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U.S. Immigration—A Legacy of Reform and Reorganization: Problems and Possible Solutions

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U.S. IMMIGRATION — A LEGACY OF REFORM AND REORGANIZATION: PROBLEMS AND POSSIBLE SOLUTIONS

David Jones^{***}

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* *Editor's Note:* This note was selected as Best Note for Fall 1997.

** To my wonderful wife, Alessandra, for her undying love and support.

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I. INTRODUCTION

The Immigration Act of 1891¹ established complete federal control over immigration by placing all immigration authority in the Immigration Bureau under the Secretary of the Treasury.² This Act was the result of a recommendation by a 1889 joint congressional committee, which found that a large portion of immigration problems was due to the division of authority between the federal and state governments.³ After the enactment of numerous other acts and years of continuing concerns, Congress further consolidated immigration authority in 1933, creating the Immigration and Naturalization Service (INS).⁴ Over sixty years later, the INS continues to be burdened by problems, and on September 30, 1997, a congressional committee recommended that it be disbanded.⁵

I, myself, have experienced the problems of the INS first hand. I recently married a Brazilian, and the immigration process proved to be a true abomination. I recall contacting the "Ask INS" hotline to inquire whether my then fiancée would be able to attend the University of Florida pending her adjustment to permanent resident. I spoke to nearly a half-dozen people, beginning with the person who answered, and ending with a supervisor. I never got the same answer twice, and some of the answers I did get were

1. 26 Stat. 1084 (1891).
 2. SHARON MASANZ, HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE, S. REP. NO. 96-2, at 9 (1980).
 3. *Id.* at 8.
 4. *Id.* at 41.
 5. *Out of Many, One: Commission on Immigration Reform Issues Final Report*, 74 INTERPRETER RELEASES (Federal Publications Inc. D.C.), Oct. 6, 1997, at 1509 [hereinafter *Final Report*]; William Branigin, *Immigration Panel Calls for "Americanization" Effort*, WASH. POST, Oct. 1, 1997, at A18; Ruben Navarette, Jr., *Proposal to Dismantle INS Draws Mixed Reviews: Services Shouldn't Suffer, Hispanic Leaders Say*, ARIZ. REPUBLIC, Oct. 1, 1997, at A14. Shirley M. Hufstедler, former Education Secretary, headed the CIR. Branigin, *supra*, at A18. In addition to the dismantling of the INS, the CIR made a number of other recommendations. *Final Report, supra*, at 1510. The CIR urged an extensive re-engineering of immigration management, including better recruitment, training, and use of fees. *Id.* at 1510-11. Furthermore, it called for improvement of the processes of naturalization and admission of immigrants, as well as improved integration of immigrants into American culture. *Id.* at 1511. The CIR suggested "giving orientation materials to legal immigrants upon admission; . . . encouraging state governments to establish information clearinghouses in major immigrant receiving communities; . . . promoting public/private partnerships to orient and assist immigrants in adapting;" and increasing the commitment to educating immigrants, with a focus on English language skills. *Id.* It called upon Congress to change the focus of the immigration debate from "a numbers game to . . . weaving America's myriad cultures into a national fabric." Jodi Wilgoren & Patrick J. McDonnell, *Immigration Panel Urges Focus on Unity*, L.A. TIMES, Oct. 1, 1997, at A1.

blatantly wrong. The phone call ended when I asked if there were anyone there who actually knew the regulations, and the INS officer hung up on me.

Another example involves work authorization for people on fiancé visas. According to someone⁶ at the Jacksonville INS office, when a person comes into the U.S. with a fiancé visa, the officers at the airport are supposed to stamp his or her papers with “work authorized.” When my fiancée arrived, however, the officers refused to do so, and when asked, said that they did not stamp the work authorization there. Subsequently, I returned to Jacksonville, where the officer told me that officers in Miami and Orlando routinely refuse to stamp the work authorization. The officer could give me no reason why. To this day, I am still not certain whether the officers at the airport are supposed to stamp the work authorization. The problem is that apparently the INS is not sure either.

Since then, I have been working for an immigration law firm, and the INS continues to baffle me. The officers routinely lose documents and make absurd evidence requests. Not surprisingly, when I heard that a congressional committee recommended the dismantling of the INS, I became interested. I was curious to see the various opinions and proposed solutions. This note will summarize the history of the INS and analyze its current problems and the proposed solutions.

II. HISTORY

Congress passed the first law aimed at controlling immigration in 1864.⁷ However, the first law actually regulating immigration did not appear until 1882.⁸ This Act was intended to prevent the admission of criminals, idiots, lunatics, and immigrants who were likely to become public charges.⁹ In 1888, a House select committee was appointed, and in 1889, a joint congressional committee was established, both of which determined that many of the immigration laws were being violated.¹⁰ Accordingly, Congress enacted the Immigration Act of 1891.¹¹

Concern over immigration continued despite federal control, and in 1903,

6. I have omitted the names of those INS officers from this note.

7. MASANZ, *supra* note 2, at 6 (citing 13 Stat. 385 (1864)).

8. *Id.* at 7. The statute was codified as 22 Stat. 214 (1882).

9. *Id.*; Joseph Minsky, *Introductory Overview of Immigration Law and Practice: Historical Background*, C394 A.L.I.-A.B.A. 8 (1989). A similar law was enacted in 1885 against contract laborers, 23 Stat. 332, and was amended in 1887, 24 Stat. 414, giving the Secretary of the Treasury the power to deport aliens who were in violation of these laws. MASANZ, *supra* note 2, at 7.

