming for a bona fide business trip, allowing him to enter on a business visitor's visa or under the visa waiver program, or whether the purpose of the trip might cross the line into employment in the United States, requiring a visa that includes appropriate work authorization. This is an adjudicative function, requiring an examination of the totality of the circumstances that cannot be made in the context of the pressures of primary inspection and requiring a decision-maker who is fully trained in adjudicative standards. Thus, it will be critical for Immigration Services to have a role in Inspections, and secondary inspection is where this role is usually played.

A department with the mission to guard against terrorism must also ensure that families are reunited, international commerce is enhanced, and

tourism is encouraged. This is a security matter: America's understanding of the world in which we exist is greatly enhanced by the presence of immigrants and visitors from other countries. This is an economic matter: immigration and tourism has provided much fuel for our economy, and studies show that both will increase in future years. This is a matter of our national values: protection of the oppressed and unity of families underpin what makes the United States great.

It will be important that these initiatives have a strong voice within the division and within the Department. Because the Services operation will have the most knowledge of adjudications issues, it must also have a significant role in policy development and implementation. It is also critical that Immigration Services have the resources necessary to do its job, including staffing, technology and infrastructure requirements. Neither our nation's security nor our nation's values are served by adjudications that are delayed for years, petitions that are lost in huge warehouses, simple processes that are made complex by duplication and inefficiency, and delays that require the readjudication and re-checking, over and over, of the same data simply due to the passage of time.

Ajudication fees paid by applicants for immigration benefits should be used solely to adjudicate those applications. None of these funds should be diverted to support other functions. Applicants and petitioners, particularly when they are already experiencing lengthy delays and unacceptable levels of service, should not be forced to pay for programs unrelated to the service for which they have paid the fee—the processing of their applications. Also, since adjudications are as much in the national interest as enforcement, adjudications should receive on an ongoing basis direct congressional appropriations to supplement user fees and build and maintain the infrastructure to support Immigration Services and its interrelationship with enforcement functions.

3. Interior Security Subdivision: This subdivision would include intelligence, investigations, and detention and removal (all currently in the INS/Justice Department.)

Investigations: The Investigations Division currently is the interior enforcement arm of the Service. It is charged with investigating violations of the criminal and administrative provisions of the Immigration and Nationality Act (INA) and other related provisions of the U.S. Code. The Investigations Division's enforcement mission has five broad objectives: identify and remove criminal aliens; counter alien smuggling; counter immigration fraud; enforce employer provisions of the INA; and respond to community complaints regarding illegal criminal alien activity.

Intelligence: As the principal source of immigration-related intelligence, the INS Intelligence Program currently provides analyses to INS staff at all levels to aid in making day-to-day, mid-term, and long-term operational decisions; acquiring and allocating resources; and determining policy. Intelligence is as important to the adjudications side of the immigration function as it is to the law enforcement side. In fact, adjudications include a strong security component for which intelligence is key. The recent implementation of IBIS checks that INS is currently conducting exemplifies the need for coordination between both sides of the INS house. In addition, the INS's forensics document laboratory, which is part of the INS intelligence program, assists INS adjudicators in detecting document fraud in petitions filed with the INS.

Detention and Removal: This branch is responsible for detaining, transporting, processing and supervising illegal aliens who are awaiting removal or other disposition of their case. Especially given the changes in the law enacted in 1996, recent court decisions, and prosecutorial discretion in the law, it is vitally important that the law is consistently interpreted and that applicants' rights are protected.

THE DEPARTMENT OF HOMELAND SECURITY MUST ENSURE THAT IT DOES NOT OVERLOOK THE CIVIL RIGHTS OF AFFECTED PERSONS

The Homeland Security Department will fail in its mission if it does not pay close attention to another mission that belongs to all government agencies: the upholding and advancement of the Constitution and of the basic rights and liberties of all persons. Nothing could be more fundamental to any American undertaking. AILA therefore urges that a Division of Civil Rights and Oversight be formed within the Department of Homeland Security to ensure that the Department protects these rights. This Division is especially important given that the mission of the Homeland

Security Department would prioritize enforcement and national security, leaving it questionable how civil liberty concerns and considerations, as well as the protection of the provision of services for people seeking immigration benefits, would be addressed.

Given the extensive authority of the Department of Homeland Security, it is imperative that there be one office that can develop consistent interpretations of the law, one office to which people seeking benefits can turn if they feel they have been unjustly denied, one office to which people can go if they believe ethnic or racial proofing has occurred. The proposed Department of Homeland Security would lack credibility if there were no Division of Civil Rights and Oversight to focus exclusively on addressing these concerns.

THE STATE DEPARTMENT'S CURRENT ROLE IN VISA PROCESSING MUST BE PRESERVED

The Administration's proposal would place policy development for visa issuance in the hands of the Homeland Security Department, while leaving the ministerial function of issuing the visas with the State Department. AILA believes that dividing policy and process would result in chaos where the United States can least afford it—our international affairs. Every day, in consular posts around the world, issues arise as to how a policy or regulation, which was necessarily stated in broad terms, should apply in a specific case. Often, the cases that raise these questions can be of major consequence to our foreign policy interests, U.S. business interests, or the interests of preserving American values of family unity and humanitarian protection. The issues that arise in these contexts need to be resolved by those who best understand the reasoning and history behind the policy; namely, the department that develops the policy. But, if the policy was developed by a different agency, the nature of government agencies is such that the ability to resolve specific questions will be all but lost in the structure of different departments. As a result, policy implementation will become either disjointed or gridlocked. And, given the nature of the Department of Homeland Security, establishing an administrative presence all over the world at the staffing level required would be inappropriate and a waste of resources.

Indeed, a department devoted to internal security is best operated internally. But there are functions of the current INS that require a presence outside the United States. Primarily, these are refugee processing, orphan/adoption processing and the adjudication of waivers. AILA proposes that these functions be transferred to the State Department, which already possesses related expertise and has the needed infrastructure in the countries where these activities take place.

In addition, to maintain a fair and reasoned process for visa issuance, decisions regarding visa eligibility must be subject to appellate review. This review must apply to all of the functions transferred to the Department of State, which already are subject to such review, as well as to consular decisions. For example, as we have seen with recent decisions regarding international adoptions, checks and balances are needed to ensure that the legally correct decision is made.

EOIR MUST REMAIN OUTSIDE OF THE DEPARTMENT OF HOMELAND SECURITY AND BE CONSTITUTED AS AN INDEPENDENT AGENCY

AILA strongly opposes including the Executive Office for Immigration Review within the proposed Homeland Security Department. It is vitally important that our immigration courts be independent, impartial and include meaningful checks and balances. Any proposal that would include the EOIR in a new homeland security department is going in the absolutely wrong direction, as is evident by the EOIR's role, responsibilities and history.

Under authority delegated by the Attorney General, the EOIR administers and interprets federal immigration laws and regulations through the conduct of immigration court proceedings, appellate reviews, and administrative hearings in individual cases. The EOIR carries out these responsibilities through its three main components:

- The Board of Immigration Appeals (BIA), which hears appeals of decisions made in individual cases by immigration judges (IJs), INS District Directors, or other immigration officials;
- The Office of the Chief Immigration Judge (OCIJ), which oversees all the immigration courts and their proceedings throughout the United States; and
- The Office of the Chief Administrative Hearing Officer (OCAHO), which became part of the EOIR in 1987 to resolve cases concerning employer sanctions, document fraud, and immigration-related employment discrimination

The EOIR was created on January 9, 1983, through an internal Department of Justice (DOJ) reorganization that combined the BIA with the immigration judge function previously performed by the INS. Along with establishing the EOIR as a separate agency within the DOJ, this reorganization sought to make the immigration courts independent of the INS, the agency charged with enforcing federal immigration laws. The EOIR also is separate from the Office of Special Counsel for Immigration-Related Employment Practices in the DOJ Civil Rights Division and the Office of Immigration Litigation (OIL) in the DOJ Civil Division. As an office within the DOJ, the EOIR is headed by a Director who reports directly to the Deputy Attorney General.

The BIA is the highest administrative body for interpreting and applying immigration laws. Decisions of the Board are binding on all INS officers and IJs unless modified or overruled by the Attorney General or a federal court. The majority of appeals reaching the Board involve orders of removal and applications for relief from removal. Other cases before the Board include the exclusion of aliens applying for admission to the United States, petitions to classify the status of alien relatives for the issuance of preference immigrant visas, fines imposed upon carriers for the violation of immigration laws, and motions for reopening and reconsideration of decisions previously rendered.

The historical reasons for creating EOIR and separating its functions from the INS are even more compelling today. In these difficult times, the need for public confidence in the integrity and impartiality of the system is great, especially when government agencies are accruing more power, and there is the need for an accompanying system of checks and balances that is the foundation upon which our system is built. At the same time, there is growing public cynicism about the impartiality and integrity of the system. Immigration judges who issue unfavorable opinions have been the object of interagency squabbles and acts of retribution. And, since many high-level managers at EOIR had been INS or DOJ employees, reports have emerged of cases being "administratively" resolved by an ex-parte phone call to a former colleague or high-ranking administrator, rather than through the appropriate appeals process.

The Department of Justice itself has often ignored the important role of IJs and the statutory authority that Congress has granted to them. As an example, the Attorney General, on October 31, 2001, issued an interim rule which insulates INS custody determinations from any IJ review by granting an automatic stay of release on Immigration Judge decisions where the initial bond was set by the Service at $10,000 or higher. Since the INS is the entity that sets the initial bond amount, this provision guarantees that the INS will be the final decision-maker on the issue of an alien's release from custody during the pendency of administrative proceedings, despite the fact that the law clearly entitles an alien to a bail re-determination hearing before an IJ.

The current system of housing immigration prosecutors and judges within the same agency is a disturbing concept, which creates, at the very minimum, the appearance of partiality. In this environment, it is not surprising that the public perceives this system as "rigged." Legal scholars who have studied our immigration system have made it clear that "the reviewing body must not only seem to be, but must in fact be free of command influence. . . . What is important is that the court/corps not be part of the agency on whose actions it is to sit in judgment. More specifically, the members of such a body cannot be beholden to the agency in matters of compensation, tenure, or conditions of employment. This means it should be free to formulate and advance its own budget before the relevant Congressional authorizing and appropriating committees." (Richard B. Hoffman and Frank P. Cihlar, "Judicial Independence: Can It Be Done Without Article I?," 46 Mercer L. Rev. 863, 878 (Winter, 1995)).

AILA testified in February of this year before the House Subcommittee on Immigration and Claims against a proposed rule that would make a number of procedural reforms at the BIA that, taken together, would amount to a denial of due process. We believe bringing the EOIR within the new Homeland Security Department raises similar objections. In fact, AILA advocates the creation of a separate, Executive Branch agency that would include the trial-level immigration courts and the BIA. Such an independent agency would best protect and advance America's core legal values by safeguarding the independence and impartiality of the immigration court system. Due process requires no less.

Specifically, AILA believes that the creation of an independent immigration court should be based on the following considerations:

- The independence and impartiality of the immigration judges and the immigration court system must be affirmed;

- Proposed changes must facilitate, not erode, immigrants' access to the BIA and federal courts, consistent with due process considerations in our justice system; and
- Such changes must also enhance efficiency, increase accuracy, acceptability, accountability and consistency, and facilitate oversight and review.

CHANGING OUR IMMIGRATION LAWS TO HELP ENHANCE OUR SECURITY, ECONOMY, AND SOCIETY

The goals of a new Homeland Security Department cannot be achieved until our immigration laws are reformed. The creation of this department will not alter the fact that U.S. immigration policy needs to be changed to make legality the norm. Currently, families face long delays before they can be reunited, no visa exists to bring in certain kinds of needed workers, and the 1996 immigration laws eliminated due process for many legal permanent residents. Furthermore, the status quo is unacceptable in a world in which enhanced security has become a higher priority.

An agreement between the United States and Mexico on immigration and border issues will help the U.S. address national security concerns. Bilateral cooperation in enforcement initiatives that focus on illegal immigration, the opportunity for hardworking immigrants already here filling legitimate labor needs to earn legal status, a new temporary program for essential workers to fill identified labor needs, and more visas for workers and family members are initiatives that together will contribute to our security. Because our shared security needs create the additional impetus for Mexico and the U.S. to coordinate and cooperate, it follows that by encouraging and facilitating legal immigration, both countries will be able to focus their resources on terrorists and people engaged in smuggling, trafficking, and other criminal activities.

The following principles are essential to successful immigration reform that enhances our security, as well as our economy and society.

1. *Approaching Immigration Reform in a Comprehensive Manner:* The United States' current immigration system needs to be reformed to reflect current needs and realities. Due to our current system, families are separated for long periods of time and U.S. employers cannot bring in needed workers. People are forced to live an underground existence in the shadows, not making themselves known to the government for fear of being separated from their families and jobs. The current enforcement system has failed to prevent illegal immigration and precious resources that should be spent on enhancing security are wasted on stopping hard-working people from filling vacancies in the U.S. labor market. Border enforcement efforts that do little to enhance our security have led to people losing their lives, while current laws make it difficult for many to enter legally. Our immigration system needs to be reformed so that legality is the norm, and immigration is legal, safe, orderly, and reflective of the needs of American families, businesses, and national security.
2. *Implementing Immigration Reform as an Important Component of our Enhanced National Security.* Immigration reform that legalizes hard-working people already here and that creates a new temporary program will help the U.S. government focus resources on enhancing security, not on detaining hard-working people who are filling vacancies in the U.S. labor market or seeking to reunite with their close family members. In addition, reform that includes a new legalization program and a temporary worker program will encourage people to come out of the shadows and be scrutinized by our government. The legality that results from these initiatives will contribute to our national security.
3. *Developing a Regularization Program for People in the U.S. without Authorization:* People who work hard, pay taxes, and contribute to the U.S. should be given the opportunity to obtain permanent residence. This legalization would stabilize the workforce of U.S. employers, encourage people to come out of the shadows to be scrutinized by our government, and allow immigrants to work and travel legally and be treated equally. Many have been here for years, are paying taxes, raising families (typically including U.S. citizen and lawful permanent resident spouses and children), contributing to their communities and are essential to the industries within which they work. In order to unite families and keep them together, liberal and generous waivers must be made available for grounds of admissibility and deportability. It is neither in the best interests of the workers nor of their employers for this situation to remain unaddressed.

4. *Creating a New Temporary Worker Program:* Current immigration laws do not meet the needs of our economy for short- and long-term employees in those sectors currently experiencing worker shortages and others that are expected to experience shortages when the economy rebounds. A new temporary program would give workers the opportunity to work in areas of the country where they are needed and would give employers experiencing shortages the workforce they need. Current programs have often proven unusable by both employees and employers, and do not accommodate employers facing longer term, chronic labor shortages. The framework for a new temporary worker program must differ significantly from existing programs, and must respect both the labor needs of business as well as the rights of workers.
5. *Opening Up Legal Channels for Family- and Business-Based Immigration:* Our immigration system has been characterized by long backlogs in family-based immigration and long delays in business-based immigration. Illegal immigration is a symptom of a system that fails to reunify families and address economic conditions in the U.S. and abroad. To ensure an orderly future process, it is critical to reduce bureaucratic obstacles and undue restrictions to permanent legal immigration. Developing an increased legal migration flow will make immigration more orderly and legal. It will also allow more people to reunite with their families and work legally in the U.S., and will facilitate fair, equitable, and efficient immigration law, policy, and processing. It is essential to make legal future immigration that otherwise will happen illegally.
6. *Adequately Funding Immigration Reform Initiatives:* Immigration reform must include adequate funding to implement reform. Congress frequently passes new immigration laws without including adequate funding. Lack of adequate funding has contributed to the long backlogs and ineffective, inefficient and unfair services that currently characterize the Immigration and Naturalization Service (INS). Whether funds are directed to the INS or other entities to implement reform, any changes in the law must be accompanied by adequate funding, in the form of direct congressional appropriations.

CONCLUSION

The same criteria that are essential to an effective reorganization of the INS are key to immigration in the context of any national homeland security department discussion: It is necessary to have one person in charge of the immigration function and to coordinate the separated enforcement and adjudication activities. In addition, the services/adjudications function merits adequate funding, no less because adjudications is as much in the national interest as is enforcement. Such a reorganized immigration function (modeled on provisions in S. 2444) is best left outside of the Homeland Security Department, with coordination mandated between the two. If immigration is included within the Homeland Security Department, then AILA supports the creation of a separate division (Immigration Services and Security) to best support our immigration function (that also would use S. 2444 as the model for reform).

Clearly more needs to be done, but since September 11, the status quo already has undergone much positive change, with federal agencies (INS, Customs, Coast Guard and the other border agencies) coordinating and cooperating at unprecedented levels to improve the processes at the border to protect our homeland and efficiently process legitimate trade and travel. Furthermore, the new Enhanced Border Security and Visa Entry Reform Act addresses many concerns about improving cooperation and information sharing, as well as tackling problems with existing systems.

As Congress debates the creation of a Homeland Security Department, we must recognize the need both to reform our immigration function, and change current immigration laws to make legality the norm. The success of a new Department of Homeland Security is directly linked to reforming our immigration laws so that they make sense for and to a nation of immigrants.

Mr. Chairman, thank you very much for this opportunity to share my thoughts and perspectives with the committee. I and other members of AILA remain available to discuss these matters with you at any future time. We look forward to working closely with you on legislative efforts to enact needed changes.

Mr. GALLEGLY. Thank you very much, Ms. Walker.

