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THE IMMIGRATION AND NATURALIZATION SERVICE: HOW SHOULD IT BE RESTRUCTURED?

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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THE IMMIGRATION AND NATURALIZATION SERVICE: HOW SHOULD IT BE RESTRUCTURED?

THURSDAY, MAY 2, 2002

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:30 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Edward M. Kennedy presiding.

Present: Senators Kennedy, Leahy, Feinstein, Durbin, Brownback, and Grassley.

OPENING STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. We will come to order.

September 11 clearly demonstrated that our immigration system has not kept up with security challenges. Two weeks ago, the Senate took an important step in the effort to bolster national security by unanimously passing legislation to strengthen the security of our borders. Restructuring the INS will help further this effort by bringing our immigration system into the 21st century.

I thank my colleague, Senator Brownback, for his significant commitment to this issue. I thank Senator Grassley and Senator Feinstein, who are recommending that we hold this important hearing.

Senator Brownback and I have just introduced the Immigration Reform, Accountability, and Security Enhancement Act, comprehensive legislation to remedy many of the problems that currently plague the agency and provide a more effective and efficient framework to address our immigration responsibilities.

Senator Feinstein's bill addressing the plight of unaccompanied minors which we held a hearing on earlier this year is a natural complement to this legislation, and I thank her for her willingness to merge the two bills.

This bill will untangle the overlapping and often confusing organizational structure of the INS, and replace it with two clear chains of command, one for enforcement and the other for services. Both functions have long suffered under the current structure. Separating these competing responsibilities will provide the new Immigration Affairs Agency created by this bill with greater accountability, efficiency, and clarity of purpose.

On the enforcement side, it is clear that our immigration laws are being applied inconsistently. Some of the September 11 terrorists were here legally, others had overstayed their visas, and the statute of others is still unknown. Improving the structure of the agency will help ensure greater accountability and consistent and effective enforcement of our immigration laws.

Immigration services are also suffering. Massive backlogs force individuals to languish for years waiting for their naturalization and permanent resident applications to be processed. Files are lost, fingerprints go stale. Courtesy behavior is too often the exception rather than the rule. Application fees continues to increase. Yet, poor services and long delays continue as well.

As important as it is to separate these functions, adequate coordination between the two branches is also critical. This bill provides for a strong, shared, central authority over the two branches to ensure uniform immigration policy, efficient interaction between the two bureaus, and fiscal responsibility.

Commissioner Ziglar has made significant progress in addressing the agency's problems. However, I believe this legislation is needed to ensure the agency's successful operation in the future.

There is strong bipartisan agreement that the INS must be reformed, but restructuring must be done right. Successful reform must separate the enforcement and service functions, while maintaining a central authority for uniform policymaking, accountability, coordination, and fiscal responsibility. The Immigration Reform, Accountability, and Security Enhancement Act accomplishes these goals.

I look forward to the testimony of our witnesses, and I hope the Senate acts favorably on this legislation in the near future.

Senator Grassley?

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Mr. Chairman. This is a very important hearing to be held and I thank you very much for holding it.

We have, starting last November, Mr. Ashcroft and Mr. Ziglar releasing a proposal to restructure the agency. That very same day, I asked Senators Kennedy and Brownback, the leaders of this subcommittee, to bring this important issue to light by holding a hearing on the administration proposal. So obviously I thank you for what I consider the beginning of a discussion on the problems facing INS.

The American people do not need to be convinced that this agency needs to be reformed. We all heard about the student visa approval being sent to terrorists six months after the World Trade Center incident. We know that there have been failures to detect immigration benefit fraud, and we know that the agency is not abiding by the provisions of the Whistleblower Protection Act.

I understand that Commissioner Ziglar is moving ahead on his plan, and on April 17 announcing the first steps in that regard. They have more significant steps that I know they are anticipating, including creation of a field advisory board.

We are not getting answers, and straight answers, from the administration about snafus that have occurred at the INS or actions they have taken. We will be giving the agency millions of dollars this year to run more efficiently and implement changes in structure.

I think as a member of this committee, having responsibility to oversee INS management and performance, we have a responsibility to get some answers from the Commissioner, who is in control, and I am thankful for the assurance that the chairman has given me that that will happen.

I know there is a growing consensus to split INS. I agree that there are conflicts of interest. However, I think the two new bureaus need to continue to work together hand in hand in order to best serve the country. I know the Attorney General and Commissioner propose to create a information officer. What other links will be put in place to make sure that these two bureaus work cooperatively and remain unified under one director is a question that we have to ponder carefully.