10. MASANZ, *supra* note 2, at 8. Aliens excluded under the 1882 Act were still gaining entry, the laws against contract-labor were being avoided, and immigration through Canada was proving problematic. *Id.*

11. *Id.* at 9 (establishing federal control over the immigration process).

the Commissioner-General of the Bureau of Immigration argued that responsibilities within the Bureau were not adequately defined.¹² The Immigration Bureau noted continuing problems in enforcement at the Canadian and Mexican borders, lack of uniformity of naturalization, and an increasing number of naturalization frauds.¹³ In 1906, Congress added the naturalization of aliens to the duties of the Bureau of Immigration, which became the Bureau of Immigration and Naturalization.¹⁴ In 1907, the Commissioner-General further noted that the U.S. attorneys under the Department of Justice (DOJ) were not equipped to adequately assess the large number of cases.¹⁵ In 1909, in an attempt to give the Bureau of Immigration more control, Congress transferred the field agents under the U.S. attorneys to the Department of Commerce and Labor.¹⁶ Four short years later, however, the Department of Commerce and Labor was abolished.¹⁷ The immigration Bureau was split into two bureaus,¹⁸ one for immigration and the other for naturalization.¹⁹ Both bureaus were placed under the newly formed Department of Labor (DOL).²⁰

Once again, in 1933, the Bureau of Immigration and the Bureau of Naturalization were reconsolidated as the INS.²¹ Shortly thereafter, in 1940, the INS was transferred from the DOL to the DOJ.²² At this time, Congress also created a Special Inspections Division²³ and the five-member Board of Immigration Appeals.²⁴ In 1955, the INS restructured its internal organization, creating regional offices and eliminating a number of smaller offices.²⁵ In 1977, the INS began using the Houston Model Office program,

12. *Id.* at 12.

13. *Id.* at 13-14.

14. *Id.* at 14. The naturalization side of the Immigration Bureau did not come into being until Congress passed the Naturalization Act of 1906, 34 Stat. 596. MASANZ, *supra* note 2, at 14. Before then, naturalization had been the role of the courts. *Id.*

15. MASANZ, *supra* note 2, at 15.

16. *Id.* at 19.

17. *Id.* Two departments were created: the Department of Commerce and the Department of Labor (DOL). *Id.*

18. *Id.* The combined functions of immigration and naturalization had lasted only seven years.

19. *Id.*

20. *Id.*

21. *Id.* at 41.

22. *Id.* at 47. This was done in the interest of national security. *Id.* It was thought that the DOJ would be able to exercise more effective control over immigration, as regards criminal and subversive aliens. *Id.*

23. *Id.* at 48. This division was created to investigate crimes relating to registration under the Alien Registration Act of 1940. *Id.*

24. *Id.* The Board of Immigration Appeals was created from the Board of Review, which had provided recommendations to the DOL regarding deportation cases. *Id.*

25. *Id.* at 70.

in an attempt to streamline its processing of cases and organize its records.²⁶ The INS has continued to restructure its organization²⁷ and Congress has continued to pass immigration reform legislation.²⁸ Nonetheless, the problems persist.²⁹

III. CURRENT CRITICISMS AND PROBLEMS OF THE IMMIGRATION AND NATURALIZATION SERVICE

A. *Overlapping of the INS Border Patrol and the Customs Service*

The first problem found in the INS concerns the overlapping of the INS Border Patrol and the Customs Service. “Customs . . . [agents] are generally responsible for examining goods entering the country, while the [Border Patrol is] responsible for examining people entering the country.”³⁰ Nonetheless, they tend to unnecessarily duplicate each other’s functions.³¹ Both agencies will often run background checks on persons crossing the border, question the contents of a vehicle, or inquire as to a person’s immigrant status.³²

Despite the fact that these two agencies work side by side, they do not work together.³³ There is no cross-training between the two agencies, their operations are planned separately, they report to different leaders, and there

26. *Id.* at 79.

27. Currently the INS consists of four regional offices, Northern, Eastern, Southern, and Western, which have administrative responsibility for the district offices. Minsky, *supra* note 9, at 11. The district office is the basic operating unit of the INS, “where some applications and petitions for immigration benefits are submitted, where enforcement action is taken, and where exclusion or deportation proceedings are instituted.” *Id.* “The district director is in charge of the district office. Each district office has a legal staff whose members serve as prosecutors in exclusion and deportation proceedings and are known as general attorneys or trial attorneys.” *Id.*

28. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. 104-208, 1996 U.S.C.C.A.N. (110 Stat.) 3009-546; Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 1986 U.S.C.C.A.N. (100 Stat.) 3359.

29. Some argue that these problems result from the conflict between the ideals of the United States and our practical concerns. James J. Orlow, *America’s Incoherent Immigration Policy: Problems and Solutions*, 36 U. MIAMI L. REV. 931 (1982). On the one hand, one hopes that the United States would eliminate discrimination and embrace immigrants. *Id.* at 931-32. At the same time, however, people are concerned about the cost immigrants may lay on the country and the effects of immigration on the job market. *Id.* at 932. Related to this problem is a “service versus enforcement” conflict. 143 CONG. REC. H8164, H8164 (daily ed. Sept. 30, 1997) (statement of Rep. Reyes). As such, the INS must somehow strive to balance these duties. *Id.* “For all of its good intentions and willing personnel, the INS is doomed to fail.” *Id.*

30. Daniel W. Sutherland, *The Federal Immigration Bureaucracy: The Achilles Heel of Immigration Reform*, 10 GEO. IMMIGR. L.J. 109, 128-29 (1996).

31. *Id.* at 129-31.

32. *Id.* at 129.