As you know, the second bell rang. I think perhaps Mr. Cannon and I should run over to vote, and hopefully within a minute,

minute and a half, we will have a couple other Members back where we can continue this. I apologize to you, Mr. Appleby, but that is just the way it is. So we will recess the Committee until such time that we have two Members return, which should be shortly.

[Recess.]

Ms. HART. [Presiding.] The Committee will come to order. Since we only need one Member to resume the hearing, we will go ahead and resume.

Kevin Appleby is Director of Migration and Refugee Policy for Migration and Refugee Services of the U.S. Conference of Catholic Bishops. Prior to this position, he worked as Deputy Director of the Maryland Catholic Conference in Annapolis.

Mr. Appleby has worked for Senator Russell Long of Louisiana. He received his law degree from the University of Maryland, his Master's Degree from George Washington University, and his Bachelor's Degree from Notre Dame.

Go ahead and proceed.

STATEMENT OF KEVIN APPLEBY, POLICY DIRECTOR, UNITED STATES CONFERENCE OF BISHOPS (USCCB) MIGRATION AND REFUGEE SERVICES

Mr. APPLEBY. Thank you, Madam Chairman.

My name is Kevin Appleby. I am the Director of Migration and Refugee Policy for the U.S. Conference of Catholic Bishops. And I thank Chairman Gekas and Ranking Member Sheila Jackson Lee for inviting us to testify today.

The United States Conference of Catholic Bishops stands opposed to the transfer of the Immigration and Naturalization Service in its entirety into the new Department of Homeland Security. Instead, we recommend that specific enforcement, detention, intelligence, and investigation functions consistent with preventing terrorism be transferred to the new department, while the remainder of INS, including adjudication services and some non-terrorist related immigration enforcement remain in the Department of Justice. This proposal is detailed in our written testimony.

We further recommend that INS be restructured along the lines of S. 2444, the Immigration Reform, Accountability, Security, and Enforcement Act of 2002, or, with modifications, H.R. 3231, the Barbara Jordan Immigration Reform and Accountability Act, legislation passed by the full House upon your recommendation in May.

Let me emphasize up front that the Catholic Bishops are not opposed to the creation of a new Homeland Security Department, but simply opposed to placing the entirety of the Nation's immigration function into the new department. Our reasons are three-fold:

First, placement of INS into Homeland Security could diminish, not enhance, our Nation's ability to efficiently administer and enforce our immigration laws as well as our ability to detect and prevent terrorist attacks.

Mr. APPLEBY. Second, immigration adjudications already competing for limited resources within INS will receive even less priority and resources in a new department.

Third, enactment of the Administration's proposal without significant change to its immigration provisions would undermine our

Nation's long-standing policy of welcoming newcomers, a posture which has served our Nation well for over 200 years.

First, placing the entirety of INS into the new agency would in our view distract from its national security mission and weaken, not strengthen, the enforcement of our immigration laws. During the recent INS reorganization debate, many from both sides of the aisle agreed that the embattled agency suffered from mission overload, in which the tasks assigned to it were not matched by resources in an appropriate managerial structure. This basic fact will not change by transferring the entire agency into the new department. In fact it could exacerbate the problem.

INS currently detains more than 20,000 individuals at one time and has a pending caseload of close to 5 million benefit applications. It also has the difficult task of implementing and enforcing a complex set of immigration laws. Burdening the new department with these overwhelming responsibilities could well divert attention from its primary mission of homeland security. This argument carries additional weight when you consider that the overwhelming majority of immigrants who enter our country and for whom the new agency would be responsible are not national security threats to our Nation.

We believe a better approach would be to transfer some enforcement functions to the new agency, ensure that two laws passed by Congress; namely, the USA PATRIOT Act and the Border and Security and Visa Act, are properly implemented and funded. As you know, the enforcement powers of the PATRIOT Act allow the Attorney General to detain suspected terrorists. The Border Security Act requires the implementation of several systems to improve interagency information and intelligence sharing on would-be terrorists. Taken together, these two new laws, properly funded and implemented, would provide the new agency the tools it needs to fulfill its mission without the additional burden of executing our Nation's vital immigration function.

Second, immigration adjudications, an area which we believe is also vital to the Nation's interest would be gradually diminished in a new agency with a national security mandate. Enforcement is only one portion of INS's responsibilities. In total, each year the Service examines and adjudicates several million family and employment-based immigration petitions, investor visas, adjustments to immigration status, and other applications. This does not include the work needed to implement new laws passed by Congress. We are fearful that the inefficiencies and backlogs which already plague the INS will only grow in a department with so many broad and unfocused, yet important responsibilities.

Finally, and most alarming to the U.S. Bishops, is a significant change in our Nation's view toward immigrants that the President's proposal signals. If the proposal is enacted without change, no longer will this Nation of immigrants view newcomers in a positive light but as potential threats to our security examined through a terrorist lens. It is in our national interest that we welcome those from abroad who come here for employment, tourism or family reunification purposes. Placing the INS within a Homeland Security Department would threaten these purposes.

In summary, Mr. Chairman, the U.S. Catholic Bishops recommend this position to you with the considered view that this approach can effectively preserve the security of the U.S. public and also maintain our Nation's traditional posture as a Nation of immigrants, a posture which we believe has helped make our Nation great.

Considering the historic importance of this proposal and its implication for immigrants for years to come, we hope that you consider it with due deliberation and not in haste. We are confident that with such deliberation you may come to agree with our recommendations here today.

Thank you.

[The prepared statement of Mr. Appleby follows:]

PREPARED STATEMENT OF KEVIN APPLEBY

I am Kevin Appleby, Policy Director of the United States Conference of Catholic Bishops (USCCB) Migration and Refugee Services. I offer this testimony today on behalf of Bishop Thomas G. Wenski, auxiliary bishop of Miami and chairman of the U.S. Conference of Catholic Bishops Committee on Migration.

My testimony outlines the views of the U.S. Catholic bishops with regard to the Bush Administration's recent proposal to reorganize the federal government and create a new Department of Homeland Security. Specifically, my testimony focuses on the Administration's proposal to transfer the functions currently performed by the Immigration and Naturalization Service (INS) and the Department of State to the proposed new Department of Homeland Security.

The Catholic Church in the United States provides a myriad of services to immigrants, asylum-seekers, and refugees throughout the country. Migration and Refugee Services, through more than 100 dioceses nationwide, resettles approximately 18,000 refugees per year. The Catholic Legal Immigration Network, Inc. (CLINIC) provides immigration-related services to dioceses across the nation and to thousands of legal immigrants each year.

Let me state at the outset of my testimony that the Catholic bishops are not opposed to the creation of a new Department of Homeland Security. Indeed, if implemented correctly, one could envision that such a department would help improve our nation's ability to detect and prevent both foreign and domestic threats to the security of the public.

In our testimony today, we will discuss four principles that we believe should guide Congress and the Administration on the issue of the placement of immigration functions within a homeland security department:

- First, we believe that Congress and the Administration must remember that the United States is a nation of immigrants and that, as Ranking Member Shelia Jackson Lee has often reminded us since that horrible day of September 11, 2001, "immigration does not equate with terrorism."
- Second, we believe it essential that Congress and the Administration work closely and deliberately to ensure that any new Homeland Security department does not inherit functions which are so far outside its mandate that they distract the new department from its ability to effectively serve its mission of protecting us from terrorism.
- Third, we believe it is important to ensure that vital functions not relating to homeland security that currently are being performed by various departments and agencies of government be preserved and not be unnecessarily transferred to the new department.
- And fourth, while we believe it is preferable that the current functions of the INS remain wholly within the Department of Justice, we will outline specific immigration-related functions that we believe could be transferred to the new Department of Homeland Security without unduly harming our immigration service and enforcement functions, and provide a framework for how the functions that remain behind in the Department of Justice should be structured.

Thorough and deliberative examination of the Administration's proposal in a manner that keeps these four principles in mind would serve the nation and these functions well.

A NATION OF IMMIGRANTS

The Catholic bishops of the United States come to this debate deeply concerned about the consequences that the proposals to reorganize the nation's immigration functions would pose for the nearly one million immigrants, refugees, and asylees who are admitted into the United States each year, as well as for the millions of foreign-born United States citizens and lawful permanent residents already inside the United States who came here over the years and who occasionally need to obtain services from the INS. These individuals have greatly contributed to the economic, social, and cultural fabric of our nation. They, along with the many other legal short-term workers, students, and visitors to the United States, currently depend on the INS to operate efficiently and with justice in adjudicating their immigration benefits, which include such items as adjustments of status, naturalization, employment authorization documents, and other such service-related instruments.

THE SPECTRE OF AN OVERBURDENED DEPARTMENT WITH MISSION OVERLOAD

The Administration's proposal recommends that the entirety of INS's current functions be transferred into the Department of Homeland Security under one of four divisions, entitled "Border and Transportation Security." Immigration enforcement and immigration services would be separated, but it remains unclear how the two responsibilities would interact and if the addition of other enforcement functions would further complicate such coordination. We recommend against this construction, and support keeping most functions of INS out of the new department.

We fear that, unless Congress acts to modify it, the inclusion in the President's proposal of all of the nation's immigration functions in the new Department of Homeland Security could create a department that is over-burdened with immigration functions that have nothing to do with homeland security. This, in turn, could present grave dangers over time to both homeland security and immigration.

One of the fundamental concerns expressed by public officials and other voices in the INS reorganization debate was the problem of "mission overload" within our nation's immigration function. The enforcement and implementation of immigration law and the adjudication of large numbers of visa, adjustment of status, and naturalization requests, especially during this period of unprecedented immigration, represents a broad mission which is not easily handled under current resources and structure of the INS. Handing these broad duties to a new department will distract from its national security mission or diminish our immigration function because of neglect.

HARM TO IMMIGRATION FUNCTIONS

We also fear that transferring all of the functions of the INS, which is an already over-burdened agency, to a new Department of Homeland Security that has a wide-ranging set of unfocused missions could do grievous harm to immigration enforcement, immigration services, and even to immigration and immigrants, themselves.

- *Harm to Immigration Enforcement.* The great bulk of the nation's immigration enforcement needs and efforts have nothing to do with terrorism. Instead, they relate to such mundane but important functions as preventing the entry of undocumented immigrants on our Southwest border, enforcing our laws against the hiring of undocumented immigrants, detaining criminal aliens, and removing inadmissible aliens from the United States. In response to the September 11, 2001, terrorist attacks, Congress, with this Committee's leadership, passed two new laws to help the INS in these efforts. They include the USA Patriot Act, which was enacted into law just weeks after the September 11, 2001, terrorist attacks, and the more recently enacted border and visa security bill, enacted into law on May 14, 2002.

  While we differed with some of the provisions in those laws, we note that existing agencies and bureaus of government have only now begun to implement them. The border and visa security bill requires biometric visa identifiers, more efficient information sharing between agencies, and background checks for certain arrivals. This law seeks to ensure that information between the new agency and the INS is up to date and available at the point a visa is being considered for approval. It also seeks to ensure that individuals cannot use false documents and that border agents and INS inspectors are working in concert to identify and detain potential terrorists. The USA Patriot Act gives the Department of Justice the ability to detain persons for up to seven days based upon a standard of "reasonable suspicion," a standard established in the USA Patriot Act which permits the government to detain for up to 7 days an individual suspects, on that basis, of terrorist-related activity. This

will allow border enforcement officers as well as INS enforcement officials to immediately detain someone without receiving approval from a magistrate.

Taken together, the provisions of the Border Visa and Security Act and the USA Patriot act give the new agency ample tools to protect the public from further attacks. The laws take into account that multiple agencies are charged with the mission of protecting the American public and that information and intelligence sharing are the key to prevention.

One could reasonably argue, however, that moving all of the INS's enforcement functions from the INS to a new department with a disparate mission will interrupt the implementation of the not only those two new laws, but of all of the enforcement efforts that have long been undertaken by the INS and its components, as the line officials responsible for the enforcement of the nation's immigration laws accommodate to a new culture, new supervisors, new missions, and worry about their own personal fate in a regime where they are in danger of losing their civil service protections or their pay grades.

Moreover, placing the disparate functions of national security and immigration services together will not make the nation safer if these tools are misused and proper intelligence gathering and information sharing is not achieved.

- *Harm to Immigration Services.* Under the Administration proposal, immigration services would be placed within a Border and Transportation security division of the new department and would compete for prioritization with such functions as the United States Coast Guard, United States Customs Service, the Border Patrol, and Transportation Security. We fear that it is unlikely that immigration services would receive the attention it deserves in such a structure. Moreover, we are concerned that the structure proposed by the Administration would wind up starving immigration services of funding it needs to reduce already unacceptably large processing backlogs. The result could be a services function gradually diminished over time, increasing waiting times for service and thereby limiting the number of immigrants, asylum-seekers, and refugees admitted into the country.

  Just as importantly, placing the immigration services functions into an organization with a paramilitary culture, designed to keep out terrorists, makes absolutely no sense. The vast majority of people seeking immigration benefits on a day-to-day basis are already in the United States. They are lawful permanent residents seeking naturalization. They are nonimmigrants seeking adjustments of status. They are residents seeking to obtain employment authorization documents. They are individuals, already in the United States, seeking the protection of asylum. They are young girls or women, already here, seeking protection from traffickers or smugglers. They are unaccompanied minors seeking protection and support.

- *Harm to Immigrants and Immigration.* Enactment of the Administration's proposal without significant change to its immigration provisions could diminish and significantly limit our nation's historic commitment to newcomers to our land, and it could fundamentally change how our nation perceives and treats immigrants.

  Indeed, the transfer of all of the INS's functions would ignore over two hundred years of evidence that a generous immigration system which welcomes the foreign-born to our shores serves, not undermines, our nation's best interests. It also would send a stark and clear message to the world that the United States views foreign-born persons, generally speaking, with suspicion and fear and not as neighbors who bring skills, culture, and faith to benefit our communities, towns, and cities.

  Placement of all INS functions into the new Homeland Security Department also could prove detrimental to the civil rights of persons who "look or sound" foreign. Under the current law, the INS is contained in a department that also has the protection of civil rights as one of its missions. Indeed, there currently is a unit within the Department of Justice that specifically is devoted to preventing alienage based discrimination against those who "look or sound" foreign or who have "foreign sounding" names. If immigration the entirety of the INS's immigration functions are transferred from the Department of Justice to the new Department of Homeland Security, we fear there would be no possibility of a seamless integration of immigration and civil rights concerns, given the necessary focus on terrorism of the new department.

  Moving all of the functions of the INS into a Homeland Security Department could fundamentally alter how our nation views and treats immigrants

for years to come. We believe that transferring the entirety of INS's current functions into the Department of Homeland Security, a new department whose primary mission would be to protect the United States from terrorist attacks, could fundamentally alter long-standing U.S immigration policy. Under a new Department of Homeland Security, it is likely that the overall mission of rooting out terrorism would overwhelm any immigration-related mission of welcoming immigrants or other visitors who come here for employment, tourism, or family reunification purposes. It also could undermine our nation's traditional role as a safe haven for refugees and asylum-seekers. We fear that, over time, each of these groups of valid and legal newcomers would, instead, be viewed through a "terrorist" lens. Finally, placing INS within a Homeland Security agency sends a message both abroad and at home that immigrants should be feared and not welcomed as contributors to our economic, social, and political life.

The immigration function of our nation should receive higher priority with regard to the level of authority and resources, not less. At this point in our history, managing our nation's immigration policy and admitting and monitoring the whereabouts of nonimmigrants is a herculean task. Instead of burying these important functions within a new, wide-ranging department, they should receive higher prominence and resources. The head of a new Homeland Security department will be measured by how he or she protects the public from terrorism, not by how he or she manages immigration services. We fear that despite the best of intentions, it will be exceedingly difficult to accomplish both of these missions if all of the nation's immigration functions are contained within the Homeland Security Department.

OUR PROPOSED SOLUTION

The U.S. Catholic bishops recommend against the transfer of *the entirety of the functions of the INS* to the new Department of Homeland Security. Instead, we believe the best course is for the INS to remain completely outside of the Department of Homeland Security, but reorganized. Both the House and Senate had taken thoughtful and deliberate steps to do this prior to the release of the Administration's homeland security reorganization proposal. Earlier this year, the House of Representatives passed H.R. 3231, some portions of which we supported. That measure left the functions of the INS in the Department of Justice, dispersing its functions to an enforcement bureau and a service bureau. More recently, the bipartisan leadership of the Senate Judiciary Committee crafted and introduced S. 2444, legislation based on that same basic principle, which we believed provided an excellent basis for reform of the nation's immigration functions.

However, should Congress decide to move the debate beyond the parameters of H.R. 3231 and S. 2444 and, instead, fashion legislation patterned after the model presented in the President's homeland security reorganization proposal, we recommend an approach which would transfers to the new Department only those immigration functions which are necessary to assist in the detection and prevention of terrorist threats. These functions could include such functions as the operations of the U.S. Border Patrol, coordination of border and port enforcement, and counterterrorism intelligence and investigations operations. It also could include the transfer of the enforcement powers granted the Department of Justice by the U.S Patriot Act, legislation enacted by Congress earlier this year specifically to handle terrorist threats.

We strongly recommend against transferring any of the INS's service and adjudication functions to the new Department, especially the handling of unaccompanied alien minors, and we oppose the transfer of certain enforcement functions that are unrelated to terrorism to the new Department. Let me take this opportunity to detail the specifics of our alternative proposals. A chart detailing our recommendations can be found in Appendix A.