We can't simply move boxes around and rename the agency and then claim it is a new and improved bureaucracy. We need to fix the systemic problems at the INS. I think that any bills mandating changes to the INS should include provisions that really make the INS accountable. We need to improve oversight that allows investigations of misconduct. We need to enhance the whistleblower protections provided to INS employees and protect them from retaliation.

We need assurances that interior enforcement issues will be addressed. Just as an example, last week 646 illegals were arrested in Nebraska because they were smuggled into States beyond the border. We need improvements in customer service, seeing that the agency is doing its best to accommodate new residents. The latest idea, thanks to Senator Hatch, creates a number of field and satellite offices.

I know that legislative action is necessary. We give the agency enough leeway to reform itself. Not much has been done, but now it is time for Congress to step in.

Thank you.

Senator KENNEDY. Thank you.

Senator Brownback, we would be glad to hear from you.

STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator BROWNBACK. Thank you, Mr. Chairman, and I thank you for holding this hearing. I want to commend, as well, Senators Grassley and Feinstein for requesting the hearing. The topic certainly is critical, and it is timely.

Mr. Chairman, the attacks of September 11 exposed the weaknesses in how we protect our borders. The terrorists exploited the shortcomings in our immigration system and the lack of communication between the respective agencies that might have detected and deterred the events of that horrible day.

At the same time, however, September 11 has also brought out the best of this great Nation. As a people and as a Government, we have united and stood firm in support of our freedom and of our

principles. Significantly, September 11 has reaffirmed our Nation's pride in its immigration roots. We have not lapsed into xenophobia, nor have we let terrorism cloud our judgment about the value of our immigrant neighbors and our visitors.

Mr. Chairman, I take great pride in the fact that the border security bill which we and Senator Kyl and Senator Feinstein put together was intelligent and balanced, and was passed unanimously in the United States Senate. We were true then both to our responsibility to protect our great Nation from those who mean us harm and to keep our country open to those who mean us well.

We need an agency that is likewise true to both of these missions, an agency that can effectively enforce the immigration laws and provide timely and competent immigration services. Sadly, the Immigration and Naturalization Service has failed to perform either mission well, and restructuring INS has long been on the legislative agenda.

While I deeply respect the hard work that Commissioner Ziglar has put into reforming that agency, the fact is that the INS requires more fixes than can be done administratively. The fundamental problems with the INS compel legislative intervention.

That is why, Mr. Chairman, I am pleased to work with you on the Immigration Reform, Accountability, and Security Enhancement Act of 2002. I am also pleased that we have been joined by our colleagues on this committee, Senators DeWine, Durbin, and Edwards. I also want to thank Senator Feinstein for allowing us to incorporate her very fine bill on juvenile detention into our restructuring package.

Finally, I would like to offer special thanks to Senator Hatch, who played a key and sometimes unheralded role in the development of the border security bill. I am glad to see he will be an integral part of the formulation of this important legislation.

Mr. Chairman, I would like to point out that, as with border security, we have a bipartisan, balanced, and intelligent bill that will deal effectively with the challenges that face our Nation. I look forward to our committee working on this critical legislation, and I look forward to the testimony of the esteemed witnesses that we will have in front of us to talk about ways they view would be best at restructuring this incredibly important agency.

I just want to note one other thing, Mr. Chairman. We are looking at both the enforcement and the services end of the Immigration Service, and I think we have got clear challenges on the enforcement end that were brought into such sharp focus when Mohammed Atta got the receipt for being able to go to school six months after the event happened. It is in the enforcement area that we have problems.

On the services area, in my State my lead case work area that I have is immigration work; it is work with the INS. That is the lead case work that I have. Something is just not quite working right here when we have that type of system. It has been that way for a number of years, so I don't blame this administration and I don't blame the last administration. But it is clearly something that needs to be fixed in both the enforcement and in the services area.

What I am hopeful that we can do is provide a balanced, thoughtful approach, and work with the administration on this to get out a bill that improves the services and the enforcement in the immigration field.

Thank you for holding the hearing.

Senator KENNEDY. Thank you very much.

Senator Feinstein, welcome, if you had a word for us.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much. It is hard to say just a word, but I will do my best.