33. *Id.*

is a strong rivalry between them.³⁴ Such a structure wastes vast amounts of personnel, equipment, and funding.³⁵

B. *Uncoordinated and Unplanned Enforcement Strategies*

The Border Patrol is so unorganized, that an estimated three to four million³⁶ illegal immigrants currently live in the United States.³⁷ The Border Patrol is divided into twenty-one sectors.³⁸ These sectors, however, bear no relation to the investigative division of the INS, which is divided into thirty-three districts.³⁹ Their boundaries often overlap, making the coordination of the two divisions inherently confusing and difficult.⁴⁰ Further complicating the problem, the Border Patrol has taken upon itself much of the investigative duties of the INS.⁴¹ This change has resulted in decreased patrol of the borders,⁴² as well as decreased utility of the investigative division.⁴³

The problem of illegal immigrants is also due in part to the strategy and deployment of the Border Patrol.⁴⁴ For many years, the Border Patrol had focused on the apprehension of aliens who were already across the border.⁴⁵ In 1993, however, a new El Paso sector chief shifted that sector's focus to prevention.⁴⁶ Agents flooded the border, literally creating a wall against illegal immigrants.⁴⁷ The operation had dramatic success in the El Paso sector; however, the Clinton Administration did not immediately implement the same strategy in other sectors, and the decrease of illegal immigrants into

34. *Id.* The two agencies have gone so far as to each implement the use of drug-sniffing dogs, trying to surpass each other in making the most drug arrests. *Id.*

35. *Id.* at 130.

36. Kentucky Republican, Harold Rogers estimates this number as being over five million. Robert Pear, *Panel Urges That Immigrants Become Further Americanized*, N.Y. TIMES, Oct. 1, 1997, at A20.

37. Sutherland, *supra* note 30, at 120. "By the middle of the 1980s, so many illegal immigrants were living and working in this country that Congress unilaterally declared approximately three million undocumented people to be legal residents." *Id.*

38. *Id.* at 121.

39. *Id.*

40. *Id.*

41. *Id.* at 122.

42. *Id.* "A General Accounting Office study found that between 1986 and 1990, although the Border Patrol received substantial increases in resources, the amount of time Border Patrol agents spent patrolling the border actually dropped by eleven percent." *Id.*

43. *Id.* "One study concluded that fifty-seven percent of an INS investigator's work does not require any enforcement skills." *Id.*

44. *Id.* at 122-24 (explaining that it is a lack of a strategy for deployment of the patrols that is the problem).

45. *Id.* at 123.

46. *Id.* This change was known as "Operation Hold the Line." *Id.*

47. *Id.* at 123.

El Paso resulted in dramatic increases elsewhere.⁴⁸

The government's reaction to illegal immigration has been to pour vast numbers of Border Patrol agents into the field;⁴⁹ but without any coherent strategy, the dramatic influx of agents only further complicates the problem.⁵⁰ Inexperienced agents tend to cause border abuses and increase the likelihood of violent confrontations.⁵¹ Furthermore, Congress has never received a report detailing the number of agents that could accomplish effective border control.⁵²

C. *Lack of Communication and Consistency Among the Offices*

The INS has been called “‘a feudal state with each region, district, and sector acting independently to give its own interpretation of the law.’”⁵³ The INS is divided into four regional offices, thirty-three districts, and twenty-one border patrol sectors.⁵⁴ So many divisions will almost certainly cause a breakdown in communication.⁵⁵

Identical cases filed at different offices often receive different responses.⁵⁶ INS officers are supposed to have handbooks to guide them in the many changes in the laws and regulations,⁵⁷ but these are typically out of date and not of much use.⁵⁸ As a result, most immigration officers do not know what the current law is.⁵⁹ “U.S. immigration policy depends more on the person you ask than on the rule of law.”⁶⁰

A recent review of the INS quality control revealed that fifteen out of twenty-three offices investigated were not in compliance with the new quality control procedures.⁶¹ Seven were only in partial compliance, leaving only

48. *Id.* at 124.

49. *Id.* at 122.

50. *Id.* at 125.

51. *Id.*

52. *Id.* at 122.

53. *Id.* at 116 (quoting Weston Kosova, *The INS Mess: How Immigration Became a Nightmare*, NEW REPUBLIC, Apr. 13, 1992, at 21, quoting Raymond Momboisse, INS General Counsel, internal memorandum).

54. Minsky, *supra* note 9, at 11; Sutherland, *supra* note 30, at 121.

55. Sutherland, *supra* note 30, at 116-18. “Congress simply cannot assume that when it passes a new law, the INS will implement it in a consistent and rational manner. The agency must overcome its fragmented organizational structure and culture before it can effectively enforce the nation’s immigration laws.” *Id.* at 118.

56. *Id.* at 116.

57. *Id.*

58. Sutherland, *supra* note 30, at 116.

59. *Id.*

60. *Id.*

61. *INS Draws Renewed Congressional Criticism over Naturalization Process*, 74 INTERPRETER RELEASES, May 5, 1997, at 744.

one in total compliance.⁶² These problems indicate the poor level of communication and training in the INS.