As I have stated, we have no position on the President's initiative to create a new Department of Homeland Security, designed to coordinate our government's resources and information to deter attacks on the home front. However, we do not believe that the entirety of the functions currently exercised by the INS should be placed within the new agency in order to achieve this goal. Instead, we believe that specific offices and responsibilities which focus more directly on terrorist threats should be transferred to the new Department, with the establishment of a coordinating office within the new Department to work closely with on information-sharing and joint interests and initiatives. Under our proposal, immigration services, as well as certain non-terrorist related immigration enforcement functions, would re-

main in the Department of Justice along the lines of a structure outlined in S. 2444 and, to a lesser degree, H.R. 3231.

Basic to this approach is the notion that the new Homeland Security Department should receive the enforcement functions which oversee our ports of entry and border points as well as intelligence and investigation functions necessary to properly inform these enforcement responsibilities. In most cases, Homeland Security enforcement personnel would the first point of contact for arrivals entering both legally and undocumented. In addition, under our proposal, the new department would receive the enforcement responsibilities, including detention and removal, pursuant to the USA Patriot Act, which permits the government to detain would-be terrorist for up to seven days based upon a reasonable suspicion of terrorist-related activity. In our view, these functions would provide the new department the necessary tools to detect and root out potential terrorists who enter the country.

INS SHOULD REMAIN IN THE DEPARTMENT OF JUSTICE WITH A NEW STRUCTURE

In order to best accomplish the multiple tasks incumbent upon our nation's immigration function, immigration services and certain immigration-related enforcement responsibilities should remain within the Department of Justice and recast along the lines of S. 2444, INS restructuring legislation introduced by Senator Kennedy and Senator Brownback, and, with some necessary modifications, H.R. 3231, produced by this Committee and passed by the full House of Representatives. The structure of S. 2444, in particular, would give immigration priorities more visibility in the government, allow for better coordination between services/adjudication and immigration enforcement, and ensure that a strong, central authority supervises these responsibilities in an efficient manner. In such a structure, policy decisions would be more fairly balanced, taking into account often competing or conflicting enforcement and service priorities. Moreover, both S. 2444 and H.R. 3231 includes provisions which ensure that appropriate resources are available for immigration services, including a "firewall" against the transfer of fee money to enforcement priorities.

Perhaps the most important aspect of both S. 2444 and H.R. 3231 is the creation of an Assistant Associate Attorney General for Immigration Affairs position to oversee the immigration affairs of the nation. Such a position higher in the Department of Justice would have more visibility and weight within the government, allowing immigration concerns more of a voice within the inner deliberations of government. A higher level position such as this also would be able to work on a more equal level with the Secretary for Homeland Defense in resolving conflicts between the two agencies.

Within the structure outlined in both S. 2444 and H.R. 3231, an enforcement bureau is created to oversee the responsibilities of enforcing our immigration laws, including the detention and deportation of criminal aliens, border and interior enforcement, and intelligence functions. It is our view that certain non-terrorist enforcement functions should remain in the Department of Justice so that services and immigration enforcement are more closely coordinated. This would include the detention of non-terrorist aliens, such as asylum-seekers, indefinite detainees, and certain criminal aliens. Other enforcement operations, such as work site enforcement or other types of interior enforcement, would also remain within the Department of Justice in a new immigration agency.

Again, the most important aspect of our proposal is the fact that the Department of Homeland Security would retain certain enforcement functions related to potential terrorists, including border and port enforcement and any detention or removal relating to suspected terrorists. In addition, we recommend the creation of offices within both the Department of Justice and the new Department of Homeland Security to coordinate enforcement responsibilities. These offices also would coordinate information regarding the issuance of visas and other immigration benefits.

OFFICE OF CHILDREN'S SERVICES

Both S. 2444 and H.R. 3231 would create an Office of Children Services to oversee the handling of the more than 5,000 unaccompanied alien minors in the nation. We believe that this office and the related provisions pertaining to children in S. 2444 should be retained, provided that immigration services and enforcement remain in the Department of Justice. Should all of INS be moved to the Department of Homeland Security, we recommend that a new office be placed within the Office of Refugee Resettlement within the Department of Health and Human Services.

The proposed Department of Homeland Security would be poorly equipped to assume custodial care of unaccompanied children, lacking specific child welfare expertise or experience in handling children. The INS has been increasingly criticized for

its handling of children and a department with an even more focused national security mission would also place child welfare principles as a low priority. The Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS) has the child welfare expertise to properly care for these vulnerable children. The office already handles unaccompanied refugee minors and child trafficking victims.

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

The Administration proposal fails to detail whether the Executive Office for Immigration Review (EOIR), currently an entity outside INS in the Department of Justice, also will be folded into the new department. EOIR is a regulatory agency which is charged with the conduct of exclusion, deportation, removal, and asylum proceedings. It consists of two adjudicatory bodies, the immigration courts and the Board of Immigration Appeals (BIA).

Under our proposal, EOIR should remain within DOJ but outside a new immigration affairs agency in order to preserve its independence from the policy and detention and removal responsibilities of the agency. Should the entirety of INS be placed within the Department of Homeland Security, we would support the creation of an independent commission for EOIR in order to totally remove the strong conflict-of-interest which would exist between EOIR and a Homeland Security Department. Underlying this position is the principle that judicial functions should remain independent in order to ensure the fair and objective interpretation of U.S. immigration and asylum laws.

CONCLUSION

In summary, Migration and Refugee Services of the U.S. Conference of Catholic Bishops does not oppose the creation of a new Department of Homeland Security. However, we recommend against transferring the entirety of the INS's current functions to the new Department. Instead, we believe that the functions of the INS that are more appropriately considered national security-oriented should be transferred to the new Department, with the remaining service and enforcement functions remaining behind in the Department of Justice, reorganized along the lines of S. 2444, which is pending in the Senate, or, with modifications, of H.R. 3231, which the House of Representatives passed earlier this year. With regard to unaccompanied alien children, should Congress decide to leave immigration service and enforcement functions in the Department of Justice, we would recommend that an Office of Children's Services be established within the Department of Justice to look after such children's care and custody issues. On the other hand, should Congress transfer all of the current INS's functions to a Department of Homeland Security, we would recommend transferring responsibility for the care and custody of unaccompanied alien children to the Office of Refugee Resettlement in the Department of Health and Human Services.

At stake in this debate is how our nation, which has been built on the back of immigrants, will view and treat immigrants in the future. Under a new agency with a mission to protect the public from terrorist attacks, it is likely that immigrants will be viewed as suspect and feared. In addition, immigration could be reduced over time because of the paramilitary and intelligence culture which would pervade the new agency, leaving immigration services concerns as a low priority.

Mr. Chairman, we ask the subcommittee, the committee, and all members of Congress to consider our recommendations carefully and to consider the Administration's proposal in a deliberate and thorough manner. We fear that, unless modified, the Administration's proposal could drown the new Department of Homeland Security in a sea of unrelated missions, diverting its attention from the enormously important task of protecting us from terrorism; weaken immigration enforcement efforts; impair the provision of immigration services; and have an adverse impact on law-abiding immigrants for years to come.

Thank you for your consideration of our views.

APPENDIX A

PROPOSED ALTERNATIVE ORGANIZATIONAL STRUCTURE OF THE IMMIGRATION COMPONENTS OF THE DEPARTMENT OF HOMELAND SECURITY

Functions to be Transferred from the INS to the Department of Homeland Security (DHS)

BORDER MANAGEMENT

- Border Patrol
- Coordination of Border and Port Enforcement

COUNTERRORISM, INTELLIGENCE, AND INVESTIGATIONS

- Intelligence
  - early warning/threat detection of unlawful migration
  - data collection and analysis on alien smugglers and terrorists
  - forensics for document fraud and terrorist tracking
- Investigations
  - terrorist-related document fraud
- Alien smuggling

DETENTION OF TERRORIST ALIENS

- Detention of aliens who are being detained pursuant to the USA Patriot Act or pursuant to the security-related grounds of the Immigration and Nationality Act

Functions to be Transferred from the INS to the Office of Refugee Resettlement (ORR)

CARE AND CUSTODY OF UNACCOMPANIED ALIEN CHILDREN

Functions to Remain in a Reorganized Immigration and Naturalization Service (INS), divided along the lines of the proposals contained in S. 2444

ALL SERVICE AND ADJUDICATIONS FUNCTIONS

- naturalization
- adjudication of immigrant and nonimmigrant visa applications
- adjustment of status
- issuance of work permits
- refugee, asylum, and other humanitarian cases
- investigations (background checks)
- INS overseas adjudication of refugee, asylee, immigrant petitions
- screening political asylum applicants

ENFORCEMENT FUNCTIONS

- Intelligence
  - all other immigration-related intelligence to assist INS at all levels in making day-to-day and long-term policy and operational decisions
- Investigations
  - background checks to determine eligibility for immigration and naturalization benefits (e.g., visas, adjustment of status, etc.)
  - immigration benefit and document fraud

- identification and removal of criminal aliens
- work site enforcement
- human trafficking
- employer sanctions
- organized crime
- rapid response command center (to respond to community complaints regarding illegal criminal alien activity)
- asset forfeiture
- enforcement of provisions of the Immigration and Nationality Act (INA)

- Detention and Removal

Office of the Assistant Attorney General for Immigration Affairs

- Inspections

Creation of an Office in Justice Department and Homeland Security to coordinate national security functions

Mr. FLAKE. [Presiding.] Thank all the witnesses who have testified, and I will go ahead and start with the questions.

Mr. Green, you mentioned that, quote, our consular lookout and support system is second to none in its ability to provide a consular officer anywhere in the world the best information on people we don't want in the U.S. We know that hasn't been the case in the past. What changes have been made since September 11 that make that so?

Mr. GREEN. Mr. Chairman, obviously——

Mr. FLAKE. Would you argue that that has been the case in the past?

Mr. GREEN. I would argue that the class database has not been as complete certainly as we would have liked it. As Ms. Walker stated, as I stated in my testimony, the major weakness prior to 9/11 was the availability of information from both the intelligence and the law enforcement community. The PATRIOT Act has reinforced the requirement to provide that information and we have had literally hundreds of thousands of additional entries that have been made into that system since that time.

Mr. FLAKE. So just the mandate to enter the information and provide that information to the other, that is the difference now?

Mr. GREEN. Yes, sir. And you know, I have got to also say that regardless of how skilled you are in interviewing an individual in the 5 or 6 minutes that you have to do that, unless we have an indication that something is wrong with that individual, the chances of determining what their final intentions are very slim. We have got to have that database and it has got to be as complete as possible.

Mr. FLAKE. Let's talk about that interview process for a minute. That is mentioned as one of the most important aspects, yet in the handbook there is only about three and a half pages dealing with it. Is that sufficient training for an officer to actually conduct an interview and assess what they need to?

Mr. GREEN. There are three and a half pages of technique, but this is part of a 26-day course where interview techniques are taught throughout the course, and the practicing of actual interviews is stressed throughout it. And consular supervisors in the field continue that training as new consular officers go to the field, and they are supervised by more senior people.

Mr. FLAKE. How much training do they get then before they conduct the interviews?

Mr. GREEN. It is a 26-day consular course.

Mr. FLAKE. 26 days. That is part of it then.

Mr. GREEN. But that covers the full range of American citizen services, passport visa, citizenship adjudication, and so forth.

Mr. RATIGAN. If I may, I was in charge of that course, that 26-day course, and we would spend probably a day or day and a half on doing mock interviews and just reviewing the whole process of visa interviewing. My response to your question on three and a half pages, I think that officers very quickly pick up the thrust that they want to make in an interview and become capable interviewers. Some of it is Washington based training, some of it is on the job training at the post.

Mr. GREEN. I would add to that, too, that only so much interview technique can be taught in the classroom. You are going to become a better interviewer as you do more interviews. And as you learn the culture of the country, the economic conditions, the political conditions, you make contacts within the country, you get a sense of what kind of questions to ask. As an example, in one country our consular officers found out that people involved in the honey business were laundering money. So this would be something when you interview someone and you only find that out on the job, obviously, so when you interview somebody and they are a bee keeper you might ask a few more questions.

Mr. FLAKE. Mr. Appleby, you mentioned that paramilitary culture in this new department will be incompatible with services adjudication. What did you mean by that? You say they will be viewed through a terrorist lens. I suppose you went through some kind of metal detector when you came here.

Mr. APPLEBY. Yes, I did.

Mr. FLAKE. Does that automatically assume that kind of a terrorist lens or is that incompatible, is that something we shouldn't go through here at the Capitol?

Mr. APPLEBY. No, I think the Immigration Service provides more intensive scrutiny than just going through a metal detector and there is a lot more at stake than getting into a building. I think what is at stake is people being able to enter legally into this country. People are coming here to contribute to our Nation who are innocent of any wrongdoing or any terrorist activity who may be denied because of policy decisions made in a department whose focus is, rightly so, national security. We are just saying that some of these important functions which are very important to thousands and millions of immigrants who come and help us each year, that needs to be considered in the debate.

Mr. FLAKE. Thank you. Ms. Jackson Lee, are you prepared for questions?

Ms. JACKSON LEE. I will yield to the distinguished gentleman.

Mr. FLAKE. Mr. Issa.

Mr. ISSA. Mr. Appleby, I guess my first question is in your last statement to the Chairman you said those who come here to contribute. Isn't it true that your organization probably will take anyone whether they have anything to contribute and in fact often lobbies for groups that have little to contribute but a great deal to gain by admission to the United States?

Mr. APPLEBY. Thank you for your question. The last time that we testified you suggested that we were in favor of open borders, and that is not true. We have always——

Mr. ISSA. No, excuse me. I just wanted you to answer the question. The question I asked was you said those who have a great deal to contribute to our country. We might define that as H1-Bs, but that is not the group that you often lobby for. Isn't it true that—I am not trying to attack you as a witness beyond reasonable, but your organization often says we want those who need to come to the United States to get the benefit of the United States. Is that true or not?

Mr. APPLEBY. Well, we take the position that we believe those who are fleeing persecution, for example, and deserve safe haven in a country, and our laws reflect that.

Mr. ISSA. Don't you also support economic refugees?

Mr. APPLEBY. What do you mean by that? In terms of those who come here?

Mr. ISSA. Those whose life at home is economically deprived and will gain by coming here.

Mr. APPLEBY. We support a generous legal immigration system who allows those who legally qualify to come to this country and contribute their skills to our country and to join their families, that that be done.

Mr. ISSA. My time is limited, so I just—once I have gotten the answer that I think you are going to give, I appreciate it and we will ask the next question. I am not leaving you, I promise. What number would you put annually on the amount that the United States should absorb both legally and illegally, a total number that we should be able to absorb per year?

Mr. APPLEBY. I don't know if I would characterize it in terms of a number. I know we admit about a million or so, I mean 900,000 to a million legally a year. I think that our Nation, that evidence over the years, over the 200 years of our history shows that a generous posture in welcoming immigrants benefits our country. It has made our economy strong. We have immigrants who fill jobs throughout the country.

Mr. ISSA. Mr. Appleby, please, if there is no number just say you don't have a number. Would it be higher than the 900,000 legal and at least 500,000 of illegal that come a year? Would it be higher than it presently comes to?

Mr. APPLEBY. I am not going to engage in a number, sir. I don't understand how the question goes to the merits of our arguments on this issue.

Mr. ISSA. My basic concern today, I am very aware of how we try to screen outside the country, that today if we have 500,000 people coming illegally and nearly a million coming legally, plus of course all the tourists, guests and so on, we have clearly overwhelmed the system, then the question I have for you and this panel is how can you say please give us more when we can't deal with the ones we have here today. And that appears to be why we have the pleasure of your company again and again when in fact rather than saying we need to have a completely legal system, I have never seen an immigrant you didn't want to bring into this country.

I am thrilled to see you here again, but, yes, I do believe that you are for open borders. You would say it is not open. You would say we have to have a pass at the border. But I have never seen a group that you had said we should keep out other than possibly those with bombs attached to them as they come over the border.

Mr. APPLEBY. That is not true. We are not in favor of undocumented migration or anyone who has a criminal background coming into this country as well. So I mean I would be glad to provide you all the literature we put out on this issue.

Mr. ISSA. So you do favor the deportation of anyone who commits a crime here or is found to have committed a crime in their own country, whether legal or illegal?

Mr. APPLEBY. It depends on what the crime is. If it is a serious crime, yes.

Mr. ISSA. What is serious—you said the word "crime," I didn't.

Mr. APPLEBY. Anything that might be deportable.

Mr. ISSA. No, no. You said you didn't—people shouldn't come here if people have committed a serious crime. What is a serious crime?

Mr. APPLEBY. Anything that is probably a felony under criminal law in this country is a serious crime.

Mr. ISSA. Okay. Thank you very much. I yield back.

Mr. FLAKE. The gentleman yields back. Ms. Jackson Lee of Texas.

Ms. JACKSON LEE. Thank you, Mr. Chairman, and I thank you for your kindness in presiding over this important oversight hearing. It seems as if we have been together frequently this week. We have been in a variety of homeland security oversight hearings, and that is what we should be doing because of course we are operating under a procedural deadline of July 12. So we thank the witnesses very much. And please take my general appreciation to the extent that I do not pose questions to you, but I do appreciate your presence here because I am going to use this time, Mr. Appleby, to rehabilitate you and to articulate for this body and esteemed audience and honorable Members of Congress your position.

First of all, Mr. Chairman, I ask unanimous consent that I be allowed to submit my statement of this hearing into the record.

Mr. FLAKE. Without objection.

Ms. JACKSON LEE. I also ask that I be allowed to submit the statement of the American Civil Liberties Union testimony on this particular act from Mr. Timothy Edgar, to be submitted into the record.

Mr. FLAKE. Without objection.

Ms. JACKSON LEE. I thank the Chairman very much. But let me, I believe, interpret, articulate Mr. Appleby's presence here and also to applaud the work of the United States Conference of Catholic Bishops.