I think, as Senator Brownback has just said, that you, Mr. Chairman, have taken the initiative in pulling together a very interesting piece of legislation that is really based on reality. I think the events of September 11 have led really to the highest level of scrutiny of the INS by Congress, by the media, and by the public. Even with this heightened awareness, the agency continues to commit grave errors in its prescribed duties.

The INS has been described as an after-thought of the Department of Justice. Over the years, it has been given further responsibilities by Congress, but with little attention toward the agency's growing staffing and budgetary needs. Each effort to legalize populations in our country over the last 20 years has resulted in an immigration case overload, and explains in part the slow application processing rate of its service functions. Today, the INS adjudication caseload is approaching 5 million cases.

The immigration laws enacted in 1996 also saddled the agency with increased enforcement demands and mandates that have had major ripple effects on the agency's overall performance. The INS' organizational structure is so decentralized, without adequate controls, with uncoordinated, overlapping programs, especially in enforcement between the regional and district offices.

But this really is nothing new. More than 10 years ago, the GAO issued an extensive report identifying severe management problems across the agency. Among other things, the GAO found that the INS lacked clear priorities, lacked management control over regional commissioners and district directors; had poor internal communications and outdated policies; did not take workload into account when allocating resources, which contributed to the high backlog of applications; had unreliable financial information, and thus inadequate budget monitoring. That could almost be today's report, if you think about it.

I think, tragically, all these symptoms for us kind of came together on September 11. Then, on March 11 of this year, as Senator Brownback has pointed out, two of the hijackers received notices that they had been approved for extension of their student visas. Now, the point here is, even after 9/11, nobody bothered to check the database that was going out to look for any names that might have a terrorist connection. That is very surprising.

On March 22, we learned that the INS had inappropriately permitted four Pakistani nationals to take shore leave without visas, after a ship docked in Norfolk, Virginia. These are the only mis-

takes that have been uncovered, and it is the latest illustration of an agency without adequate control or accountability.

With an immigration landscape that is growing in complexity and in size, the INS, as it is currently structured, doesn't have the capacity to effectively manage the critical aspects of its post–September 11 mission. So I am very pleased to join with the chairman and the ranking member as a cosponsor of their bill, the Immigration Reform, Accountability, and Security Enhancement Act of 2002.

I think this legislation is really well-thought-out. It abolishes the INS. It creates a new Immigration Affairs Agency with two separate bureaus, one for enforcement, one for service, each with concrete and focused responsibility. I think more importantly, it makes immigration a higher priority within the Justice Department by elevating the new Immigration Affairs Agency into a higher position within the Department. It streamlines the agency's growing and often competing missions.

Customs is a similar thing; it has a mixed mission—speed trade, and yet prevent contraband from entering the country. They are counterintuitive. You can't really do them both at the same time, and that is also a problem in this agency.

So I think your legislation—our legislation, if you will—would enforce accountability. It would enable better communication and coordination. But I want to just say one thing. I have become convinced over my long tenure that civil service bureaucracies have a very difficult time adjusting to modern management techniques, and it is not their fault. It is that nobody is really trained as you go along. Things are done often on a seniority basis.

I feel very strongly that this legislation has to permit the hiring and firing. You have got to have managers who can manage, who can hold people accountable, and if they don't, replace them with someone who can, because the mission is too important of this agency.

So with that, I am very happy to join you as a cosponsor.

Senator KENNEDY. Thank you very much.

It is an honor to welcome my old friend and colleague, Ron Mazzoli, back to Congress. He served in the U.S. House of Representatives from 1971 to 1995, 24 years, where he chaired the Subcommittee on Immigration, Refugees, and International Law. Before entering Congress, he served in the Kentucky State Senate. He served two years of active duty with the U.S. Army.

He is currently Senior Distinguished Fellow in Law and Public Policy at the University of Louisville, in Kentucky, and this semester was a visiting fellow at the Harvard Institute of Politics, where I had the pleasure of seeing him recently and where he taught immigration law.

I thank him for making the trip to Washington, particularly during an important week in Kentucky. We see some of our witnesses know what that means. It is Derby time and he has given up the opportunity to be down there, but he has to be out of here at 3:15.

We welcome you, Ron. He is an expert on immigration and immigration law, and was responsible for many of the important things that we did in immigration. He continues to teach it.

We are joined by the chairman of our committee.

Chairman LEAHY. And one who joins in the praise of former Congressman Mazzoli, who is a dear friend of all of ours on both sides of the aisle.