D. *Duplication of INS Duties by the State Department*

Often, visa petitions must first be filed with the INS.⁶³ If they are approved, they are forwarded to the consulates where the visas will be issued.⁶⁴ Rather than just issuing the visas, however, the consulates essentially reprocess the visa petitions and make the final determination as to whether the visas will be approved.⁶⁵ Thus, the State Department has power over the INS, making visa processing by the INS superfluous.⁶⁶

Like the Border Patrol/Customs problem, this duplication wastes vast amounts of resources, personnel, and funds, and leads to inconsistent results.⁶⁷ Other countries, such as Canada and Australia, have immigration agency personnel who work in their embassies.⁶⁸ Under this type of system the immigration agency remains the only authority deciding immigration issues.⁶⁹

E. *Interaction Between the INS and the DOL*

U.S. companies must presently complete labor certification through the DOL before a foreign worker can be brought into the country.⁷⁰ Subsequent to certification, the employer must file another petition with the INS.⁷¹ "At the present time, labor certification is a total failure."⁷² Warren Leiden, Executive Director of the American Immigration Lawyers Association (AILA), stated that "the Labor Department 'is an extremely flawed agency that doesn't know what it's about.'"⁷³ Currently, labor

62. *Id.*

63. Sutherland, *supra* note 30, at 130.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 131.

69. *Id.*

70. Gene McNary, *No Authority, No Accountability: Don't Abolish the INS, Make It an Independent Agency*, 74 INTERPRETER RELEASES, Aug. 25, 1997, at 1288. A labor certification is a process by which the DOL certifies that no U.S. workers are available to perform the particular job to be filled by the foreign workers. Sutherland, *supra* note 30, at 134.

71. *Id.*

72. McNary, *supra* note 70, at 1288.

73. Sutherland, *supra* note 30, at 134 (quoting Interview with Warren Leiden, Executive Dir., AILA (Jan. 5, 1996)).

certifications can cause delays of two years or more.⁷⁴ Accordingly, employers in urgent need of labor, for which there are no Americans available, are unable to fill those positions.⁷⁵

Furthermore, the rules are in a constant “state of flux.”⁷⁶ Sister agencies to the DOL, the Employment and Training Administration’s Office of Alien Labor Certification, and the Employment Standards Administration’s Wage and Hour Division continually send inconsistent signals.⁷⁷ Further complicating this problem is the fact that in at least a few cases, the DOL itself has “provided inconsistent technical advice.”⁷⁸ The DOL admits to inconsistent interpretation and application of its prevailing wage regulation.⁷⁹

F. *Placement of the INS Under the DOJ*

Gene McNary, former Commissioner of the INS, describes the DOJ as “10,000 lawyers and not one manager.”⁸⁰ He argues that the DOJ does not know or care anything about immigration, and accordingly, so long as the INS is under the DOJ, its mission can never be accomplished.⁸¹ McNary feels that the DOJ’s concern is only that the INS not cause any embarrassment.⁸² Nonetheless, the DOJ must approve every INS budget, goal, etc., before INS can implement them.⁸³

The historic character of the DOJ makes the placement of the INS under it problematic.⁸⁴ The DOJ consists of agencies such as the Federal Bureau of Investigation, the Drug Enforcement Agency, and the Bureau of Prisons.⁸⁵ These agencies focus on enforcement, while the INS, with the exception of the Border Patrol, primarily focuses on service.⁸⁶ This enforcement-based mentality of the DOJ directly conflicts with that of

74. McNary, *supra* note 70, at 1288. Austin, Texas has the quickest time, taking 90-130 days. *Department of Labor Processing Times in Days: March 1997*, 16 AILA MONTHLY 161, 164 (1997). Kansas City, Kansas takes the longest, 690-890 days. *Id.* On average, labor certifications take at least one to one and a half years. *Id.*

75. See McNary, *supra* note 70, at 1288.

76. Mary E. Pivec, *Observations on the Enforcement of the H-1B Labor Condition Application Requirements*, 71 INTERPRETER RELEASES, May 27, 1994, at 705.

77. *Id.*

78. *Labor Dept. Cracking Down on Alleged H-1B LCA Violators*, 70 INTERPRETER RELEASES, Oct. 8, 1993, at 1328.

79. See *id.* at 1326.

80. McNary, *supra* note 70, at 1286.

81. *Id.*

82. *Id.*

83. *Id.* at 1282

84. *Id.*

85. *Id.*

86. *Id.*; see 143 CONG. REC. H8164.

service.

G. *Financial Mismanagement*

Through its own negligence, the INS loses \$23 million per year.⁸⁷ INS budgets are based on the presumption that approximately one-third of its finances will come from fees.⁸⁸ The INS, however, rarely collects certain types of fees.⁸⁹ INS rules require that airlines and cruise lines charge a fee to passengers who travel into the United States.⁹⁰ In turn, the airlines and cruise lines are required to pay this money to the INS.⁹¹ The INS, for some reason, rarely tries to collect it.⁹²

Failure to collect bail bonds also costs the INS a large amount of money.⁹³ The DOJ quoted an actual amount of \$38 million over a six-year period.⁹⁴ Ninety percent of illegal immigrants do not appear for their deportation hearings, thereby forfeiting their bonds.⁹⁵ Again, as with the airline and cruise line fees, the INS inexplicably fails to collect the forfeited bonds from the bond agencies.⁹⁶

H. *Patchwork Regulations*

Since the first immigration laws were passed, multitudes of subsequent laws have amended them. Yet, Congress has not promulgated a workable set of rules to govern immigration.⁹⁷ Accordingly, it has passed this task on to the Attorney General, who ordinarily has enforced immigration law on a case-by-case basis.⁹⁸

Congress continues to enact reform legislation, intended to improve immigration laws. Most recently, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).⁹⁹ This legislation has had a severe impact on immigrants, and all of the regulations interpreting this law have yet to be promulgated. One example involves

87. Sutherland, *supra* note 30, at 127-28.

88. *Id.* at 127. Nonetheless, the INS was budgeted \$3.1 billion this fiscal year. Editorial, *INS "Mission Overload" Not Fixed by Disbanding It*, SAN ANTONIO EXPRESS-NEWS, Aug. 6, 1997, available in LEXIS, Market Library, Promt File.

89. Sutherland, *supra* note 30, at 127.

90. *Id.*

91. *Id.*

92. *Id.* at 127-28.

93. *Id.* at 128.