I think what you are saying is we do not live in a police state. At least we have not accepted that premise at this point. We do not live under a despot or dictatorship. I think you believe that we can balance the security of this Nation with the respect for rights of all individuals. I think you understand that there are immigrants within this Nation that have legal rights because they are here as they have legal status, they are documented, they are legal immigrants.

I think you also seemingly understand the concept of earned access to legalization, that there are in fact immigrants here who are hard working, pay taxes and are seeking access to legalization.

The issue of homeland security is of course to remind us that we have turned the page in American history. Do you accept that after September 11? Is there some argument by the United States Conference of Bishops that we are not living in a new day?

Mr. APPLEBY. No, there is no argument.

Ms. JACKSON LEE. Do you have a policy statement of advocating terrorism and opening our borders to terrorists as they may be identified?

Mr. APPLEBY. No, we do not.

Ms. JACKSON LEE. Do you have a sense that the population that dominates in the United States, I believe we have a higher percentage of Hispanic immigrants coming from places like California and Texas, do you have any polling data or any kind of research by your spread across the Nation that there is a high percentage of Hispanics who are terrorists?

Mr. APPLEBY. No.

Ms. JACKSON LEE. You have no information on that?

Mr. APPLEBY. No.

Ms. JACKSON LEE. Do you happen to work with a large percentage of Hispanic immigrants?

Mr. APPLEBY. Yes, our organization does throughout our diocese, throughout the country.

Ms. JACKSON LEE. Are some of those undocumented?

Mr. APPLEBY. Yes, some are.

Ms. JACKSON LEE. As you pursue assisting them are you following the laws of this land?

Mr. APPLEBY. Yes, we are.

Ms. JACKSON LEE. What I would offer to say to you is that we need to spend our time trying to make sure that what we do in Homeland Security is directed toward securing our borders. Let me offer a proposal that I have since I see a number of Members here. I believe that we must give high credence to the immigration issues of this Nation. I have a proposal that pulls from the Border Security and Transportation Department only four in Homeland Security, a fifth division that calls itself Citizen and Border Security. And under that will be an Under Secretary, a separate independent Under Secretary, and we will have enforcement, immigration services, and visa processing. And why do I say that? We will have a singular head that balances enforcement and recognizes that we must have security on the border and as well internal security.

Does that offend you, Mr. Appleby?

Mr. APPLEBY. No, it does not offend me. In fact the organization which you described is one that we would support. Our position would be to keep INS, the majority of INS, out of the Homeland Security Department. But if Congress decides that would not be the case we would support that construction.

Ms. JACKSON LEE. I appreciate your willingness to be open minded on this issue, because I think it would be foolish for any of us to not recognize that we have some internal security issues because we don't have an absolute with respect to people who come in and out of this country. We frankly cannot even with good intentions and good laws. We have an enormous border on the Canadian border, enormously open border. If you say to any of the northern border States that you intend to do anything about it, you will hear a mouth full. And certainly we have a large southern border.

So the idea—Mr. Chair, thank you for your indulgence as I finish—the idea of course is to be able to have a unified department that addresses access to citizenship issues that our counsel Ms. Walker would have to be contending with and business issues and tourism issues, but having a succinct recognition of border safety, food safety issues that come across the border as well as realizing—if I would just be allowed an additional 30 seconds to get

Mr. Appleby to answer—if you understand the visa processing process, if you understand the visa processing situation you must be able to affirm that the documents are truthful. Do you find that offensive if we begin to implement procedures of making sure that people who bring materials to say this is who I am, to get a visa that those documents should be accurate?

Mr. APPLEBY. Yes, I agree with it.

Ms. JACKSON LEE. You are not offended by that process?

Mr. APPLEBY. No.

Ms. JACKSON LEE. I thank the distinguished gentleman. I hope I did in some way provide some commentary that was accurate on your position.

Mr. FLAKE. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Flake.

Mr. Ratigan, in your testimony you talk about moving the entire visa issue and function into DHS, that it is important that we do not create a vast enforcement minded monolith devoted to the refusal of visas and reflecting a bunker mentality. Then you went on to say that was a very hard thing not to do but don't offer any particulars about how we could institutionalize processes that would keep us from becoming that. Do you have some ideas on what we could do to stop this from being—the reason I ask the question, we stopped every aircraft in America from flying for 2 or 3 days after 9/11. There is a tendency to be knee-jerk when we have a threat to our security. And that may be good or bad, but in a bureaucratic process what can we do to keep that from happening?

Mr. RATIGAN. Well, I think I mentioned in my testimony that there are so many institutions in this country that focus on the Immigration Service and the need for prompt adjudication, processing it, et cetera, that that will—and I mentioned education, business, tourism, all have huge interests in the process. And I think their confidence and the need for DHS to maintain their confidence will be one controlling, governing force in the process.

Mr. CANNON. Are there things that we can do if we went with your suggestion to build in processes? We understand the forces out there. But is there anything we can do to create a process that would make it more difficult to become that monolithic denial of force?

Mr. RATIGAN. I believe the Immigration Service has in its district offices the concept of local advisory committees, meeting with individuals and institutions that have ongoing interests in the process, including the immigration lawyers among others. I think that sort of thing at the DHS level would be very useful, sort of either mandated, well, probably mandated sort of consultation process to get the feedback.

Mr. CANNON. So mandated, legislated consultative process before the Secretary of the Department of Homeland Defense could stop issuing visas or limit the number of visas that were being issued because of a perceived threat to our security?

Mr. RATIGAN. Well, clearly a perceived threat changes the whole dynamic. But I am thinking more just in terms of the normal day-to-day processes, the kind of things that are currently suffering from slowdown, and so forth. But just a process by which whether

you even encourage it legislatively or mandate it, set up these outside consultations with interested parties.

Mr. CANNON. I think Mr. Green was talking about the diplomatic foreign affairs uses of visas. It seems to me we have been through this. There are a lot of reasons why we are organized the way we are right now. Granted, there are some problems in the whole system, but I am just trying to get a handle on how we balance moving this into one monolithic environment and then not letting it act like a monolith.

Thank you for your comments.

Mr. Krikorian, you had a document that you held up earlier. What is that?

Mr. KRIKORIAN. It is a report we had done tracing the immigration history of 48 foreign born al Qaeda operatives that have been either convicted or acted in the United States over the past decade.

Mr. CANNON. Can we get that online?

Mr. KRIKORIAN. Yes. CIS dot org. The whole thing is there.

Mr. CANNON. I often see the number $30 billion a year as being the social cost for people who are here without—or here illegally, illegal immigrants. Does that ring a bell? Is that a number that comes from CIS?

Mr. KRIKORIAN. I don't think it comes from us. It is sort of hard to quantify what the social cost of illegal immigrants is.

Mr. CANNON. Has CIS done any attempts to do that? $30 billion on O'Reilly Factor the other day. $24 billion a year he was talking about. I am just trying to track it down.

Mr. KRIKORIAN. I honestly don't know. The National Research Council did an examination of the full impact of immigration economic impact and estimated that the net welfare cost of immigration overall, not just illegal but legal as well, was between 11 and $20 billion offset by an economic benefit by driving down the wages of the poor between 1 and $10 billion. So I am not sure where the numbers that O'Reilly used came from. It could have come from either, I don't know.

Mr. CANNON. Thank you very much.

Mr. FLAKE. Moving to the second round of questioning, Mr. Green, where on the food chain is the consular officer who issues visas? Is that a desirable position? Is that something that somebody aspires to or is it the first job taken, first job assigned I should say?

Mr. GREEN. Of the people we bring in every year, approximately one-fifth of them become consular officers. We have many—I know the impression may be that it is at the—down on the level with the catfish, but it in fact is a job that many people like because it is a job that puts you in touch with people. And there are many people, believe it or not, who would rather serve in the consular cone and have that connection with foreign audiences than to sit and prepare cables on econ or political issues.

Mr. FLAKE. Is there an inherent conflict? You are in country, you want to please the host government. Isn't there an inherent conflict with being as hard-nosed as you need to be in this function, issue visas and still pleasing and have good relations with the host government? Isn't the State Department consular official perhaps too sensitive to that?

Mr. GREEN. I don't think. So I think this is the general feeling but if you look at the number of, let's say, non-immigrant visas that we approve and disapprove or the number of immigrant visas that we approve and disapprove, I think you will see a reasonably high percentage of disapprovals. In fiscal year 20 we approved 7½ million non-inmigrant visas. We disapproved 2.8 million non-immigrant visas. So I think the common belief by many that the visa mill and you have got some kind of young first tour and many of them are first and second tour robots down there just cranking them through as fast as they can is not the case.

The people who serve and who are recruited into the Foreign Service, and I just spoke at a graduation of the most recent A-00 class, which is the basic general class, out of the 95 new Foreign Service officers, 47 had Master's Degrees, 7 had law degrees—12 had law degrees, 3 had Ph.D.s. The average age was 32 years old. So these are not young people in all cases that just fell off the turnip truck that we are shooting down there to stamp visas.

Mr. FLAKE. Thank you.

Mr. Ratigan, do you agree that get out the visas is not the mentality there or is it—what is the major—what is the mentality? What is the function there?

Mr. RATIGAN. It is a hard line to kind of set, I think.

Mr. FLAKE. Let me put it this way: Is it more likely that if we move that function as well into this new department that there would be kind of a better sense of what we are doing here, protecting the homeland as opposed to pleasing the host government? Do you see that as a conflict?

I would like your very brief answer, and then Mr. Krikorian to answer that.

Mr. RATIGAN. I think there is some conflict, some effort to maintain a positive public relations with the host government. What the effect would be of moving the visa function into DHS on that kind of concern it is very hard to speculate. I mean——

Mr. FLAKE. Mr. Krikorian, do you have any thoughts?

Mr. KRIKORIAN. Not having issued visas myself, I can't say from personal experience what goes on. But we have published the opinion of several former consular officers. There was no doubt in their minds that you don't get—that the possibility of promotion is not increased by turning down visas and nobody gets withheld promotions because they give out too many visas. There is a clear incentive to get people their visas and to see the applicant as the customer that is to be satisfied rather than the American people as the customer that they are working for.

Mr. FLAKE. Mr. Krikorian, do we avoid the service adjudication portion from being the stepchild if they are in the same department, kind of like we have now?

Mr. KRIKORIAN. I think the approach that Ms. Walker outlined where within the Homeland Security Department there would be a specific agency separate from transportation that dealt with both service and enforcement elements of the INS is I think probably a sensible approach. This House has approved legislation to separate, create separate subagencies, and I think that is probably a move in the right direction as long as the whole thing is then overseen under the umbrella of Homeland Security.

Mr. FLAKE. Thank you. Ms. Jackson Lee.

Ms. JACKSON LEE. Mr. Green, I agree with you, I think you have a very solid Foreign Service staff. I have worked with them. Certainly I can critique some of the work that they have done and I have disagreed with some of the visas that they have either given or have not given. But what I would like to pursue is my concern that I mentioned earlier about the attesting to or the confirming the legitimacy of the documentation that individuals will bring to the consular officers to determine whether visas should be issued. And I would tend to agree with Mr. Flake and give it a different perspective than in light of September 11. I think it is important to enhance the training so that those who would come with false documentation, these are foreign documents, I assume many times in a different language, would be able to assess, make their determination comfortably that they have the right information and they are reading the right information. Certainly I understand that they aren't obviously versed in the language, but I think the State Department should look at enhanced training so that your determinations are even more effective.

What is your viewpoint on that?

Mr. GREEN. Ms. Jackson Lee, I would agree fully. This doesn't just apply to the issue today, but Secretary Powell from the day he walked in the door was concerned about training within the State Department and the attitude that the State Department took relative to training. We have in the past 16 months made a major effort, a major effort to restructure and evaluate all of the training to include consular training. And as we have seen weaknesses in that training, where we need to add curriculum, where we need to add management training, where we need to add training, as you mentioned, for consular officers on being able to identify fraud in documents, we have and will continue to do that.

Ms. JACKSON LEE. Would you be kind enough to send me in writing some of the procedures, prospectively, that you are using or have used? I am very interested and concerned.

Mr. GREEN. On document fraud?

Ms. JACKSON LEE. Yes. Document fraud, right, and the use of false documents at the point of seeking a visa. So that would be at the country that the individual was seeking a visa from.

Mr. GREEN. Certainly will.

Ms. JACKSON LEE. Are you also reaching out—many of my constituents are from the Muslim community speaking Arabic. Are you reaching out to diversify more extensively your employment base to be able to be helpful in these instances of ensuring our security, so you have people who know the language and are able to address the particular area that they are in?

Mr. GREEN. Yes, we are. Again, a major effort on the part of this Secretary to diversify the Department. I just got—I don't have it because I didn't know we were going to talk about that, but I just got today statistics on our recruiting efforts in the Foreign Service as an example, and in minority recruiting, and I will be happy to send that to you.

Ms. JACKSON LEE. I would like that.

Mr. GREEN. Minority recruiting, I think you would be very pleased with the progress we have made.

Ms. JACKSON LEE. I will look for that. I am sure the Committee will accept that.

Mr. GREEN. I just have to mention this, because when we came in the State Department was 76th among Federal agencies in processing EEO complaints and civil rights complaints. We are now first.

Ms. JACKSON LEE. Give my best wishes to the Secretary. Thank you very much.

Let me, Ms. Walker, the idea that I posed and presented, the Division on Citizen and Border Security, making a fifth division under Homeland Security, if in fact we are not successful in totally separating out the INS, which frankly I don't think we will. Your comment, very brief, because I do have a question for Mr. Krikorian, if you could just briefly comment on that.

Ms. WALKER. We are in total agreement. The only point that we would be concerned about is the visa processing issue, which we feel could be fully integrated and properly supervised without totally moving them over and without losing the benefits we already gained in foreign policy with joining it with visa issues.

Ms. JACKSON LEE. I wanted you to say that because I do appreciate the dilemma. You as counsel represent a myriad of individuals, tourists, business persons who have no desire to perpetrate any harm against the United States. I will take that under consideration, but in light of the extent of visa fraud I think we have to find a balance. But I think it is important for to you get that on the record. I wanted to hear from you on that. I will be open mined on that issue.

Ms. WALKER. Thank you.

Ms. JACKSON LEE. Mr. Krikorian, is it your belief that we are where we are today with respect to terrorist activities because of immigrants?

Mr. KRIKORIAN. Well, depends what you mean. All the terrorist threat that we have experienced that comes from foreign born terrorists dwarfs the terrorist threat that we face theoretically from American born terrorists. So, yes, I would have to say yes, but it depends what you mean by immigrants. Is it people who have green cards or citizenship maybe? If you mean simply people who are from overseas, then yes, the terrorist threat from foreign born Islamic terrorists dwarfs anything we have faced in our history.

Ms. JACKSON LEE. I see the Chairman with the gavel. I would want to quarrel with you the premise, and I would just mention I am not sure if we know how many Timothy McVeighs we have in this country. I hope we don't have many more. But I think that terrorism is not labeled. We abhor September 11 but I think it doesn't equal to immigration policies. I thank you.

Mr. FLAKE. The gentleman from California.

Mr. ISSA. Thank you, Mr. Chairman. Mr. Ratigan, you are an attorney.

Mr. RATIGAN. Yes.

Mr. ISSA. In your area of expertise in immigration, are you aware whether it is illegal or not to knowingly harbor a person you know not to be a documented immigrant? Is there a civil penalty for that?

Mr. RATIGAN. I believe that there is, but I can't go much beyond that.

Mr. ISSA. To knowingly provide or see that provision is made for employment, would that also be illegal?

Mr. RATIGAN. Well, I think there have been some issues about that, that the issue has been that you can't be considered to be harboring if you employ somebody illegally. I think that has been an issue in the past that still has been unresolved.

Ms. WALKER. Thank you very much. As far as the harbor provision, there is a harboring provision that you have had in Texas, a proviso concerning exemption from the harboring provision employment. That proviso was removed. So bottom line, the harboring issue can be arguably applied to someone who is employing someone.

Mr. ISSA. So I guess it would be fair to say that when Mr. Appleby, correcting Ms. Jackson Lee's statement, felt that she was clearing the record that Mr. Appleby's group had committed no crimes and yet you said that you knew your organization had undocumented workers or undocumented people that you were bringing in or involved in, you said you know you have them and yet you are saying you are complying with the law. So I would just caution that testimony of this will be published even that I would hope in the future you would be more careful about admissions of knowing that your organization is involved with undocumented workers and yet feeling that you are not breaking any laws.

Going to Secretary Green for a moment, I too share a position I think Ms. Jackson Lee articulated that the State Department should keep its oversight of visas and that the consulars in the countries with the expertise and the liaison with the other members of State should continue to be a network and that in fact it should be part of the career path of State, and I strongly hope that that comes to pass.

But I would like you to characterize, if you will, you mentioned quite a bit about the age and the training of these individuals. But you know, I have been in several countries, including Mexico, seen the kind of scrutiny and had many of the examples of legal and illegal shown to me and how they were discovered. Would you comment further on steps post-9/11 that the State Department is taking to take what might have been a 98 percent success and raise it to a higher level for me?

Mr. GREEN. I think that obviously post-9/11 there have been a number of steps that have been taken to include more detailed questions that are provided or asked to prospective entrants and then we have gone even further with certain classes of individuals to ask even more in-depth questions which are then transmitted back here to Washington and ultimately to law enforcement agencies so they can do a more thorough records check before any visas are issued.