STATEMENT OF ROMANO L. MAZZOLI, FORMER U.S. REPRESENTATIVE, AND FELLOW IN LAW AND PUBLIC POLICY, UNIVERSITY OF LOUISVILLE, LOUISVILLE, KENTUCKY

Mr. MAZZOLI. Well, it is a great pleasure, Mr. Chairman and members of your distinguished committee. Thank you very much for the invitation. It is great to join friends. I served with at least two members in the House and, of course, worked with all the Senators in my 24 years here, in addition to which I continue to be a C–SPAN watcher. So I watch all of you quite frequently on that means.

It was a pleasure to join you, Senator Kennedy, at the Institute of Politics just very recently, Monday of last week. As I mentioned to you then, your brother, John, who is, of course, the namesake of the school, was a very great inspiration to me in the early 1960s to encourage me to go into public office. What I did, I hope, at the Kennedy School this semester was to encourage a new generation, as his generation encouraged me.

I would like to also salute each one of you on the public service aspect of what you are doing. I know enough about immigration and know it is a very nettlesome and difficult subject. People are conflicted about it, and it is therefore quite a service that you are rendering to the people.

I remember Father Ted Hesburgh, Mr. Chairman, would say often that this subject needed people who are willing to take the slings and arrows in order to achieve the greater good. That is exactly what you are doing and I commend you for that.

Mr. Chairman, today I am not going to deign to be an expert, which I am not, on management and exactly how the organization ought to be structured and the details of it. You have many of those experts coming to talk with you, but let me just address in a general way what I hope at the end of the day we have in this new immigration setting and what capability will be.

I mentioned earlier about this conflicted message and ambivalence. It has marked our policy for many years, and with all respect to the immigration people, it is very hard for them here in Washington and for people in the field to do their job when they are not really sure what job they are supposed to do.

So one of the things that we will do in the next few months or few weeks is to restructure, but that alone is not going to solve all the problems. That just begins the effort, and at some point you members of the Senate and the people of the United States will engage in a national discussion or a national debate about what immigration policy should be. Then, therefore, it seems to me that some flexibility ought to be left in whatever plan you come up with so that the new director, secretary, associate attorney general, will have that opportunity to lead the debate, to be part of it, and also to remain flexible to carry that new mandate out.

I believe, Mr. Chairman, that the House bill was a very worthy effort, and it is certainly a step in the right direction. But if I have a preference and would state it today, it would be on behalf of the

bill that you and Senator Brownback and Senator Feinstein and others on the committee have introduced.

It gives the director more authority, more visibility. It gives him or her a greater degree of budget authority, which is so important in Washington parlance. It gives that man or woman a bully pulpit in order to attempt to lead this important debate which is pending and looming.

I have worked with many directors of the Immigration Service over the years, dedicated men and women. But once again, it is hard for them to do their work unless they have a clear-cut set of authorities to deal with, and then also to have a clear mission.

Clearly, separation of the service from the enforcement sector will be done. That is a foregone conclusion, and devolution of authority to the people who will lead these two branches is also a foregone conclusion. But separating the functions alone won't do it, unless those two separated functions can work together, coordinate what they are doing, and have an orchestrated effort to achieve the overall mission and goals. So definitely separation, but some form of coordination has to remain.

Certainly, the authority ought to be in the leaders of the two separate branches, but not such plenary authority that those leaders would be able to somehow muddle or countermand the overall mission as established by the leader.

The 1998 immigration policy program headed by Dr. Papademetriou did a program called "Reorganizing the Immigration Function." In 1998, 4 years ago, 5 areas were identified that needed attention in the INS—lack of policy coordination, inadequate customer service, muddled priorities, mission overload, and lack of accountability—all of which were mentioned in the preliminary statements today. So that is a very pertinent study and members of the staff ought to perhaps, if they have not already, take a look at that. It might be helpful in looking forward.

Particularly pertinent is the policy coherence, or lack thereof, because once again, until this ambivalence is resolved, we are not going to be able to know exactly what we are doing. Reorganization alone can't do it, but I think it is a step in the right direction.

Mr. Chairman, if I might end up on this point, I am sure you and your colleagues, Mr. Chairman, will keep foremost in mind that the exercise here is not some Rube Goldberg-ish idea of moving the boxes and connecting the dots. It is an exercise in developing a Federal agency equipped to deal effectively and efficiently in the 21st century with immigration matters which affect people, not numbers, not statistics, not year-end reports, but men and women and children who often encounter problems in coming to America and living in America and raising their families in America and living out the American dream, as my father who came to this country from Italy did many years ago.