94. *Id.*

95. *Id.* Hundreds of thousands of bail bonds are forfeited each year. *Id.*

96. *Id.*

97. Orlow, *supra* note 29, at 934.

98. *Id.*

99. Publ. L. 104-208, 1996 U.S.C.C.A.N. (110 Stat.) 3009-546.

Section 245(i) of the Immigration and Nationality Act of 1952 (INA).¹⁰⁰ Congress enacted this section in 1994 primarily to allow immigrants in the United States who had not been inspected to adjust their status to lawful permanent residents.¹⁰¹ After the enactment of IIRAIRA, lack of inspection became a ground for inadmissibility.¹⁰² Thus, at least in theory, those immigrants are no longer eligible for adjustment.

IV. PROPOSALS FOR INS REFORM

Since its inception, the INS has been the focus of endless criticism, inquiries, and investigations as to its efficiency and practices.¹⁰³ As a

100. 8 U.S.C.A. § 1255(i) (1996).

101. 8 U.S.C.A. § 1182 (a)(6)(A)(i); Section 245(i) was initially to expire on October 1 of 1997. *Id.* Nonetheless, it has been extended twice as Congress tries to decide whether to keep it. *Final Report, supra* note 5, at 1513-14.

102. 8 U.S.C.A. § 1182 (a)(6)(A)(i).

103. Sutherland, *supra* note 30, at 110. Over twenty-five commissions and congressional oversight committees have proposed major reforms in the INS. *Id.* See generally *Reviewing the Status of Operations at the Immigration and Naturalization Service: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 104th Cong. 856 (1996); *Activities of the Immigration and Naturalization Service: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 104th Cong. 730 (1995). A recent scandal involved the Krome Detention Facility and the Miami International Airport. McNary, *supra* note 70, at 1284. The INS was accused of interfering with a congressional investigation when prisoners were released just before the delegation arrived. *Id.*; see also *Deception of a Congressional Task Force Delegation to Miami District of the Immigration and Naturalization Service: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 105th Cong. 11 (1997). The INS also has been accused of inflating the numbers of persons apprehended at the Tijuana-San Diego border (Operation Gatekeeper). McNary, *supra* note 70, at 1284. This accusation comes in tandem with accusations that the INS has failed to stop illegal immigration at the southwest border. *Id.* at 1285. On April 10, 1997, Congress held a hearing on the INS. *INS Again Scorched at Hearings*, 74 INTERPRETER RELEASES, Apr. 14, 1997 at 598-99. The INS was "scorched" over the Miami deception and Operation Gatekeeper. *Id.* at 598-99. Furthermore, the INS recently naturalized 180,000 persons before fingerprint checks had been completed, of which 16,000 were found to have criminal records. McNary, *supra* note 70, at 1284; see also *INS Proposes New Reorganization, But Others Urge Complete Overhaul*, 74 INTERPRETER RELEASES, Aug. 4, 1997, at 1176 [hereinafter *Reorganization*]. Incidents like these have prompted a great deal of ridicule of U.S. citizenship policies, for example, in a recent Interpreter Release, a parody of "Citizenship USA" appeared. *Do You Want Fries with That Citizenship Application?*, 74 INTERPRETER RELEASES, Mar. 28, 1997, at 532. The parody labeled the new policy, "McCitizenship USA" and discussed the incorporation of naturalization with the McDonald's drive-thru lanes. *Id.* The chairman of the House Appropriations subcommittee responsible for the immigration service has said:

The I.N.S. is overloaded The agency has too much on its plate. It cannot control our borders, process immigrants and safeguard U.S. citizenship. We've seen tens of thousands of criminals granted the most precious benefit our country has to offer: U.S. citizenship. We have over five million illegal aliens residing in the United States

Pear *supra* note 36, at A20. "Hispanic groups have long been critical of the INS, claiming

result, many different people and organizations have offered a number of proposals to solve the INS' problems. These proposals include simple internal reorganization,¹⁰⁴ making the INS an independent agency,¹⁰⁵ dividing it into two agencies,¹⁰⁶ and completely dismantling it.¹⁰⁷

A. *INS Proposals for Reorganization*

In 1994, INS Commissioner Doris Meissner announced the latest INS plan for reorganization.¹⁰⁸ The INS reorganization plan consists of five principles: "(1) strengthening the chain of command by enhancing the INS regions and regional directors and the Office of Field Operations; (2) enhancing managerial accountability and career development; (3) clarifying roles and responsibilities . . . ; (4) improving program development capacities; and (5) consolidating policy development and review."¹⁰⁹ Through this plan, the INS intends to increase the authority of the Regional Directors and Offices, as well as that of the Chief of the Border Patrol.¹¹⁰

In addition, the plan would realign and integrate a number of offices.¹¹¹ Two Associate Commissioners would report to the Office of the Executive Commissioner.¹¹² One would be in charge of enforcement, overseeing investigations, removals, intelligence, detention, asset forfeiture, and law enforcement.¹¹³ The other would handle services such as inspections, adjudications, naturalization, and other service related duties.¹¹⁴

The INS would create the new Office of Policy and Programs from the

enforcement tactics often unfairly target U.S. citizens of Hispanic ancestry." Gary Martin, *Hispanic Group Applauds Proposal to Dismantle INS*, FRESNO BEE, Aug. 6, 1997, available in LEXIS, Regnws Library, Fresno File.

104. *Reorganization*, *supra* note 103, at 1173-74.