Mr. ISSA. Thank you. I do have one follow-up. I hope I can have the chair's indulgence because it may be more specific than the oversight here. But I have become aware and watched it continue for many years now that Lebanon cannot issue a brand new visa and have you to go to Syria to get your first time visa. And since the President has made it very clear and I concur with him that

Syria is, one might say, on the periphery of the axis of evil; that is, it is a conduit for Iranian money to Hezbollah and other terrorist groups, that it occupies portions of Lebanon, and is only marginal compliant of the TIAF Accords, wouldn't it be appropriate for the State Department to ensure that the Lebanese, which are not only the largest but three-quarters of all Arabs in this country are Lebanese, are able to go to their capital rather than the capital that often claims to be the true capital of Lebanon in order to get their visas?

If you feel comfortable with your background in commenting, I would appreciate it.

Mr. GREEN. It sounds like it makes sense but if I could ask Mr. Lanin, who is the Principal Deputy Assistant Secretary.

Mr. ISSA. I think he is giving you the answer.

Mr. LANIN. Actually we are—it is a construction issue right now. We are hoping to build a complete visa facility at the embassy in Beirut and open it this summer.

Mr. ISSA. This is the one that is going to be put down below the helipad?

Mr. GREEN. No, we have identified new real estate that is on the east side. I haven't been over there but my overseas buildings guy recently came back.

Mr. ISSA. I have been there enough that my Chairman has accused me of having an apartment there.

Mr. GREEN. The building that we have now, which I haven't been, is not in a good area.

Mr. ISSA. It must be a good area. It is the most expensive embassy in the world to rent.

Mr. GREEN. We are going to get 20 million bucks for that billing. And we have——

Mr. ISSA. I am only trying to get equal time to the minority, if you could quickly answer.

Mr. GREEN. We have identified a piece of real estate that will provide for a whole compound for about an equal amount of money.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. FLAKE. The gentle lady from California.

Ms. LOFGREN. I am sorry, I missed much of this hearing and I had another obligation but I am glad to have been able to read the testimony and to listen to the tail-end. I have actually a very limited question. I have opinions on a lot of what has been said, but who it was that was quoted today—I think it was actually Congressman Mo Udall who came down to the floor of the House late at night with a sheaf of papers and he said everything has been said on this subject, but not everyone has said it, so go forward. So I will not fall afoul of that admonition.

As we create a Department of Homeland Security, I think all of us agree we should do that, the question is what goes in. I am of the belief that to take some of the immigration function; that is, have absolutely nothing to do with security could have the effect of sinking the Homeland Security agency because as we all know who has worked with the Immigration Service it is a troubled agency. It is not efficient. There are all kinds of things that need to be done. I did ask Governor Ridge the other day do you want your homeland security people to be asking the new citizen appli-

cants who was Abe Lincoln and what does that have to do with homeland security. So they are going to be troubled with a lot of this stuff.

We can go back and forth on what should go in. But one thing I think clearly does not belong in Homeland Security, the issue of foreign adoptions, and also unaccompanied minor children. And I am looking for—I mean there is no security issue with the foreign infant adoptions that I can see. A home for those activities that might be better for the children involved, and also avoid sinking this agency with the extraneous obligations. It has been suggested that there is a Children and Family Division in the Health and Human Services agency, and I note that the Catholic Conference had an opinion on the issue of unaccompanied minors.

Should this be separated out from the Immigration Service? What do you think about including the foreign adoption function as well as where should it go?

Mr. APPLEBY. It is our position that if all of INS were to go into Homeland Security the unaccompanied alien minor program should be separated out and placed into Health and Human Services. Our first blush was that it might go into the Office of Refugee Resettlement, because they have certain unaccompanied refugee minors and trafficking victims who are children and have some expertise. But the fact that it should go into HHS, which has the child welfare expertise and is able to take care of children, their psychological, emotional and other material needs, is very vital to how these children are treated and their well-being. So we would strongly support that.

Ms. LOFGREN. What about the idea of putting in the adoption of foreign children in that same group?

Mr. APPLEBY. We would agree with that as well.

Ms. LOFGREN. Any other reactions to that suggestion?

Ms. WALKER. Just that for the Immigration Lawyers Association we would agree as well.

Ms. LOFGREN. Anybody disagree with that proposal? If not, then it was unanimous. From people who don't agree on anything else today, they agree on this and perhaps we can make this suggestion to the full Committee and accomplish something that we can all feel good about.

With that, I yield back the balance of my time.

Mr. FLAKE. Thank the gentlelady for yielding back. I want to thank the witnesses for testifying today and inform any staff who are here their Member statements can be entered into the record for 5 days.

This meeting is adjourned.

[Whereupon, at 4:50 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF BILL MCCOLLUM

Mr. Chairman:

I appreciate the opportunity to submit this written statement expressing my views on the future structure and status of the Executive Office for Immigration Review (EOIR), the Immigration Court and Immigration Judges, especially in light of the recent Administration proposal to create a new Department of Homeland Security and transfer the Immigration and Naturalization Service (INS) to its jurisdiction.

I strongly recommend that in this reorganization Congress do one of the following: (1) create an Article I Immigration Court; (2) establish an independent immigration adjudicatory agency to house EOIR, the Immigration Court and Immigration Judges in the Executive Office of the President; or (3) fully separate INS from the same reporting Cabinet officer by explicitly directing that EOIR, the Immigration Court and Immigration Judges remain in the Department of Justice rather than being transferred with INS to the new Department of Homeland Security.

For 18 of the 20 years I had the privilege of serving in the United States House of Representatives I was a member of the House Subcommittee on Immigration. Through many hearings and other opportunities to conduct oversight I formed definite views regarding the need for Immigration Judges and the Immigration Court to be independent of INS and the Department of Justice where both have resided for their entire existence.

In at least the last six Congresses before I left in January 2001, I introduced legislation to establish an Article I Immigration Court. This had been the recommendation of the Commission on Immigration which reported to Congress in 1980 and whose recommendations formed the basis of the Simpson-Mazzoli legislation in 1986 which created employer sanctions. The creation of the Article I Court is the only major recommendation of that Commission never to have been enacted. In 1997 another commission, the United States Commission on Immigration Reform, reported to Congress a recommendation to place the Immigration Court and the Board of Immigration Appeals and the basic functions of Immigration Judges and the EOIR in an independent agency. There was actually a split vote of the Commission with a bare majority favoring the independent agency status over an Article I Court. But the basic rationale for both Commissions' proposals were the same in 1980 and in 1997 and are equally applicable today.

While we call them Immigration Judges, those performing adjudicatory tasks in immigration matters are attorney employees of the Department of Justice just as the attorneys of the INS are. They are judges in name only. Yet they are called upon to make adjudicatory determinations that will grant or deny individuals the right to remain or not in the United States and to ultimately become a citizen or not. In the way that they affect the lives of people and project to the rest of the world the long established image of America as a land of immigrants open to limited migration through a fundamentally fair process, they are in an entirely different league from Administrative Law Judges or any other adjudicators in the Executive Branch. There are many Article I and Article I judges who make far fewer decisions basic to individual rights and our system of government than those who bear the title Immigration Judge.

The hallmark of our freedoms is the system of checks and balances that our Founding Fathers gave us by creating the three branches of government: legislative, executive and judicial. By making Article I and Article I judges independent of the executive or legislative branches of government our Constitution provided judges with the ability to act with independent judgment free of undue influence from legislators or executives. It is the lack of such an independent judiciary in so much

of the rest of the world that impedes the development and growth of democracies, and it is our judiciary that distinguishes our free nation more than any other thing from all other countries of the world. But in the area of immigration we have failed to carry forth this basic hallmark of our system.

The inherent deficiencies in the immigration adjudicatory system were recognized even before commissions recommended the establishment of a court or an independent agency. In 1956, Special Inquiry Officers (SIO's) were separated from the supervision of the INS District Directors because these INS District Directors were often found to make a shambles of any pretense of independent adjudications by these officers. In 1973 these immigration adjudicatory officers were authorized to use the title Immigration Judge and to wear robes in their courtrooms—a further effort to provide at least the appearance of independence and fairness. Then in 1983 the Attorney General separated the Immigration Court and the Board of Immigration Appeals from the INS and created the EOIR. This was done in a further effort to distance the adjudicatory officers from the INS officers who often have a "prosecutorial" role in immigration proceedings. But all of this never came to grips with the basic problem of having the INS "prosecutors" reporting to the same boss, the Attorney General, as Immigration Judges and those doing the review of immigration cases. Not only did there remain the appearance of impropriety in this regard and a technical lack of judicial independence, but also a number of very practical problems in running a courtroom and processing immigration cases.

In an effort to give Immigration Judges some additional color of independence and the ability to control their courtrooms and advance the court calendar, Congress in 1996 legislated contempt and subpoena powers for Immigration Judges delegating the Attorney General the authority to by regulation implement them. But in the six years intervening since this legislation became law no such regulations have been promulgated. I have reviewed some of the internal documents of the Clinton Administration Justice Department and discussed this matter with a number of individuals including some in the current Administration's Justice Department. It is apparent to me that despite the wishes of Congress, INS officials have been able to persuade upper management in the Justice Departments of two Administrations that giving contempt powers to Immigration Judges who are equivalent employees in the Justice Department to attorneys working for the INS is somehow wrong. Every imaginable roadblock has been thrown up to granting these powers. Consequently, Immigration Judges have no real means of enforcing decorum in their courtrooms or sanctioning attorneys for the government or individuals who fail to heed court orders or timetables critical to rights of the individual parties and caseload management from a public interest perspective.

The simple truth is that the adjudicatory officers in immigration matters need to be real judges in a real court with real judicial powers. If there were any way possible I would urge you to take the opportunity afforded by the dramatic restructuring in creating the new Department of Homeland Security to establish an Article I Immigration Court. Failing that, I would urge you to create an agency within the Executive Office of the President to house EOIR, the Immigration Court, and Immigration Judges. And certainly, if that is not possible, at the very least, I would urge you to take this opportunity to fully separate the INS from the same reporting Cabinet officer as the Immigration Judges by explicitly directing that EOIR, the Immigration Court and the Immigration Judges remain in the Department of Justice rather than being transferred with INS to the new Department of Homeland Security. While there can be differences of opinion and arguments made for any one of these three alternatives, there is no sound argument that can be made for continuing the status quo of having the same department head responsible for both the INS and the immigration adjudicatory agencies and functions.

Some might suggest that taking any of these routes would diminish efficiency in the immigration process, but the failure to do so and the continuation of the status quo by the transferring of both INS and EOIR and the courts to the new Homeland Security Department would continue and possibly exacerbate inefficiency in immigration proceedings. Immigration Judges with some vestiges of judicial power and independence at least on the level of contempt authority with the teeth of civil sanctions could move cases much more rapidly through the system. And so much of the backbiting that apparently goes on now between INS and those involved in the adjudicatory functions would largely evaporate. There would additionally be projected a greater sense of fairness in the system. This is intangible, but nonetheless significant.

Some critics may argue that a move to more independence for adjudicators would take away some of the President's prerogatives in carrying out the nation's immigration laws which are inherently an executive function. Actually, the legislative branch ultimately controls immigration. Except for due process rights, non-citizens

have only those rights and privileges granted by Congress. In the past Congress has delegated the principal authority to the executive branch, not the judicial. For national security reasons it is understandable why some would argue that a degree of authority in these matters needs to remain with the nation's Chief Executive Officer. Even with the establishment of an Article I Court Congress could keep the ultimate authority where needed in the hands of the President. Certainly there is no threat to the President's authority in either of the other two options of independent agency status within the Executive Office of the President or in placing INS in the Homeland Security Department and the Immigration Court and EOIR in the Justice Department. Consequently, concerns in this regard should easily be allayed while resolving the inherent flaws of the present structure.

Congress has a great opportunity in the debate over the creation of the Department of Homeland Security to rectify longstanding ills within the adjudicatory functions of immigration law. I strongly encourage you to take full advantage of this opportunity, and if you do, future generations will thank you.

PREPARED STATEMENT OF DANA MARKS KEENER

Mr. Chairman:

I am submitting this testimony on behalf of the National Association of Immigration Judges (NAIJ) to provide you with our perspective on where the Immigration Courts should be located in the midst of the debate regarding the proper components to be included in a new Homeland Security Department and in light of the on-going efforts to reorganize the Immigration and Naturalization Service. I am the elected President of NAIJ, which is the certified representative and recognized collective bargaining unit representing the approximately 228 Immigration Judges presiding in the 50 states and U.S. territories. NAIJ is an affiliate of the International Federation of Professional and Technical Engineers, which in turn is an affiliate of AFL-CIO. In my capacity as President, the opinions offered represent the consensus of our members, and may or may not coincide with any official position taken by the DOJ.

Immigration Judges are a diverse corps of highly skilled attorneys, whose backgrounds include representation in administrative and federal courts, and even successful arguments at the United States Supreme Court. Some of us are former INS prosecutors, others former private practitioners. Our ranks include former state court judges, former U.S. Attorneys, and the former national president of the American Immigration Lawyers Association, the field's most prestigious legal organization, as well as several former local chapter officers. Many Immigration Judges continue to serve as adjunct law professors at well-respected law schools throughout the United States. Many former Immigration Judges have been selected to serve as ALJs, whose qualifications have been compared with federal district judges.[1]

As you may be aware, in January of this year, the NAIJ published a position paper advocating increased independence for the Immigration Courts. We are submitting that paper as part of today's written testimony for your full consideration. Today I would like to review the major premise of that paper and bring our views into a more current time frame in view of efforts to reorganize the INS and create a new Homeland Security Department.

When our position paper was drafted, we suggested the model recommended by the U.S. Commission on Immigration Reform ("the Commission"), as an exhaustively studied, thoroughly researched, bi-partisan proposal which was the culmination of years of research involving all parties and players in this complex area. In its final report in 1997, the Commission proposed that the functions of EOIR should be located in an independent executive branch agency.[2]

We do not believe it is the role of NAIJ to advise beyond the area of our direct experience, thus we do not address broader reform encompassing the Immigration and Naturalization Service or components of EOIR other than the Immigration Courts, although it would seem logical to keep EOIR's structure intact.

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[1] "The calibre of administrative law judges ? is certainly as high as those of federal district judges?" Treasury Postal Serv., and Gen. Gov't Appropriations for Fiscal Year 1984: Hearings on S.1275 before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 112 (1983) (statement of Loren A. Smith, Chairman of ACUS).

[2] United States Commission on Immigration Reform (USCIR), 1997 Report to Congress, *Becoming An American: Immigration and Immigrant Policy*, at 174 (September 1997)]

THE NEED FOR INDEPENDENCE FOR IMMIGRATION COURTS

Our paramount concern is safeguarding the independence of the Immigration Court system so as to protect America's core, legal values. Although immigration proceedings are civil in nature, they have long been recognized as having the potential to deprive one of that which makes life worth living.[3] When dealing with asylum issues, they can be death penalty cases, since an erroneous denial of a claim can result in the applicant's death.[4]

It is the most fundamental aspect of due process that one be given the opportunity to present one's case and confront the adverse evidence in an impartial forum. At present, there is at least the perception that this is not always provided. Increased public confidence and de facto independence of the decision-makers from the prosecuting authorities in the immigration enforcement arena is what we believe to be optimal. Not only would creating an independent agency or keeping EOIR at DOJ provide such a solution, but it would also serve to demonstrate an appropriate balance of powers in this extremely sensitive context. In addition, we believe this move could also provide much needed oversight on various immigration related functions and become a vehicle for increasing efficiency.

Immigration Courts are the trial-level tribunals that determine if an individual ("respondent") is in the United States illegally, and if so, whether there is any status or benefit to which he is entitled under the Immigration and Nationality Act of 1952, as amended (INA).[5] The INS has virtually unfettered prosecutorial discretion to lodge charges with the Immigration Court, which sets the removal process in motion. The INS is represented in Immigration Court proceedings by an INS trial attorney (usually an Assistant District Counsel). Respondents have the right to be represented by an attorney, but at no expense to the U.S. Government. For a respondent in such proceedings, eligibility for relief from deportation or removal (through attaining a status such as lawful permanent residence through a relative's petition or asylum, for example) generally involves two aspects: a statutory eligibility component and a discretionary component. Some respondents are placed in proceedings before the Immigration Court after an application filed by them has been denied by the INS, while others are discovered illegally in the U.S. (for example, after being witnessed crossing the border without inspection or after the commission of a crime while serving a criminal sentence in a State prison). Thus, Immigration Judges make many determinations regarding eligibility for relief as initial applications, others upon *de novo* review of an INS denial of an application, and still others upon review of whether an INS decision below was based on sufficient evidence.[6]

To understand our current posture within the Department of Justice and the reasons for our proposal, a bit of context and history is needed. In an effort to ameliorate concerns regarding a perceived lack of independence, several steps have been taken over the years to protect fundamental fairness. In 1956, Immigration Judges (then called Special Inquiry Officers or SIOs) were removed from the supervision of the INS District Directors and the position of Chief SIO was created.[7] In 1973, SIOs were authorized to use the title Immigration Judge and wear robes in the courtroom.[8] In 1983, the Attorney General formally separated the Immigration Court and the Board of Immigration Appeals from the INS, creating the EOIR, the agency within the Department of Justice which houses these functions to this day.[9]

The historical reasons for creating EOIR and separating its functions from the INS are even more compelling today, and now militate toward retaining EOIR at DOJ if all components of the INS are moved to the newly created Homeland Secu-

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[3] *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922)

[4] These cases have also been analogized to criminal trials, because fundamental human rights are so involved in these enforcement type proceedings. *See*, John H. Frye lll, "Survey of Non-ALJ Hearing Programs in the Federal Government," 44 Admin. L.Rev. 261, 276 (1992).]