So, Mr. Chairman, whatever the Congress and the administration do will have desperate importance to these people, simple people, hard-working people, people with a dream, people once again like my father, people like George Atia, the cab driver that we sort of fell into in Cambridge, and James Wong, who runs the laundry in Cambridge that we became friends with, simple people, and also people, Mr. Chairman, exactly like those 300 people from 60 na-

tions of the world who gathered in Faneuil Hall on March 28, just a few days ago, to be sworn in as newly-minted U.S. citizens, and courtesy of Judge Neumann of Springfield, were led in their first Pledge of Allegiance to the Flag of the United States by our granddaughters, 9-year-old and 7-year-old Katie and Courtney Doyle of Louisville, Kentucky.

I am sure, Mr. Chairman, that this new group of immigrants will contribute, achieve, and overcome, as earlier generations have. How can I be sure, Mr. Chairman? Because I saw it in their eyes and I heard it in their voices. Mr. Chairman, I commend you and your colleagues to your task of reorganizing the Immigration Service, always bearing in mind the people for whom we undertake this task.

Mr. Chairman, thank you very much.

[The prepared statement of Mr. Mazzoli follows.]

STATEMENT OF HON. ROMANO L. MAZZOLI, FORMER U.S. REPRESENTATIVE FROM THE STATE OF LOUISVILLE, KENTUCKY

Thank you, Senator Kennedy and Senator Brownback for this invitation. It allows me to return to Capitol Hill, where I spent 24 happy years in the Congress—serving, I should add, with many members of this panel while they were Members of the House and with scores of other Senators who started their careers in the "Peoples' House" before moving to the "Other Body" as House Members term the U.S. Senate. It is always a great pleasure and even a thrill to return to the historic and hallowed buildings of Capitol Hill.

I must confess that my years on Capitol Hill observing and engaging in Floor and Committee proceedings have left their indelible mark. Seven years after retiring from the House to return home to teach at the University of Louisville, I remain a "C–SPAN junkie"—needing a daily ration of Congressional fare to stay healthy and content. So, though I have been gone a long time, I have stayed in close touch with my former colleagues and their legislative interests—specially including today's subject: immigration policy and procedure.

Before getting to my brief observations about the legislative effort to restructure the U.S. Immigration and Naturalization Service, I must mention having been with Senator Kennedy Monday of last week when he and the members of the Senior Advisory Committee—the Board—of the Institute of Politics at Harvard University's John F. Kennedy School of Government met to evaluate the Institute's many programs and to receive reports from the Fellows of the Institute.

It was my distinct pleasure and honor to have been a Fellow for the Spring Semester and to have led a Study Group of Harvard College students in a discussion of immigration. My students were talented and intelligent and personable, and they made my stay at Harvard enriching and memorable.

As I mentioned to Senator Kennedy at the conference, his brother became president a year after my wife and I were married, and we were impressed greatly by this near-contemporary who was our new, young leader. We were inspired—as were so many in my generation—to think of public service as a noble calling and a high pursuit. I entered public life in 1967 in part because of John Kennedy and his example, and I found it fitting and appropriate that, many years later, I would serve in the school named in his honor. As your brother inspired my generation, Senator Kennedy, I strove as a Fellow to pass along his inspiration to a new generation of future leaders.

Lastly, I salute all of you on serving your country and your constituencies by grappling with the vexing and nettlesome issues surrounding immigration. People ask me today, twenty years after I took up immigration issues in the House of Representatives, why I got involved. I reply: not just because my own father was an immigrant to the U.S. from Italy though that was a reason and not just because it gave me a chance to work with some of the revered figures in the field such as Senator Al Simpson and Representatives Peter Rodino and Hamilton Fish and staff leaders such as Jerry Tinker and Dick Day, though this is a reason, but mainly, I reply, because of Reverend Theodore M. Hesburgh, CSC, then President of the University of Notre Dame, my alma mater, who served in 1981 as Chair of President Jimmy Carter's panel on immigration reform and who judged the issue to be a preeminent, overriding one which needed legislative leaders poised to accept the

"slings and arrows" in order to achieve the greater good. I hope I acquitted Father Ted's judgment, by my work in the legislative vineyards, and I am sure each of you is acquitting it today.