105. McNary, *supra* note 70, at 1290.

106. Sutherland, *supra* note 30, at 133.

107. *As Details on Proposed Dismantling of INS Emerge, Reactions Vary*, 74 INTERPRETER RELEASES, Aug. 11, 1997, at 1213 [hereinafter *Reactions Vary*]; *Reorganization*, *supra* note 103, at 1175. There are a number of other less involved proposals not fully discussed in this note. Among them, James J. Orlow, Director of the AILA, proposes the creation of an ongoing task force called the Immigration Policy Research Institute (IPRI). Orlow, *supra* note 29, at 936. The IPRI would be an "independent, nonpartisan body, composed of scholars and practitioners from a variety of disciplines who would discuss the problems confronting American immigration policy and its implementation." *Id.* It would centralize data on immigration and provide analysis thereof. *Id.* Accordingly, it could provide advice on INS policy. *Id.* Orlow also suggests that the IPRI could serve as a school to train asylum officers and immigration judges. *Id.*

108. *Reorganization*, *supra* note 103, at 1173.

109. *Id.* at 1174.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

Jones: U.S. Immigration—A Legacy of Reform and Reorganization: Problems two offices currently in existence, the Office of Programs and the Office of Policy and Planning.¹¹⁵ The reorganization would also realign the Program Development units into border management, enforcement, service, status verification, and information systems.¹¹⁶

B. *Making the INS an Independent Agency*

Gene McNary responded to recommendation that the INS be abolished, by recommending that it instead be made an independent agency.¹¹⁷ He refers to the proposed dismantling and parceling out of the INS as “a child-like tantrum.”¹¹⁸ He argues that Congress should eliminate the DOL and DOJ interference in immigration matters.¹¹⁹ In support of his proposal, he cites the backlog of labor certifications at the DOL,¹²⁰ the lack of management in the DOJ,¹²¹ and the DOJ composition as primarily an enforcement agency.¹²²

Furthermore, McNary criticizes State Department interference with the INS, citing an incident where the State Department prevented the INS from building a fence along the border with Tijuana, on the grounds that it was bad diplomacy.¹²³ He also contends that the State Department is basically anti-immigration and thus, that Congress must divest it of its immigration authority.¹²⁴ McNary admits, however, that the INS requires a new management scheme.¹²⁵

C. *Dividing the INS into Two Agencies*

Daniel W. Sutherland¹²⁶ argues that the INS must be divided into a service agency and an enforcement agency.¹²⁷ He labels the service agency the Federal Immigration Agency (FIA).¹²⁸ The FIA would perform all of the immigration functions currently performed by the INS and the State Department.¹²⁹ The FIA would have an office in each U.S. consulate in

115. *Id.*

116. *Id.*

117. McNary, *supra* note 70, at 1290.

118. *Id.* at 1288.

119. *Id.*

120. *Id.*

121. *Id.* at 1286.

122. *Id.* at 1282.

123. *Id.* at 1285.

124. *Id.* at 1288.

125. *Id.*

126. Daniel Sutherland is a Legal Scholar with the Center for Equal Opportunity. Sutherland, *supra* note 30, at 109 n.*.

127. *Id.* at 133.

128. *Id.*

129. *Id.* at 133-34.

order to replace the State Department's immigration functions.¹³⁰ In addition, the FIA would make the immigration decisions currently handled by the DOL, such as labor certification.¹³¹

Sutherland contends that by allowing the FIA to handle immigration petitions from beginning to end, needless repetition by multiple agencies would end, and tens of millions of dollars would be saved.¹³² Furthermore, it "would also produce a more fair and consistent immigration policy."¹³³ He cites the Ascencio Commission's assertion that combining these functions in one agency would "'provide the basis for developing a more professional corps of officers and policymakers.'"¹³⁴ Sutherland argues that the FIA would eliminate the "fiefdoms" currently in the INS and would improve communication between offices.¹³⁵ The relationship between immigrants and the FIA also would be better than that with the INS because the FIA would not be involved in enforcement activities.¹³⁶

The enforcement agency would be a Border Management Agency (BMA), operated by the Customs Service.¹³⁷ This agency would replace the Border Patrol and handle investigations, deportations, and inspections, making Customs responsible for the control of people and goods entering the country.¹³⁸ Integration of the Border Patrol and Customs would save taxpayers tens of millions of dollars and reduce overlap.¹³⁹

There are currently 6000 Customs inspectors and 4000 INS inspectors.¹⁴⁰ The integration could vastly reduce the number of these employees.¹⁴¹ In addition, the integration would eliminate the animosity and competition between Customs and INS inspectors.¹⁴² Finally, Sutherland argues that the BMA would improve the morale of the immigration officers because they would be able to transfer to the different branches of border enforcement.¹⁴³

130. *Id.* at 134.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 134-35 (quoting COMM'N FOR THE STUDY OF INT'L MIGRATION AND CO-OP. ECONOMIC DEV., MIGRATION: AN ECONOMIC DEVELOPMENT RESPONSE 30 (1990)).

135. *Id.* at 135.

136. *Id.*

137. *Id.* at 135-36.

138. *Id.*

139. *Id.* at 136.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 137.