[5] For a concise but comprehensive explanation of immigration court proceedings, *see Kurzban's Immigration Sourcebook: A Comprehensive Outline and Reference Tool*, 7th Ed. 2000, by Ira J. Kurzban.

[6] Once in removal proceedings, many respondents are eligible for release on bond. The INS sets the initial amount of bond and generally an Immigration Judge may redetermine if custody is mandatory or desirable and the proper amount of any bond.

[7] *From Wong Yang Sung to Black Robes,* Sidney B. Rawitz, Vol. 65 Interpreter Releases No. 17 (May 2, 1988) at 458.

[8] 8 C.F.R. 1.1(1) (1973), Rawitz at 48.

[9] *See, e.g.* Rawitz at 458–459; Education and Training Service, *Major Issues in Immigration Law, A Report to the Federal Judicial Center*, 1987, David A. Martin; *The United States Immigration Court in the 21st Century*, Institute for Court Management, court Executive Development Program, Phase III Project, May 9, 19999, Michael J. Creppy, H. Jere Armstrong, Thomas L. Pullen, Brian M. O'Leary, Robert P. Owens.

rity Department. Just short months ago, the United States Supreme Court reminded us that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent." [10] Yet the need to safeguard due process has long been seen as at odds with the demands for productivity in this high volume realm. The Immigration Courts handle more than 260,000 matters annually.[11] It is undisputed that administrative efficiency is a practical necessity in this area. With this enormous caseload, the need for public confidence in the integrity and impartiality of the system is all the more pronounced. Without it, unnecessary appeals and last-ditch, legal maneuvering flourish.

Unfortunately, there have been many instances where public cynicism was justified. Prior to 1983, Immigration Judges were dependent on INS District Directors, the direct line boss of the prosecutors who appeared before them daily, to provide their hearing facilities, office space, supplies and clerical staff. More recent examples of equally disturbing encroachments on judicial independence regrettably occur and these were detailed in our previous position paper.

Perhaps the most blatant example of this susceptibility to improper interference relates to the failure to implement the Congressional enactment of contempt authority for Immigration Judges. In 1996, contempt authority for Immigration Judges was mandated by Congress.[12] However, actual implementation required the promulgation of regulations by the Attorney General. When Immigration Judges protested the lengthy delay in implementation, it was discovered that the Attorney General had failed to do so, in large part, because the INS objected to having its attorneys subjected to contempt provisions by other attorneys within the Department, even if they do serve as judges.[13] Because of this impasse, NAIJ has suggests that legislation be passed mandating prompt implementation of such contempt authority. *See* Appendix A.

Indeed, promulgation of contempt authority could provide the Immigration Court with an important tool to enforce INS compliance with its orders and to assure that terrorists in Immigration Court proceedings comply with orders closing those proceedings for national security reasons. The Attorney General has issued new regulations for protective orders in national security cases, but the sanctions for violation of those orders are ineffective where they are needed most. The prompt issuance of regulatory authority for contempt power could resolve this problem. At present, the sanction of mandatory denial of any discretionary relief when a protective order is violated is a toothless sanction in those cases where it matters most. Some of these cases will involve aliens engaged in terrorist activities. In a case where an alien has been involved in such activities, he or she will not be eligible for any discretionary relief as a matter of law.[14] The threat of denial of discretionary relief to a terrorist is meaningless; he is not statutorily eligible for such relief in any event. The irony is that the only people that will be deterred by this sanction is those for whom discretionary relief is available, and in those cases it would be unlikely that the Government would have much of an interest in enforcing a protective order. Unless and until the Department of Justice promulgates regulatory authority for the contempt power given to the Immigration Court by Congress, there is no real sanction for a terrorist who flaunts a protective order of the Immigration Court.

Both due process and administrative efficiency will be fostered by a structure where the Immigration Courts continue to be a neutral arbiter. The Court's credibility would be strengthened by a more separate identity, one clearly outside the imposing shadow of our larger and more powerful sibling, the INS. The Immigration Courts would continue to impartially scrutinize the allegations made by the INS, endorsing those determinations which are correct, and providing vindication to those

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[10] *Zadvydas* v. *Davis*, 121 S.Ct. 2491, 2500 (2001)

[11] *See*, "In the Spotlight: the Hon. Michael J. Creppy, Chief Immigration Judge of the United States" in *Lateral Attorney Recruitment*, Office of Attorney Recruitment and Management, U.S. Department of Justice.

[12] *See* § 240(b)(1) of the INA, as amended by § 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 (IIRIRA).

[13] "The INS has generally opposed the application of this [contempt] authority to its attorneys. In more than [six] years since the enactment of IIRIRA, the Executive Office for Immigration Review (EOIR) and the INS have failed to resolve this issue. Consequently, the Attorney General has not published regulations implementing contempt authority for Immigration Judges," despite the Congressional mandate. *The United States Immigration Court in the 21st Century*, Institute for Court Management, Court Executive Development Program, Phase III Project, May 1999, Michael J. Creppy, H. Jere Armstrong, Thomas L. Pullen, Brian M. O'Leary, Robert P. Owens, at page 109, n.313.

[14] About the only form of relief available to an alien engaged in terrorism is deferral of removal under the Convention Against Torture, which is not discretionary.

who are accused without sufficient objective proof, without the need to apologize to the public for the close alignment with the INS. The separation of the Immigration Court from the agency which houses INS will also aid Congress and the American people by providing an independent source of statistical information to assist them in determining whether the INS mandate is being carried out in a fair, impartial and efficient manner.[15] In addition, such a structure will provide a needed safeguard against possible prosecutorial excesses.

When reduced to its simplest form, any structure, be it DOJ or Homeland Security, in which the same person supervises both the prosecutor and the judge in "court" proceedings is suspect. One does not need legal training to find this a disturbing concept, which creates, at the very minimum, the appearance of partiality. Thus, it is not surprising that the public perceives this system as "rigged."[16] NAIJ has also provided proposed language to clarify the independent nature of Immigration Judge decisions.[17]

AN INDEPENDENT IMMIGRATION COURT CAN BE A CATALYST FOR INS PRODUCTIVITY

Keeping EOIR outside of the Homeland Security Department can provide much needed oversight on various immigration related functions and become a vehicle for increasing efficiency. On January 11, 2001, EOIR's Executive Director established case completion goals for the Immigration Courts and Board of Immigration Review. These goals set target times for the adjudication of various types of cases. When case completion goals were discussed recently at our annual immigration judges' conference, there were several specific examples of recurrent situations where the INS is an impediment, rather than a facilitator, to timely case completions. For example, inordinate delays in INS processing of visa petitions, INS forensic evaluation of documents (some of which may go to the identity of a respondent), INS investigations, and INS follow up after the FBI has determined that a respondent's prints show a criminal history are routine causes for INS requested delays of proceedings, sometimes for well over one year. It is not uncommon for the INS to take one year or longer to determine if a respondent has a bona fide marriage to a U.S. citizen, and thus is eligible to apply for lawful permanent resident status. Indeed, the Judges often feel that the current system is set up to let the immigration court act as a tickler system for INS case processing, as opposed to setting up its own internal system with oversight to check on these matters.

One obvious way to deal with these problems would be to require the INS to meet timely pre-trial deadlines to resolve these issues, or notify the court and parties of delays, so that matters move expeditiously before the court without wasting valuable docket time. However, the lack of any contempt powers hinders this approach.

Frankly, neither the Commission nor NAIJ anticipated that INS or DOJ reorganization would culminate in the departure of the INS from the DOJ. Now that this seems to be the approach favored by the White House, INS Commissioner Ziglar, and many others, NAIJ would like to make our position clear. In the absence of an independent agency status as recommended by the Commission, which remains our first choice, we believe that EOIR should remain in the DOJ. Were the INS to be transferred, (both enforcement and adjudications functions) to the newly created Department of Homeland Security, then an alternative where the Immigration Courts (and EOIR) remain in the DOJ could serve as an acceptable stop-gap solution. The same rationale we detailed in our initial position paper compels that conclusion under these new circumstances. In the present state of affairs, this would be the solution which is most likely to safeguard our most important guiding tenet: decisional independence. By keeping EOIR with DOJ while INS moves to the Department of Homeland Security, some modicum of judicial independence is achieved without the expense of creating an independent agency.

In addition to safeguarding and assuring judicial independence, retaining EOIR in DOJ in that circumstance would allow the Immigration Court to act as a catalyst

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[15] United States Commission on Immigration Reform (USCIR), 1997 Report to Congress, *Becoming An American: Immigration and Immigrant Policy*, at 179 (September 1997).

[16] *The United States Immigration Court in the 21st Century*, Institute for Court Management, Court Executive Development Program, Phase III Project, May 1999, Michael J. Creppy, H. Jere Armstrong, Thomas L. Pullen, Brian M. O'Leary, Robert P. Owens at 100–105 (finding that 68% of those who were surveyed thought the Immigration Courts were part of the INS, while nearly ¼ (22%) indicated that the close personal relationships between employees of the INS and the Immigration Courts were a factor in their conclusion that the Immigration Courts were not separate from the INS).

[17] In Appendix B to this testimony, NAIJ has provided a proposed amendment, consisting of merely two sentences, which if added to the current statutory language at INA section 101(b)(4), which would provide unequivocal statutory authority for the decisional independence of Immigration Judges in individual matters pending before them.

for INS production in matters before it. Finally, that option would also assure that the individual who appoints immigration judges and who acts as the final arbiter in immigration cases, is a lawyer. To that end, we would propose that Section 802 of the Homeland Security Act of 2002 as proposed, be amended to add to the last sentence *"except that the Executive Office of Immigration Review shall not be transferred to the Department of Homeland Security."*

Under the current system, the Attorney General has the authority to review cases issued by the Board of Immigration Appeals, as the Board requests or as he or she deems appropriate. *See* 8 C.F.R. Section 3.1(h). Both in the past and in recent years, the Attorney General has used this powerful mechanism to oversee the administration of immigration law.[18] A review of these decisions will show that, in the area of immigration law, which is an extremely complex legal field, it is very important to have a lawyer in this position, as the lines between matters of law and the proper exercise of discretion are not always easy to determine.

The primary impetus behind the universal call for INS reorganization is the need to restore accountability to the system.[19] Implementation of our proposal will satisfy this need in the circumscribed area of adjudicative review, while retaining the efficiency of an administrative tribunal. The removal of the immigration review functions from the same agency as the INS will create a forum which will provide the needed checks and balances. The Homeland Security Department will be free to focus its mission on the prosecution of those in the United States illegally—an increasingly compelling focus—while the Attorney General can employ the legal expertise of his agency to assure that due process and fundamental fairness prevail.

The optimal balance of efficiency, accountability and impartiality would be achieved by adopting the USCIR's proposal of an independent executive branch agency. This carefully considered recommendation was offered after years of thorough study of all aspects of this intricate process by a bipartisan panel of experts. However, at the very minimum, this rationale, modified to meet current reorganization plan, would require maintaining EOIR as an agency within the DOJ. Establishment of an independent Immigration Court in this manner would achieve meaningful reform of the current structure with a minimum of disruption and expense. It would restore public confidence and safeguard due process, while providing insulation from any political agenda.

We strongly urge you adopt this approach.

APPENDIX A: (language to mandate promulgation of contempt regulations)

NAIJ proposes that Congress enact the following provision:

> Within 120 days of enactment, the Department of Justice shall promulgate regulations implementing the contempt authority for immigration judges provided by INA Section 240(b)(1). Such regulations shall provide that any contempt sanctions including any civil money penalty shall be applicable to all parties appearing before the immigration judge and shall be imposed by a single process applicable to all parties.

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[18] *See, e.g., Matter of N-J-B-*, 21 I&N Dec. 812 (AG 7/9/97); *Matter of Soriano*, 21 I&N Dec. 516 (AG 2/21/97); *Matter of Farias-Mendoza*, 21 I&N Dec. 269 (AG 3/27/97); *Matter of Cazares-Alvarez*, 21 I&N Dec. 188 (AG 6/29/97); *Matter of De Leon-Ruiz*, 21 I&N Dec. 154 (AG 6/29/97); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (AG 3/18/91); *Matter of Leon-Orosco and Rodriguez-Colas*, 19 I&N Dec. 136 (AG 7/27/84).

[19] The cries for accountability in recent months have been virtually deafening. *See*, e.g., "Secret Evidence Invites Abuse," Red Bluff Daily News Editorial, 1/9/02; "Questions Raised About Detainees," by Mae M. Cheng, NewsDay, 12/7/01; "U.S. Has Overstated Terrorist Arrests for Years," by Mark Fazlollah and Peter Nicholas, Miami Herald, 12/14/01; "Secret Justice: Ashcroft Orders Closed Courts," by Josh Gerstein, ABCnews.com, 11/28/01; "Ashcroft Offers Accounting of 641 Charged or Held—Names 93" by Neil Lewis and Don Van Natta Jr, New York Times, 11/28/01; "Analysis- Ashcroft Does an About-Face on Detainees," by Todd S. Purdum, New York Times, 11/28/01; "INS Can Overrule Judges' Orders to Release Jailed Immigrants," by David Firestone, New York Times, 11/28/01; "Cases Closed," by Josh Gerstein, ABCnews.com, 11/19/01; "US Issues Rules to Indefinitely Detain Illegal Aliens Who Are Potential Terrorists," by Jess Bravin, The Wall Street Journal, 11/15/01; "INS to Stop Issuing Detention Tallies," by Amy Goldstein and Dan Eggen, Washington Post, 11/9/01; "Count of Released Detainees is Hard to Pin Down," by Dan Eggen and Susan Schmidt, Washington Post, 11/6/01; "Justice Department Cannot Confirm How Many Detainees Released," by Terry Frieden, CNN.com, 11/6/01; "Opponents' and Supporters' Portrayals of Detentions Prove Inaccurate," by Christopher Drew and William Rashbaum, New York Times, 114/3/01; "U.S. Holds Hundreds in Terror Probes; Who Are They?," by Chris Mondics, The Record, 11/3/01; "Detentions After Attacks Pass 1000, U.S. Says," by Neil A. Lewis, New York Times, 10/30/01; "Detention and Accountability," New York Times Editorial, 10/19/01; "A Need for Sunlight," Washington Post Editorial, 10/17/01.

APPENDIX B: (language to ensure decisional independence)

NAIJ would propose that Congress act to amend the definition of Immigration Judge at INA Section 101(b)(4) as follows (by *adding language in underline* to the current statutory definition as shown in full):

> The term "immigration judge" means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under Section 240. *In deciding the individual cases before them, Immigration Judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.* An immigration judge shall be subject to such supervision and shall perform such *duties as the Attorney General shall prescribe, except that no immigration judge shall be sanctioned or disciplined for the exercise of his or her independent judgment and discretion in the disposition of a case before him or her*. An immigration judge shall not be employed by the Immigration and Naturalization Service. [Amendments are underscored].

POSITION PAPER OF THE NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

Never before September 11th has the urgency been so great and the stakes so high. The time to reform our nation's immigration system is clearly now. Yet never before have conditions made such an undertaking more perilous. The ideas we advance are not new. Many date back over a decade. Never before have the competing interests been so poignant. Strong criticism has been leveled against the President, the Attorney General and the Department of Justice that legal rights have been curtailed in the aftermath of September 11th. There are those who say the terrorists have won if we abandon the freedoms which characterize the American way of life. Congressmen and Senators (on both sides of the aisle) and legal experts have expressed serious concern that due process rights for noncitizens have been encroached upon. Yet all agree we must take appropriate action. The challenge is to balance all interests to ascertain the most effective, efficient and judicious steps to take.

The National Association of Immigration Judges offers a solution. We advocate the creation of a separate, Executive Branch agency to house the trial-level Immigration Courts and the administrative appeals court, currently called the Board of Immigration Appeals. This solution was first proposed in 1997 by the United States Commission on Immigration Reform, a *bipartisan*, Congressional study group, which worked years reviewing the immigration system from the perspective of all parties involved. We do not believe it is our role to advise beyond the area of our direct experience, thus we do not address broader reform encompassing the Immigration and Naturalization Service. The collective expertise of our corps in this complex and highly specialized area of law is unparalleled. Our perspective is non-partisan, and has been forged in the trenches where the battles are being waged. We are firmly convinced that the plan we advocate will go a long way towards achieving the appropriate balance between fundamental fairness and security concerns in these tumultuous times.

Our paramount concern is safeguarding the independence of the Immigration Court system so as to protect America's core, legal values. Although immigration proceedings are civil in nature, they have long been recognized as having the potential to deprive one of that which makes life worth living. When dealing with asylum issues, they can be death penalty cases, since an erroneous denial of a claim can result in the applicant's death.

It is the most fundamental aspect of due process that one be given the opportunity to present one's case and confront the adverse evidence in an impartial forum. At present, there is at least the perception that this is not always provided. To understand our current posture within the Department of Justice and the reasons for our proposal, a bit of context and history is needed.

THE CURRENT STRUCTURE

Congress has delegated authority to the Attorney General to enforce and administer immigration laws through the provisions of the Immigration and Nationality Act (INA). The Attorney General, in turn, has delegated the bulk of that authority to the Commissioner of the INS. However, specific authority for immigration, trial level and appellate administrative review has been delegated by the Attorney General to the Executive Office for Immigration Review (EOIR).