Let me begin today by stating that I will not recommend a detailed, specific plan for INS reorganization. I am not a management expert nor am I totally familiar with the nuances and subtleties of the several plans to remodel the INS which are before the panel and the Congress. But, I am sure in them—augmented by the several proposals offered by immigration advocacy and policy groups including that of Dr. Papademetriou's Migration Policy Institute—are all the ingredients necessary to craft a final workable plan.

My role today, as I see it, is to opine on what, at the end of the day, the restructured immigration entity should be capable of doing well and efficiently.

I start my remarks as I will end them, by paraphrasing my all time favorite government quote—except for Tip O'Neill's "all politics is local" "If it ain't broke don't fix it." Regarding the INS: It is broke. So, fix it. But, don't break it all over again in fixing it." In other words, the INS needs repair and redirection and restructure in the worst way, but do not repair, redirect and restructure it "in the worst way." Just because the INS has bungled its job and because it frustrates us by its failures and ineptitude, Congress should not make changes just to make changes or just to make a point. The changes need to be measured against the immigration entity's roles and functions and against its missions and goals. Form follows function in all things including governmental reorganization.

The House bill strikes me as a step in the right direction and a good faith effort to deliver to the nation an immigration agency equipped for the challenges of the 21st Century. But, I believe the bill drafted by the Chair and Ranking Member of this panel has advantages over the House-passed measure, and the Conference Report sent to the President later this session should reflect its basic provisions.

The role, responsibility and authority outlined in the Senate bill for the new Director of the Immigration Affairs Agency would seem to give that individual greater opportunity and ability to develop, implement and finance immigration policy than the House bill's counterpart Associate Attorney General for Immigration Affairs. We have had devoted and dedicated INS Commissioners over the years, but they have lacked the "clout" to get things done. Both bills provide clout, but the Senate bill delivers more.

While a separation of the INS service function from the enforcement function is a foregone conclusion—and a desirable one—and while allowing the head of each function to exercise authority and make decisions is important, these decisions must be coordinated between the two branches and with the agency head and must be compatible with the immigration entity's overall mission. In other words, the new immigration system needs separation between functions but not such separation that a coordinated mission is impossible. And, the leaders of the branches need more authority, but not so much that they undercut, conflict with or muddle the immigration entity's policies.

The key to success in any mission, public or private, is for the leader to have the ability to marshal human and financial resources for the tasks at hand. The final INS reorganization plan must guarantee the Director, Associate Attorney General, or, Secretary such budgetary and personnel ("hire and fire") authority as today can be allocated to a government official. Having such authority—which seems to be more present in the pending Senate bill than in the House-passed measure—gives the holder command and control as well as access to the "bully pulpit" and with it the chance to lead national debate on immigration issues and to help form national immigration policy.

Mr. Chairman, I recommend that Members and staff refer to the 1998 study done by the then-Migration Policy Program (today, the Migration Policy Institute), entitled "Reorganizing the Immigration Function." It summarizes the areas of need calling for INS reorganization to be:

- Lack of Policy Coherence
- Inadequate Attention to Customer Service
- Unequal Priority and Attention to Service and
- Mission Overload
- Lack of Accountability

I suggest, Mr. Chairman, that these remain the issues which any reorganization plan must address and ones which I am sure this committee will address. I specially call to attention to the policy coherence element. Ambivalence marks today, as it has for decades, our national immigration policy. This ambivalence—this conflictedness between open borders and closed borders, between more and fewer, between evenhandedness in selection and a point system to reward skills—has ham-

strung the INS and the other agencies of government in doing their jobs well. They often do not know what their superiors and the people of America through the Congress want them to do.

Mr. Chairman, we have to take up this debate on what our immigration policy should be sooner rather than later. Reorganization alone cannot overcome this ambivalence and uncertainty. So, leave flexibility in your plan so the new immigration entity and its leaders can adjust the form to fit any new function mandated.

Attached to my statement, Mr. Chairman, is material I asked Mr. Dennis Clare to prepare. He is an attorney in Louisville specializing in immigration law—and a friend with whom I occasionally practice a case. Since, in the final analysis, reorganizing the INS is meant to produce an agency which can handle better the immigration caseload and since this caseload is actually people not numbers, and since attorneys are those who represent these people, Mr. Clare's thoughts on how the ultimate system should work—from the people standpoint—could be helpful to the Committee.