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D. *Proposal by the U.S. Commission on Immigration Reform*

The Commission on Immigration Reform (CIR) has expressed concern over whether one agency can handle all of the tasks of an effective immigration system.¹⁴⁴ The CIR recommended breaking down the INS into what it considers the four “core” immigration functions.¹⁴⁵ The first “core” function is border and interior enforcement.¹⁴⁶ The CIR recommends the creation of a Bureau of Immigration Enforcement under the DOJ to handle this function.¹⁴⁷ The Bureau also would be responsible for detention and prosecution of aliens.¹⁴⁸ Under this Bureau, responsibilities would be divided among a new “Immigration Uniformed Service Branch,” investigators, intelligence, an “Assets Forfeiture Unit,” pre- and post-trial probation officers, trial attorneys/prosecutors, and field offices.¹⁴⁹ The Immigration Uniformed Service Branch would incorporate INS inspectors, Border Patrol agents, and detention officers.¹⁵⁰ The CIR believes that this scenario would more closely resemble traditional law enforcement agencies.¹⁵¹

The next “core” function would include the adjudication of visas.¹⁵² The State Department would control this function exclusively, by way of an “Undersecretary for Citizenship, Immigration, and Refugee Admissions.”¹⁵³ Under this agency, there would be three bureaus: a Bureau of Immigration Affairs, a Bureau of Refugee Admissions and Asylum Affairs, and a Bureau of Citizenship and Passport Affairs.¹⁵⁴ Since the State Department has traditionally performed a part of this role in the past and has a strong infrastructure, the CIR feels that the Department is well suited to the task.¹⁵⁵ The CIR believes that such a change would lead to more effective and efficient processing.¹⁵⁶

The third “core” function would involve all of the labor aspects of immigration, which under the current system, are performed by both the DOL and the INS.¹⁵⁷ The CIR’s plan would place all functions such as the

144. *Reactions Vary*, *supra* note 107, at 1213.

145. *Id.*; *see also Reorganization*, *supra* note 103, at 1175.

146. *Reactions Vary*, *supra* note 107, at 1213.

147. *Id.*

148. *Id.*

149. *Final Report*, *supra* note 5, at 1510.

150. *Id.*

151. *Reactions Vary*, *supra* note 107, at 1213.

152. *Id.* at 1214.

153. *Id.*

154. *Final Report*, *supra* note 5, at 1510.

155. *Reactions Vary*, *supra* note 107, at 1214.

156. *Id.*

157. *Id.*

hiring of foreign workers and enforcement of immigration regulations at the workplace under the DOL.¹⁵⁸

The fourth "core" function involves the immigration appeal process.¹⁵⁹ The CIR recommends creating a new agency, the Agency for Immigration Review, to hear all immigration appeals.¹⁶⁰ Such an agency would replace the Board of Immigration Appeals and the Board of Alien Labor Certification Appeals.

V. ANALYSIS OF PROPOSALS

A. *The INS Proposal*

The INS reorganization plan does not propose any changes that would adversely affect immigration. Strengthening the chain of command, enhancing managerial accountability, clarifying roles, etc. are sound goals and would improve the overall efficiency of the INS.¹⁶¹ This plan, however, does not address the duplication of efforts both at the border and in visa processing.¹⁶² First, to improve efficiency, the government must resolve the duplication of duties by the Border Patrol and Customs.¹⁶³ Secondly, in addition to being costly, the duplication of visa processing efforts causes inconsistent results for immigrants.¹⁶⁴ An immigrant may receive an approved petition from the INS, only to have his or her visa denied at the consulate.¹⁶⁵ Moreover, the INS-proposed reorganization does not specifically address the problems of interaction with the DOL.¹⁶⁶ Without solving these problems, immigration in this country will continue to be troubled. The INS plan may improve the INS, but not the U.S. immigration process.

B. *Proposal for an Independent Agency*

Making the INS an independent agency presents some interesting possibilities. If the INS were an independent agency, problems such as its placement under the DOJ and interference by the State Department would be eliminated.¹⁶⁷ In addition, if the INS took control of the labor aspects of

158. *Id.*

159. *Id.*

160. *Id.*

161. *See Reorganization, supra* note 103, at 1174.

162. *See supra* notes 108-10 and accompanying text.

163. *See supra* notes 30-35 and accompanying text.

164. Sutherland, *supra* note 30, at 130; *see supra* notes 63-69 and accompanying text.

165. Sutherland, *supra* note 30, at 130; *see supra* notes 63-69 and accompanying text.

166. *Reorganization, supra* note 103, at 1173-76.

167. *See McNary, supra* note 70, at 1286-89.

immigration and completely subverted the State Department's role, it would lead to a more cohesive and coherent immigration policy.¹⁶⁸

This proposal itself, however, does not detail its specifics or indicate whether the INS, as an independent agency, would be completely disconnected from the DOL and the State Department. Furthermore, as with the INS proposed reorganization, this plan does not address the overlap of functions at the border.¹⁶⁹ The INS would still have a vast number of resources competing with Customs to do the same job.

Finally, making the INS an independent agency would present problems in itself. For example, the INS would have to divert already overloaded and unorganized resources to handle the labor determinations currently done by the DOL. Currently, the INS is horribly mismanaged.¹⁷⁰ The INS must remedy this problem before it takes on any further responsibilities.

C. *Proposal for Two Agencies*

The proposal of making the INS into two agencies, one for enforcement and one for service, would solve the service versus enforcement dilemma.¹⁷¹ In addition, it would eliminate the overlap between the INS and the State Department, and between the Border Patrol and the Customs Service.¹⁷² Placing the enforcement arm of the INS under the Customs Service also would improve the efficiency of border enforcement and decrease cost to the government.¹⁷³

An immigration office located in the State Department, as opposed to processing by consular officers, would eliminate the inconsistency between INS and State Department visa adjudications. The immigration service would be able to control the immigration process in its entirety. Under this plan, however, the DOL appears to still be involved with the immigration process. The plan does not provide for any improvement in labor certification processes. Also, it does not designate any kind of management scheme for the immigration service. Nonetheless, absent these problems, the plan seems fairly sound.

168. *See id.* at 1288.

169. *See generally id.* at 1281.

170. Sutherland, *supra* note 30, at 109.

171. *Id.* at 133-37. Such a proposal has been endorsed by Sen. Spencer Abraham (R-Mich.): "We should consider splitting the INS up into one enforcement agency and one legal immigration agency to increase the efficiency of both." William Branigin, *Bipartisan Commission to Recommend End of INS, Dispersal of Its Functions*, WASH. POST, Aug. 6, 1997, at A4 (quoting Spencer Abraham).