Immigration Courts are the trial-level tribunals that determine if an individual ("respondent") is in the United States illegally, and if so, whether there is any status or benefit to which he is entitled under the Immigration and Nationality Act of 1952, as amended (INA). The INS has virutally unfettered prosecutorial discretion to lodge charges with the Immigration Court, which sets the removal process in motion. The INS is represented in Immigration Court proceedings by an INS trial attorney (usually an Assistant District Counsel). For a respondent in such proceedings, eligibility for relief from deportation or removal (through attaining a status such as lawful permanent residence through a relative's petition or asylum, for example) generally involves two aspects: a statutory eligibility component and a discretionary component. Respondents have the right to be represented by an attorney, but at no expense to the U.S. Government. Some respondents are placed in proceedings before the Immigration Court after an application filed by them has been denied by the INS, while others are discovered illegally in the U.S. (for example, after being witnessed crossing the border without inspection or after the commission of a crime while serving a criminal sentence in a State prison). Thus, Immigration Judges make many determinations regarding eligibility for relief as initial applications, others upon de novo review of an INS denial of an application, and still others upon review of whether an INS decision below was based on sufficient evidence. Once in removal proceedings, many respondents are eligible for release on bond. The INS sets the initial amount of bond and generally an Immigration Judge may redetermine if custody is mandatory or desirable and the proper amount of any bond.

Many lawyers are surprised to learn that the Administrative Procedure Act of 1946, as amended (APA) does not apply to most proceedings under the INA. Even the United States Supreme Court initially ruled that such hearings were subject to the procedural safeguards of the APA, acknowledging that the purpose of the APA was to eliminate the commingling of prosecutorial and fact-finding functions, because it "not only undermines judicial fairness; it weakens public confidence in that fairness." The Court noted that "this commingling, if objectionable anywhere, would seem to be particularly so in deportation proceedings, where we frequently meet with a voiceless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused." However, when Congress enacted the Immigration and Nationality Act of 1952, it instead provided a specific procedure applicable only to deportation proceedings under § 242, distinct from the APA. This congressional choice was upheld by the United States Supreme Court in 1955.

In an effort to ameliorate some concerns, several steps have been taken over the years to protect fundamental fairness. In 1956, Immigration Judges (then called Special Inquiry Officers or SIOs) were removed from the supervision of the INS District Directors and the position of Chief SIO was created. In 1973, SIOs were authorized to use the title Immigration Judge and wear robes in the courtroom. In 1983, the Attorney General formally separated the Immigration Court and the Board of Immigration Appeals from the INS, creating the EOIR, the agency within the Department of Justice which houses these functions to this day.

CURRENT PROBLEMS

The historical reasons for creating EOIR and separating its functions from the INS are even more compelling today. Just short months ago, the United States Supreme Court reminded us that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent." Yet the need to safeguard due process has long been seen as at odds with the demands for productivity in this high volume realm. The Immigration Courts handle more than 260,000 matters annually, employing 221 Immigration Judges in more than 52 locations across the country. It is undisputed that administrative efficiency is a practical necessity in this area. With this enormous caseload, the need for public confidence in the integrity and impartiality of the system is all the more pronounced. Without it, unnecessary appeals and last-ditch, legal maneuvering flourish.

Unfortunately, there have been many instances where public cynicism was justified. Prior to 1983, Immigration Judges were dependent on INS District Directors, the direct line boss of the prosecutors who appeared before them daily, to provide their hearing facilities, office space, supplies and clerical staff. Most in our judge corps are aware of the rumor that a Texas Immigration Judge lost his parking space when a District Director became miffed by an adverse decision! Whether true or not, this example serves to illustrate the need for Immigration Judges to be independent

of outside influences. More recent examples of equally disturbing encroachments on judicial independence regrettably occur.

In all fairness, the line between administrative, procedural and substantive issues is not always a bright or obvious one. However many disturbing situations persist, and demonstrate that actual conflicts of interest, and the appearance of possible conflicts, continue to arise. Many believe this occurs due to the Immigration Court's placement within the Department of Justice, where it is sometimes referred to as a "Cinderella" because it appears to be dominated by its more powerful older sibling, the INS.

For example, actions taken by the Chief Immigration Judge and the Chairman of the Board of Immigration Appeals, acting on the delegated authority of the Attorney General, have been reversed by the Ninth Circuit Court of Appeals, which declined to find the issue merely an "administrative" matter. "The Creppy and Schmidt issued directives were purportedly temporary and internal, but they did not leave any real discretion to the BIA board members or the immigration judges. Whether or not the directives constituted rules requiring notice and comment, or merely general policy statements, is a question requiring further examination by the district court." Years later, this class action litigation has dragged on because Immigration Judges (and BIA board members) were not allowed to apply their own sound, legal skills in the moment to conditionally grant a case. Instead, the Attorney General froze the process, delaying the bestowing of benefits (or the issuance of deportation orders), to address matters deemed merely "administrative".

The taint of inherent conflict of interest caused by housing the Immigration Court within the DOJ is insidious and pervasive. Rather than follow proper legal procedures and appeal adverse rulings on a case-by-case basis, disgruntled INS prosecutors have resorted to tattle-tale tactics and end-runs. Since many high-level managers at EOIR had been INS or DOJ employees for years, INS has more than once found a sympathetic ear for its discontent with a particular Immigration Judge's ruling. There is a strong temptation to have cases "administratively" resolved, by an ex-parte phone call to a former colleague or high-ranking administrator, rather than through the appropriate appeals process. Allegations of forum shopping by INS officials and manipulation of venue issues have been documented as well.

Perhaps the most blatant example of this susceptibility to improper interference relates to the failure to implement the Congressional enactment of contempt authority for Immigration Judges. In 1996, contempt authority for Immigration Judges was mandated by Congress. However, actual implementation required the promulgation of regulations by the Attorney General. When Immigration Judges protested the lengthy delay in implementation, it was discovered that the Attorney General had failed to do so, in large part, because the INS objected to having its attorneys subjected to contempt provisions by other attorneys within the Department, even if they do serve as judges. "The INS has generally opposed the application of this [contempt] authority to its attorneys. In more than [six] years since the enactment of IIRIRA, the Executive Office for Immigration Review (EOIR) and the INS have failed to resolve this issue. Consequently, the Attorney General has not published regulations implementing contempt authority for Immigration Judges," despite the Congressional mandate.

Another recent action demonstrates that this trend continues with equal force. On October 31, 2001, the Attorney General issued an interim rule which insulates INS custody determinations from any IJ review by granting an automatic stay of release on Immigration Judge decisions where the initial bond was set by the Service at $10,000 or higher. Since the INS is the entity which sets the initial bond amount, this provision guarantees it the ability to prevent an alien's release from custody during the pendency of administrative proceedings, despite the statutory provisions which entitle an alien to a bail re-determination hearing.

Just as this paper was being finalized, another issue arose that reveals both the public perception that due process is not available before Immigration Courts because of their commingling with INS and the reality that INS through DOJ sometimes dictates to EOIR. On January 29, 2002, National Public Radio reported that two local newspapers and the ACLU are filing suit against the DOJ because of its policy of closing Immigration Court hearings. The report noted that while "INS Judges" used to make the decision on a case-by-case basis as to whether a hearing would be closed, an "INS policy" after September 11th has mandated the closing of all hearings where the Department suspected terrorist activity, even where the hearings themselves were on "technical immigration violations." When explaining how this could happen, the report noted that Immigration Judges are employees of the Department of Justice.

When reduced to its simplest form, in the current structure the Attorney General supervises both the prosecutor and the judge in Immigration Court proceedings. One

does not need legal training to find this a disturbing concept, which creates, at the very minimum, the appearance of partiality. Thus, it is not surprising that the public perceives this system as "rigged." Indeed, the analysis of legal scholars also supports the notion that the independence of the decisionmaker is perhaps the most crucial component needed to assure fundamental fairness:

> "The reviewing body must not only seem to be, but must in fact be free of command influence. Whether we are talking about an Article I court or a corps of ALJs afloat within the executive branch is beside the point . . . What is important is that the court/corps not be part of the agency on whose actions it is to sit in judgment. More specifically, the members of such a body cannot be beholden to the agency in matters of compensation, tenure, or conditions of employment. This means it should be free to formulate and advance its own budget before the relevant Congressional authorizing and appropriating committees."

THE SOLUTION

In less emotionally charged times, the United States Commission on Immigration Reform (USCIR) concluded, after years of study, that the Immigration Courts and the Board of Immigration Appeals should be taken out of the Department of Justice and given the status of an independent agency in the Executive Branch. The report observed that: "Experience teaches that the review function works best when it is well-insulated from the initial adjudicatory function and *when it is conducted by decisionmakers entrusted with the highest degree of independence*. Not only is independence in decisionmaking the hallmark of meaningful and effective review, it is also critical to the reality and the perception of fair and impartial review." In arriving at its decision:

> "The Commission was persuaded by the arguments that the review function should be completely independent of the underlying enforcement and benefits adjudication functions and the reviewing officials should not be beholden to the head of any Department. Although the desired independence could be attained by establishing an Article I Immigration Court . . . the overall operation of the immigration system requires flexibility and coordination of function, including the review function, by the various agencies in the Executive Branch."

We believe the time has come to adopt the Commission's solution. The primary impetus behind the universal call for INS reorganization is the need to restore accountability to the system. Implementation of our proposal will satisfy this need in the circumscribed area of adjudicative review, while retaining the efficiency of an administrative tribunal. The removal of the immigration review functions from the Department of Justice and establishment of an independent and insulated agency for the Immigration Courts and administrative appeals, will create a forum which will provide the needed checks and balances. The DOJ will be freed to focus its mission on the prosecution of those in the United States illegally—an increasingly compelling focus.

Both due process and administrative efficiency will be fostered by a structure where the Immigration Courts continue to be a neutral arbiter. The Court's credibility would be strengthened by a more separate identity, one clearly outside the imposing shadow of our larger and more powerful sibling, the INS. The Immigration Courts would continue to impartially scrutinize the allegations made by the INS, endorsing those determinations which are correct, and providing vindication to those who are accused without sufficient objective proof, without the need to apologize to the public for the close alignment with the INS. The creation of an Immigration Court which is not a component of the DOJ will also aid Congress and the American people by providing an independent source of statistical information to assist them in determining whether the INS mandate is being carried out in a fair, impartial and efficient manner. In addition, such a structure will provide a needed safeguard against possible prosecutorial excesses.

The traditional reason for maintaining the Immigration Courts within the DOJ no longer has the same force as it did in the1950s, when the current structure of the Immigration and Nationality Act was promulgated. The historical basis for the establishment of administrative agencies in general was to maximize the existing expertise in a given field, through general, rulemaking authority and specific, case adjudications. "The purpose of the administrative bodies is to withdraw from the courts, subject to the power of judicial review, a class of controversy which experience has shown can be more effectively and expeditiously handled in the first instance by a special and expert tribunal."

While it is indisputable that the expertise of the Immigration Courts is unmatched, the need for the Attorney General (usually through his delegees) to set

broad policy based on that expertise has diminished considerably in recent years. In the past decade, for example, Congressional enactments involving immigration matters have provided specific and detailed roadmaps to enforcement, not general goals which require the specialized skill of an agency to provide a methodology to implement or flesh-out. The general trend in the field of administrative law appears to be shifting towards a judicial focus of insuring that Congressional will is implemented, rather than a reliance on agency expertise in interpretation. This is a task which affords far less deference to administrative experience and interpretation, since it focuses instead on a search for Congressional purpose. In any event, such guidance would be available if needed by a Presidentially-appointed Director, who would serve subject to the advice and consent of the U.S. Senate. Such a Director of the newly created agency would be free to focus on adjudicative fairness and efficiency, unfettered by the competing concerns of prosecutorial imperatives.

THE BENEFITS OF THIS APPROACH

Some would argue that any reform of the current system should place the Immigration Courts under the Administrative Procedure Act (APA). The American Bar Association in 1983 supported legislation to require administrative judges for immigration proceedings to be appointed pursuant to the APA. Others assert that Immigration Courts should be Article I courts, as was done in the fields of tax law and bankruptcy law.

The factors which favor the creation of an administrative agency, an administrative tribunal or an Article I court are the same: to accommodate the need for specialized expertise, to reduce the caseload burdens placed on Article III courts and to encourage legal uniformity. Generally, the major distinction between the APA tribunals and Article I courts is the greater degree of judicial independence which is provided by the latter, due to the insulation of decisionmakers from the agency whose rulings it impacts. Legal experts differ on their views as to how the degree of independence varies between the two types of forums and it is an issue to which a great amount of academic discussion has been devoted.

The suggestions to make Immigration Court proceedings subject to the APA or to create an Article I Immigration Court were studied in depth by the USCIR and rejected. In brief, the APA approach was viewed as unworkable by some, because it requires too much formality, such as discovery and written decisions with findings of fact and conclusions of law in all cases. These aspects of the traditional APA jurisprudence were perceived as interfering with the ability to quickly adjudicate the large volume of cases currently handled by the Immigration Court. Similarly, critics of the Article I approach predicted a decrease in efficiency and increase in operating costs. We recognize the merits of Article I status, and in fact believe it is an appropriate solution to which we have no objections. However, independent agency status seems a more feasible approach at this time, especially in light of the Commission's recommendations. Moreover, it may well comprise the best of all alternatives, since it would involve a minimum of disruption or restructuring to implement, but would provide a significant amount of additional impartiality and fundamental fairness.

The optimal balance of efficiency, accountability and impartiality would be achieved by adopting the USCIR's recommendation to establish an independent Immigration Court as an agency within the Executive Branch. This conclusion was reached after years of thorough study of all aspects of this intricate process by a bipartisan panel of experts. Establishment of an independent Immigration Court would achieve meaningful reform of the current structure with a minimum of disruption and expense. It would restore public confidence and safeguard due process, insulated from any political agenda. And the time for such action is now!

American Civil Liberties Union
Testimony on the President's Proposal for a Homeland Security Department:
"The Homeland Security Act of 2002"
Before the Immigration and Claims Subcommittee
Of the House Committee on the Judiciary
Submitted by Timothy H. Edgar, Legislative Counsel
June 27, 2002

On behalf of the American Civil Liberties Union (ACLU) and its approximately 300,000 members, we welcome this opportunity to provide this testimony for the record on the President's proposed legislation to create a Department of Homeland Security, the Homeland Security Act of 2002 ("HSA"). We commend you for examining these issues in today's hearing.

The ACLU is a non-partisan, non-profit organization dedicated to preserving civil liberties and the principles of our constitutional democracy, including open and accountable government.

The proposed Department of Homeland Security will be a massive Cabinet-level department, containing over 170,000 employees and twenty-two federal agencies.[1] It will have substantial powers, and will include more armed federal agents with arrest power than any other agency. In considering the proposed Department, Congress should ask itself not only whether the proposal represents sound public management, but also whether the Department will have structural and legal safeguards in place that are sufficient to keep the agency open and accountable to the public.

Unfortunately, the draft legislation not only fails to provide such safeguards, it eviscerates many of the safeguards that are available throughout the government and have worked well to safeguard the public interest. As proposed, the plan:

- **Hobbles FOIA** – Any information voluntarily submitted to the department about terrorist threats to the nation's infrastructure are exempt from Freedom of Information Act disclosure, drastically limiting the agency's responsibility to answer public questions about how well it is addressing these threats. (HSA § 204).

- **Limits citizen input** – Advisory committees to the department, which normally include citizen input, hold open meetings and must be balanced in viewpoint would be immune from these safeguards of the Federal Advisory Committee Act, further undercutting the agency's accountability to the public. (HSA § 731).

- **Muzzles whistleblowers** – Employees of the new agency could be stripped of the protections contained in the federal Whistleblower Protection Act. This would eliminate guarantees that -- were the agency to overreach its mandate or

[1] *See* Bob Williams & David Nather, *Homeland Security Debate: Balancing Swift and Sure*, CQ Weekly, June 22, 2002 at 1642.

engage in questionable activities – such abuse would be disclosed and the agency held accountable to Congress and the American public. Protection for the bravery like that displayed by FBI Agent Coleen Rowley would not exist in the new agency. (HSA § 731).

- **Lacks strong oversight** – Given the enormous potential power of the proposed agency, its Inspector General must not be hampered like those in other federal law enforcement agencies. Currently, the cabinet secretary in charge would have veto power over the IG's audits and investigations. (HSA § 710).

- **Threatens personal privacy and constitutional freedoms** – Many of the information sharing provisions in the HSA are vague and do not provide sufficient guarantees to protect privacy or constitutional freedoms.

Finally, we firmly reject proposals to include in the Department of Homeland Security the intelligence gathering functions of the Central Intelligence Agency (CIA), other foreign intelligence agencies, or the Federal Bureau of Investigation (FBI). Intelligence gathering operations abroad are, as a practical matter, largely immune from constitutional constraints. The CIA and other agencies that gather foreign intelligence abroad operate in a largely lawless environment. To bring these agencies into the same organization as the FBI risks further damage to Americans' civil liberties. As a result, Congress should resist any attempt to endow the Department of Homeland Security with new intelligence gathering powers or to fold the FBI and CIA into the new agency. Instead, Congress should put in place clear limits to prevent the Department from permanently retaining files on Americans that relate to First Amendment activities and have no connection to any criminal activity.

I. The Homeland Security Department Must Be Open and Accountable

The President's plan does not contain sufficient structural guarantees to ensure that this vast new Department will be accountable to the public, both to ensure it is doing its job and to ensure against abuse. Instead, the plan eviscerates many of the existing safeguards for government agencies. These provisions should be eliminated, and a strong mechanism should be put in place to ensure against abuse.

Freedom of Information Act (FOIA) Exemption

The ACLU strongly opposes section 204 of the proposed legislation, which creates a broad new exemption to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Section 204 provides that information that companies or others voluntarily provide to the Department about "infrastructure vulnerabilities" and other information said to be relevant to terrorism will be exempt from FOIA. These terms are not defined by the proposed legislation and could potentially cover a host of information. This is a deeply misguided proposal, and it should be rejected.