Finally, Mr. Chairman, I am sure you and your colleagues will keep foremost in mind that the exercise here is not some Rube Goldberg-ish effort to move the boxes around and to connect the dots. It is an exercise in developing a federal agency equipped to handle effectively and efficiently immigration-related matters which affect people—not machines, not numbers on a page, not statistics in a year-end report—but men, women and children who often encounter these problems in coming to America, in working here, in raising families here, in writing new chapters of the American Dream here.

So, whatever the Congress and the Administration do will have desperate importance to people—simple people, hard working people, people with a dream, people like my late father, Romano Mazzoli, and people, Mr. Chairman, such as those 300 persons from sixty lands of the world who gathered in Faneuil Hall March 28 to be sworn-in as newly minted U.S. Citizens and who, courtesy of Magistrate-Judge Neumann, were led in their first Pledge of Allegiance to the Flag of the United States of America by our 9- and 7-year-old granddaughters, Katie and Courtney Doyle.

I am sure this new group of immigrants will contribute, achieve and overcome as earlier generations have. How can I be so sure? Because I saw it in their eyes. Because I heard it in their voices.

Mr. Chairman, I commend you and your colleagues to your task of reorganizing the Immigration Service while always bearing in mind for whom it is we are undertaking this task.

Senator KENNEDY. Thank you very much. Well, that is very compelling testimony and we thank you. You have obviously lived this issue and feel deeply about the different components.

There have been a number of suggestions, as you referenced in your testimony, about the law enforcement aspects, and there have been some who have said we ought to coordinate Customs, Border Patrol, and INS, and everything ought to be coordinated in one place, and then the services in the other.

You talk about the importance of having a coordination of the services and the law enforcement, and you also emphasized the importance of a significant role for the head of the INS, line responsibility, and that that be an individual who is held accountable, but also has the capability to interpret the laws and be able to lead the country on these issues.

Why is it so important that the enforcement and service components be at least coordinated? No one is questioning the importance of having good institutions in both of these areas, but I am interested in why it is important from your point of view.

How do we answer people who say what we really need is let's get all the border and security issues sort of coordinated and then we will worry about the service aspects over here, and if they talk to each other, good? Why do you think in terms of immigration policy it is important to coordinate?

Mr. MAZZOLI. Mr. Chairman, I served, as you mentioned earlier, some 12 years as Chair on the House side of the Immigration Subcommittee and I saw enough to prove to me that while we need to have separation and there should have been separation maybe years ago, the reality is that we need to have these two sides being able to work together.

I think if you lumped all of the enforcement on one side and put a firewall of some sort between them and gave them a mission that was maybe different than the overall mission of the Immigration Service in coordination with the service side, then I think you have missed it.

One of the things that I am concerned about, and I am sure it will be talked about often in the next several days and few weeks, is the fact that there is some thought about putting everything, Customs and all sorts of aspects of this, into one overall homeland security thing. While that may make some sense in a way, it obviously concerns me in that there would not be this ability for the two sides to work together toward a common mission.

I think that would be the idea. There has to be a common mission, and we, of course, the people of the country, have to settle what that mission is through the members of Congress. But on the other hand, once that mission is settled, I think unless you have the ability to work together and function together, with certain separation, you might not be able to achieve that mission.

Senator KENNEDY. Senator Brownback?

Senator BROWNBACK. You chaired the subcommittee for a number of years. Did you take this topic up in legislation? You mentioned the earlier working group that brought this up. If so, what walls did you hit at that point in time?

Mr. MAZZOLI. I had left Congress by 1998, when this report was filed, but we had talked about it often, a reorganization. But I think what happens is you have inertia, you have this ambivalence again in the mission, and all of that seems to defeat any effort to reorganize within the agency. So we took up measures that would have made these profound changes and the measures were never really adopted.

Senator BROWNBACK. Measures similar to what you are seeing in the bill that we have put forward here?

Mr. MAZZOLI. Yes, exactly. This always appeared to me to be the way to go, the way you and the Chairman have introduced, would be to have separation of function, to have some authority at the head of these separated functions, have those individuals responsible to one who himself or herself has clout.

One of the concerns I have about the House bill—and others might testify more knowledgeably than myself to that bill, but it concerns me that a third person in the rank of attorney general in the Justice Department may not have that kind of clout or visibility or power or authority or sway that I think that individual has to have to do two things.