172. *See* Sutherland, *supra* note 30 and accompanying text.

173. *Id.* at 133-34.

D. *The CIR Proposal*

The CIR proposal to dismantle the INS seems like an attempt to flee one sinking boat for several others. Essentially, Congress blames the INS for all immigration problems without considering any external factors.¹⁷⁴ The CIR proposes to place all immigration functions in the State Department.¹⁷⁵ This solution ignores the fact that the State Department is basically disinterested in immigration and is at least as much a part of the problem as the INS.¹⁷⁶ Furthermore, such a change would place a heavy burden on the State Department and would pose problems in the management of immigration cases within the United States.

In addition, the CIR proposes to create a new independent agency to control the border.¹⁷⁷ This proposition is presumably in response to the service versus enforcement problem.¹⁷⁸ Nonetheless, this solution would further exacerbate the problem of duplication of efforts at the border. The government would expend a large amount of resources to create a completely new agency that would echo the Customs Service. This solution would simply rename the problem.¹⁷⁹

Finally, the CIR proposes to place all labor related immigration functions in the DOL,¹⁸⁰ a provenly ineffective and inefficient agency, at least where immigration matters are concerned.¹⁸¹ Here again, as with the State Department, the DOL causes a major portion of the labor-related immigration problems. It is in as much need for reform as the INS.

The only reasonable aspect of the CIR's proposal is the creation of the independent review agency.¹⁸² It does not seem to pose any great problems; but then the current review system does not necessarily need to be replaced. In short, the CIR plan, like so much of the legislative history of

174. McNary, *supra* note 70, at 1287.

175. *Final Report*, *supra* note 5, at 1510.

176. McNary, *supra* note 70, at 1288.

177. *Final Report*, *supra* note 5, at 1510 (Bureau for Immigration Enforcement).

178. *Id.* Cecilia Muñoz, of the National Council of La Raza, doubts whether the INS "can be a service provider and an enforcer for the same group of people. However, it's not clear that separating the functions is going to fix the fact that the service side of the INS has traditionally gotten short shrift." *Reactions Vary*, *supra* note 107, at 1214 (quoting Cecilia Muñoz). Ms. Muñoz also has expressed fear that the split may lead to more enforcement and less service. Navarette, *supra* note 5, at A14.

179. This proposal has been attacked by a number of people and agencies. Mark Krikorian of the Center for Immigrations Studies is quoted as having said, "It strikes me as something of a gimmick." *Reactions Vary*, *supra* note 107, at 1214.

180. *Id.*

181. McNary, *supra* note 70, at 1288; *see supra* note 74 and accompanying text (regarding DOL inefficiency).

182. *Final Report*, *supra* note 5, at 1510.

immigration, tries to solve the problem by reshuffling it.¹⁸³ The plan would not alleviate any of the immigration problems; only displace them. Accordingly, Congress should not implement it.¹⁸⁴

VI. RECOMMENDATION

As one might expect, the best solution is often a medley of various proposals. None of the proposed solutions solves the overall problem; although the two-agency solution comes fairly close. Nonetheless, a combination of some of those ideas could very likely remedy the problem.

First, the overlap between the INS and the State Department, as well as that between the INS and the Border Patrol, must be eliminated. In this respect, one could follow the two-agency plan. The Border Patrol should come under the management of the Customs Service. Accordingly, it would eliminate the dual effort and reduce the INS budget without significantly increasing the Customs Service's budget. It also would eliminate the competition between Customs and the Border Patrol.

Next, the INS must place offices in the various consulates around the world and eliminate the State Department's role in immigration. As such, the INS would handle the immigration process from start to finish. This action would once again eliminate dual effort while increasing the consistency of visa adjudications.

Finally, the DOL is not capable of handling immigration by itself, and the INS is not capable of making labor determinations by itself. Accordingly, the interaction between the DOL and the INS needs serious improvement. The two agencies must rework their management and clarify regulations for their staffs. In addition, the DOL must drastically reduce the time it requires for labor determinations. Although this last proposition may prove difficult, it is the key to ameliorating labor-related immigration problems.

There remains, however, one issue that none of the proposals has really addressed: the patchwork set of immigration laws that Congress continues to promulgate. Current immigration laws contain numerous inconsistencies and vagaries. The regulations are so complicated that most immigration officers do not even know what the law is. As such, Congress should essentially start over. Rather than constantly revising current law, a committee could rewrite

183. Demitrios Papademetriou, a senior associate at the Carnegie Endowment for International Peace, stated that the proposal would "send an orphan agency from one department to another." *Reactions Vary, supra* note 107, at 1214 (quoting Demitrios Papademetriou).

184. Subsequent to the completion of this Note, the Clinton Administration has chosen not to follow the CIR proposal. Eric Schmitt, *White House Will Reject Advice to Abolish Immigration Service, Officials Say*, N.Y. TIMES, Jan. 21, 1998, at A14.

the entire immigration section of the Federal Statutes. Once this was done, Congress could repeal the previous laws and enact new, consistent and clear ones. With new, clear, and coherent laws, immigration officers could easily learn the regulations without the worry that they could change the next week. Not only would this improve immigration service, it also would improve the interaction between the DOL and the INS.

VII. CONCLUSION

Congress should not dismantle the INS. The CIR recommendation is misplaced. For the first time in its history the United States should make a comprehensive effort to create an effective immigration service, rather than merely reshuffling the problems. The INS needs some reorganization, but it is not a sinking ship. Reform is feasible and desperately needed, but Congress must act accordingly and face the problem.