The FOIA is the bedrock statute designed to preserve openness and accountability in government and new exemptions to its provisions should not be created lightly. As the Supreme Court has made clear, "Disclosure, not secrecy, is the dominant objective of the Act."[2] Open government is a core American value. It should not be set aside for reasons other than genuine necessity.

The FOIA already contains a number of common sense exemptions that would cover critical infrastructure information the disclosure of which could result in harm. The FOIA does not require the disclosure of national security information (exemption 1), sensitive law enforcement information (exemption 7), or confidential business information (exemption 4).

Courts have carefully weighed the public's need for disclosure against the possible harms of disclosure under FOIA's traditional exemptions. In deciding whether to disclose technical information voluntarily submitted by private industry, courts have given substantial – many in the public interest and FOIA requester community would say excessive – deference to industry demands for confidentiality of business information under exemption 4.

Generally, information that a business voluntarily submits to the government on the basis that it be kept confidential is already exempt from disclosure if the company does not customarily release such information to the public and preserving confidentiality is necessary to ensure that the government will continue to receive industry's cooperation. *See, e.g., Critical Mass Energy Project* v. *Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992). It is difficult to see how any truly sensitive business information that was voluntarily submitted by a company concerning the vulnerabilities of its critical infrastructure could be released under this standard.

Indeed, supporters of a new FOIA exemption for critical infrastructure information have, when pressed, been forthright in admitting that such legislation simply is not needed to protect sensitive information from disclosure. For example,

- Senator Bennett, chief sponsor of legislation creating a new critical infrastructure exemption, has admitted that "[t]he Freedom of Information Act itself" currently allows sensitive information to be protected. "That is, there are provisions in the Act that say information need not be shared" with the public.[3]

- John S. Tritak, Director of the Critical Infrastructure Assurance Office of the U.S. Chamber of Commerce, says "You could say that [in the] current environment, if you're very careful and you watch out, the old existing exemptions will cover any concerns that may arise under FOIA, not to worry."[4]

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[2] *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976).
[3] *Senate Governmental Affairs Committee Holds Hearing on Private and Public Information Sharing and Infrastructure Security* (FDCH Transcripts), May 8, 2002.
[4] *Id.*

- Ronald L. Dick, Director of the National Infrastructure Protection Center of the Federal Bureau of Investigation (FBI), has said "[M]any legal authorities have agreed that the federal government has the ability to protect information from mandatory disclosure under the current statutory framework."[5]

- VeriSign public policy director Michael Aisenberg has said worries about disclosure were overblown because FOIA already protects sensitive information, and new legislation is simply not needed "substantively."[6]

Rather than put forward evidence that some information about critical infrastructure exists that is not adequately protected, supporters of a new exemption have said "it doesn't matter" whether current law provides adequate protection. Rather, it is said, a new exemption is needed because of a "perception" in private industry that there is some risk, however remote, that information that is voluntarily submitted to the government might be at risk of disclosure under FOIA.

If industry is unwilling to provide information to the government, despite adequate legal protection, the solution is not to change the law but to change the misperception by issuing legal guidance making clear the parameters of the FOIA as it currently exists. If a misperception exists that truly sensitive information that is given to the government cannot be protected from disclosure, it is hard to see how that will change if another exemption is enacted.

Perhaps most importantly, creating an overbroad exemption for "critical infrastructure information" would undermine, rather than enhance, security. Such an exemption would permit private industry and the government to shield from the public the actions they are taking - and, more importantly, the actions they are not taking - to protect the public from attacks on critical infrastructures.

Secrecy can hinder anti-terrorism efforts. Earlier this year in Israel, the media obtained a government report that discussed the potential vulnerability of a fuel depot to terrorists – exactly the sort of information about "infrastructure vulnerabilities" that might be exempt from FOIA under the proposed legislation. Military censors blocked publication of the report, and persuaded the mayor of Tel Aviv not to go public with a campaign to fix the problem. Nothing was done. Terrorists then attacked the fuel depot. In that case, public debate might well have forced action to address the problem.[7] The United States should not make the same mistake.

For the all of the above reasons, ACLU opposes the enactment of a new FOIA exemption for critical infrastructure information. At the very least, however, any new exemption that Congress enacts should be subject to the following responsible limits:

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[5] *Id.*

[6] *Washington Internet Daily*, April 18, 2002

[7] *See* Aviv Lavie, *Media: Sensing the Censor*, Ha'aretz (Tel Aviv, Israel), May 29, 2002.

First, any new exemption must be limited to clearly marked cyber-security documents, i.e., reports that describe cyber-attacks on a company's computer systems that have resulted or could result in some harm to its critical infrastructure. It should not apply to information about *all* vulnerabilities in critical infrastructure. Proposals to exempt information that is voluntarily shared with the government were developed to deal with the discrete and relatively new problem of cyber-attacks. To expand the scope of information that is exempted to include information about vulnerabilities to traditional physical attacks would interfere with a host of environmental and public safety regulatory regimes that have been developed over decades.

Second, any new exemption must be for written documents only, not "information" of all sorts. It would be virtually impossible to determine if information possessed by the government was the result of some oral conversation with a private sector company, making a FOIA exemption that covered such information unworkable and potentially devastating to the public's right to know.

Third, any new exemption must be limited in time, and should last for months, not years. A company which controls infrastructure that is vital to the public must have an incentive not only to share information, but also to do something to make itself less vulnerable to such attacks. A time limited exemption will give responsible companies and government agencies an incentive to fix their problem with due speed. Without a time limit, companies and the government can simply sit on the problem without any pressure to act.

Fourth, a new exemption should be an alternative to existing FOIA protections, not a new club to wield against FOIA requesters. Companies that wish to take advantage of the new exemption should clearly state on the relevant document they are requesting confidentiality under that exemption. Companies that fail to fix their vulnerabilities within a reasonable time limit, even with the protection of the new exemption, should not be allowed to take advantage of FOIA's other potentially applicable exemptions to cover up their failure to act after that time limit has expired. If companies believe the information they desire to share is protected under another FOIA exemption, they should be required instead to rely on that other exemption at the time of submission.

Finally, strict reporting requirements and a sunset clause should be included in the legislation to determine whether the new regime is working.

Federal Advisory Committee Act (FACA) Exemption

Section 731 of the HSA provides that advisory committees established by the Secretary of the Department of Homeland Security are exempt from the Federal Advisory Committee Act (FACA), and that members of such advisory committees are not subject to certain restrictions on federal employees' conduct.

The FACA was passed in 1972 to promote the values of openness, accountability, and balance of viewpoints, and to ensure administrative efficiency and cost reduction. FACA

imposes requirements on agencies[8] when they establish or utilize any advisory committee, which is defined as a group of individuals, including at least one non-federal employee, which provides collective advice or recommendations to the agency. 5 U.S.C. App. II, § 3(2). When an agency seeks to obtain such advice or recommendations, it must ensure the advisory committee is "in the public interest," *id.* at § 9(2), is "fairly balanced in terms of points of view represented and the function to be performed," *id.* at § 5(b)(2), and does not contain members with inappropriate special interests. *Id.* at § 5(b)(3). If these criteria are satisfied, the agency must file a charter for the committee. *Id.* at § 9(c).

Once an advisory committee is operating, the agency also must comply with requirements designed to ensure public access and participation. FACA requires an agency to provide adequate public notice that it is establishing an advisory committee, *id.* at § 9(a)(2), conduct open meetings, *id.* at § 10(a), keep minutes of those meetings, *id.* at § 10(c), make available for public inspection and purchase all documents prepared for or by advisory committees, *id.* at §§ 10(b), 11(a), and permit all interested persons to attend, appear before, or file statements with any advisory committee. *Id.* at 10(a)(3). These openness requirements ensure public monitoring of advisory committees and reduce the likelihood that advisory committees can serve as secretive channels for special-interest access to government agencies. FACA's right of access to advisory committee records is subject to the same nine exemptions that apply to access to agency records under the FOIA, which we believe are sufficient to guard against any disclosure of truly sensitive information.

By exempting from FACA requirements *any* advisory committees established by the Secretary of the Department of Homeland Security, the HSA severely undermines the openness and public-access goals of FACA. Although the HSA provides that the Secretary shall publish notice in the Federal Registrar announcing the establishment of an advisory committee and identifying its purpose and membership, the meetings will not be open to the public, formal minutes of committee activity during those meetings will not be kept, and the public will not have access to view or purchase documents prepared for or by those advisory committees. Public access to and participation in advisory committees are essential to guarding against special-interest access to advisory committees and influence upon government decision-making.

In addition, the HSA exempts members of advisory committees established under the Department of Homeland Security from federal laws restricting federal employees and officers (including members of advisory committees) from participating in or advising the government upon matters about which there exists a conflict of interest. *See* 18 U.S.C. §§ 203, 205, 207. Combined with the lack of public access to and participation in advisory committee proceedings, exemption from these laws threatens to erode FACA's requirement that advisory committees' memberships reflect a balance of viewpoints, and undermines the goal of accountability.

Waiver of Whistleblower Protection Act (WPA) and other Title 5 Protections

[8] The FACA does not apply to the CIA or the Federal Reserve System. 5 U.S.C. App. II § 4(b).

The federal Whistleblower Protection Act (WPA) was enacted to ensure that federal employees[9] who believe that a violation of law, mismanagement or other abuse has occurred may come forward and disclose that information without fear of summary dismissal or punitive action. The WPA protects federal employees from adverse action on the basis of a disclosure of information if the employee "reasonably believes [the information] evidences a violation of any law, rule, or regulation or gross mismanagement, gross waste of funds, an abuse of authority or a substantial and specific danger to public health and safety." 5 U.S.C. § 2302(b)(8). An employee is not protected if the disclosure involves classified information or if the disclosure is specifically prohibited by law. *Id.* The Act contains administrative remedies, administered by the Merit System Protections Board, and an employee may also seek judicial review in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. §§ 1221, 7703(b). In this way, the WPA guarantees that federal agencies are held accountable to the American public if they overreach their mandate or engage in questionable activities.

The HSA permits the Secretary to sweep away the Whistleblower Protection Act, and all other protections for federal employees under Title 5, for the purpose of establishing a "Human Resources Management System" (HSA § 730) that is "flexible, contemporary, and grounded in the public employment principles of merit and fitness." By allowing the Secretary to make these personnel rules "[n]otwithstanding any other provision of this title," i.e., Title 5, the HSA does not guarantee employees of the Department of Homeland Security the protections of the WPA. Without such protection, employees who are in the best position to spot problems, violations of the law or dangers to the public are effectively silenced.

The Homeland Security Department's Inspector General May Lack Authority

We are concerned that the Homeland Security Act does not adequately provide for a fully functioning Inspector General (IG). Section 103(b) provides for the creation of an Inspector General pursuant to the Inspector General Act of 1978. However, section 710 of the HSA gives the Secretary of Homeland Security authority to override Inspector General Investigations in several areas including: (1) intelligence, counterintelligence, or counter terrorism matters; (2) ongoing criminal investigations or proceedings; (3) undercover operations; (4) the identity of confidential sources, including protected witnesses; (5) matters that constitute a threat to persons or property protected by the United States Secret Service and (6) other matters that constitute a serious threat to national security. Given the mission of the Homeland Security Agency, it is conceivable that many of the functions performed by this new agency could be said to fall under one of these exempted categories.

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[9] The WPA does not apply to the CIA, FBI, Defense Intelligence Agency (DIA), the National Imagery and Mapping Agency (NIMA), the National Security Agency (NSA), and, "as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities." 5 U.S.C. 2302(a)(2)(C)(ii). However, employees of the FBI are covered by similar whistleblower protections contained at 5 U.S.C. § 2303, but must make their disclosures to an official designated by the Attorney General.

Other agencies have similar provisions that require the inspector general to be under the direct authority of the Department Secretary (e.g. Treasury, Department of Justice, Postal Service) when the IG is investigating areas of national security. We understand the need to protect information that if released could pose a danger to national security. However, many of the agencies that are going to become a part of the new Homeland Security Act such as FEMA, the INS, the Animal and Plant Health Inspection Service of the Department of Agriculture and the Coast Guard have functions much broader than dealing with national security. We are concerned that transferring these agencies into a Department whose primary function is to protect the United States against terrorism could erroneously be perceived as elevating their regular duties to those of national security, thereby making such currently non-exempt activities exempt from Inspector General oversight.

We recommend further study of this issue before legislation is approved, regular oversight by Congress and a requirement for the Homeland Security Department to report to Congress concerning how often the Inspector General is prevented from performing its duties due to section 710 exemptions, and the standards by which the Secretary exercises such authority.

II. The Homeland Security Department Should Not Invade the Privacy or Constitutional Rights of Americans

Finally, the creation of a new Homeland Security Department naturally leads to concerns that such a large government agency could abuse its authority by invading the privacy or freedoms that Americans hold dear. Common sense protections can ensure against such abuses.

Because a primary function of the new Department is to receive and analyze information, Congress should insist on appropriate safeguards to protect the privacy of the information and to make sure that it is not used inappropriately. For example, there should be procedures to limit the use and disclosure of the collected information; rules that require the information to be secure and confidential; procedures to remove and destroy old data and remedies for the violation of statutory and constitutional rights and penalties for misuse of personal information.

The Intelligence Gathering Functions of the CIA and FBI Should Remain Separate and Outside the Homeland Security Department

We commend the Administration for leaving the intelligence gathering function out of the new Department. The HSA leaves those functions to the Central Intelligence Agency (CIA) and other intelligence agencies and to the Federal Bureau of Investigation (FBI). While the government must do a better job of analyzing the intelligence information it already collects from both foreign and domestic sources, the Congress should not approve new intelligence gathering powers, much less a new intelligence gathering agency, without a showing that such powers are truly needed and do not unnecessarily tread on Americans' civil liberties.

Under our system of government, the CIA and other intelligence agencies are tasked with collecting foreign intelligence abroad. As a practical matter, these foreign activities have been largely immune from constitutional limits and from oversight by the federal courts, although they are and must remain subject to oversight by the Congress. On the other hand, the FBI collects foreign intelligence in the United States, and also investigates and prevents criminal activity. These domestic activities are clearly constrained by statute and by the Constitution. The FBI's intelligence gathering functions are also subject to oversight by the Foreign Intelligence Surveillance Court.

Blurring of domestic and foreign intelligence gathering functions could have a severe impact on civil liberties, potentially leading to widespread spying on Americans constitutionally-protected political and religious activity. This is already a danger under the relaxed FBI guidelines for domestic investigations recently announced by Attorney General Ashcroft.[10] The Congress should resist any attempt to further erode these protections by including substantial intelligence gathering functions in the new Department of Homeland Security.

The Homeland Security Department Should be Barred from Political Spying

Instead of adding to the Homeland Security Department new intelligence gathering powers that could tread on civil liberties, Congress should consider adding provisions that would prevent the Department from maintaining files on Americans that are not linked to any criminal activity, but instead relate solely to political beliefs and associations. Under the draft legislation, while the Department will not gather intelligence information, it will receive such information in the course of its efforts to prevent terrorism.

Without safeguards, these provisions could lead to abuse. No one wants a repeat of the J. Edgar Hoover era, when the FBI was used to collect information about and disrupt the activities of civil rights leaders and others whose ideas Hoover distained.[11] Moreover, during the Clinton Administration, the "Filegate" matter involving the improper transfer of sensitive information from FBI background checks of prominent Republicans to the White House generated enormous public concern that private security-related information was being used for political purposes. Congress should not provide a future Administration with the temptation to use information available in Homeland Security Department files to the detriment of its political enemies.

One model the Congress could consider is Oregon Revised Statutes § 181.575. It provides that no state law enforcement agency may "collect or maintain information

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[10] For a memorandum explaining how these changes threaten constitutional rights, see Interested Persons Memorandum of Marvin J. Johnson, ACLU Legislative Counsel, June 6, 2002, available at <http://www.aclu.org/congress/l060602c.html>

[11] For a discussion of how the FBI engaged in illegal surveillance and harassment of Dr. Martin Luther King, Jr., see Marvin J. Johnson, ACLU Legislative Counsel, *The Dangers of Domestic Spying by Federal Law Enforcement: A Case Study on FBI Surveillance of Dr. Martin Luther King* (January 2002), available at <http://www.aclu.org/congress/mlkreport.PDF>

about the political, religious or social views, associations or activities" of a person or group unless such information "directly relates to an investigation of criminal activities" and there are "reasonable grounds to suspect" the subject "is or may be involved in criminal conduct." Such sensible limits would ensure that the Department is focused on its mission of preventing unlawful terrorist activity, not on keeping tabs on unorthodox or unusual, but constitutionally protected, political or religious activity.

III. Conclusion

The creation of a new Homeland Security Department is truly a massive undertaking. It requires careful and thoughtful consideration. While Congress understandably wants to respond to the Administration's initiative without undue delay, caution is needed to ensure that the basic principles of our government that ensure public accountability of government activity remain intact.

Instead, the Administration's plan weakens many of the laws that are vital to ensuring an open and accountable government, by creating unnecessary blanket exemptions to the Freedom of Information Act, the Federal Advisory Committees Act, and the Whistleblower Protection Act. The plan also fails to provide for an effective review mechanism, instead proposing an Inspector General that may lack sufficient power to provide an effective check on the powerful new Secretary of Homeland Security. Finally, while the plan should be commended for recognizing the importance of the distinction between foreign and domestic intelligence gathering for the protection of civil liberties, safeguards against political spying must be added to avoid a repeat of the abuses of the Hoover era.

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