One is to run the agency, whatever the agency looks like when you hit the conference report, but also to keep in mind that that function is going to be changing, because this debate goes on. In Kansas, in the Courier–Journal, the lead story of the particular day was the fact that the House passed the reorganization bill for

INS. This is not Miami, this is not L.A., this is not Chicago or New York or Boston. This is Louisville, Kentucky, which suggests, as in Kansas, that this is becoming an issue in the heartland. This is an issue all over.

So the people of America will be involved in establishing what the mission of this new agency will be, and so the director needs to have authority and needs to have an ability to convince people in Government, as well as to carry the discussion in a nationwide setting, as to what exactly our immigration policy will be. Is it open borders, closed borders, more people, fewer people, trained people, untrained people? Until that message is clear, it is pretty hard for the INS even today and in the future to follow through.

Senator BROWNBACK. I agree with you on that, obviously. In putting forward the bill, I think the importance of with what immigration is and what border issues are and the significance of those, you need to get somebody of a stature that can be able to voice a position, and that is what we are trying to create, this position that is along the lines similar to the head of the FBI. We have that forward as well.

Mr. MAZZOLI. If I might mention something Senator Feinstein said that I think is on target, it is in my prepared statement but not in my opening remarks, and that is I think some sort of hire/fire authority—whatever you can give in this day and age of organized Government, that sort of hire/fire authority must be given to this individual because that individual will simply be hampered, hamstrung, and completely unable to perform the full function.

Unless you can get people in there and move them around, not capriciously and not without attention to their human rights and civil rights——

Senator BROWNBACK. Due process.

Mr. MAZZOLI. I think, Senator Brownback, very much that there ought to be some real new approach that you might take in this final effort to give that individual more control than maybe his or her counterparts have in Government today.

Senator BROWNBACK. Thank you, Mr. Chairman.

Senator KENNEDY. Senator Leahy, our chairman.

Chairman LEAHY. Thank you, Mr. Chairman. I am glad you and Senator Brownback are having this hearing. Of course, it is great to see our friend, Congressman Mazzoli, back here. The chairman and I joke periodically about my mixed heritage. Your comment about your parents raising their hand and taking the oath—I think of my mother's family coming here from Italy, how they must feel, or my wife's family coming here from Canada.

We talk about the INS. There are a lot of great employees there, as we know, whom we have to use to get a handle on this problem, and there are problems. I know that the Eastern Service Center in St. Albans, Vermont, has done a great job providing immigration services and trying to weed out those who fraudulently seek it. But their workload keeps increasing, so much so that I think they took the cafeteria and turned that into additional work space. They have had a number of people working out of their homes to do it.

The Law Enforcement Support Center in South Burlington, Vermont, provides criminal background information about aliens to all of our law enforcement agencies. It is on duty 7 days a week,

24 hours a day. Interestingly enough, one day when we had about a 14-inch snowfall overnight and people wondered if it would still be open, they said, of course, it was. I mean, it was 14 inches, not 40 inches. That is no real problem in Vermont. We have the Swanton Border Patrol Sector, and so on.

What I worry about is I don't want to see a reorganization for the sake of having a reorganization. I know partly out of frustration, the House bill passed heavily. But I think, for example, asylum seeks need more protection than they have, and I was glad to see that Senator Kennedy and Senator Brownback introduced new legislation today which I think covers some of the problems.

You made reference to this in your testimony now, and in your written testimony more about it, that sometimes INS employees get so many conflicting directives, both from their superiors and from Congress, that they are not sure just what it is they are supposed to do.

How do we get a hold of that?

Mr. MAZZOLI. Senator Leahy, first of all, I thank you for bringing up the fact that we partly share a common heritage. I am happy to say that we even actually are distantly related. I always at least like to say that.

Chairman LEAHY. I would be proud of it.

Mr. MAZZOLI. So would I.

How do we get our hands around it? I think it is going to be something that the current members of Congress and maybe people like me who were here and who have a background in the field will have to become involved in. We want to certainly avoid the term that Senator Brownback used, "xenophobia." We don't want to be xenophobes. On the other hand, sometimes Al Simpson was fond of saying that you can't just talk about this issue quoting Emma Lazarus and the "New Colossus" all the time, either way.

So I think that, first of all, you have to have sensible people, thoughtful people who will engage themselves in a long-term effort to decide what is going to be in the national interest, what is going to be the way that we can remain a strong, vibrant Nation economically, socially, morally, and politically.

It is not easy because it deal with numbers, it deals with family relationships, it deals with job skills, it deals with language skills, it deals with demographics. But in the last analysis, I have the confidence, having worked with this for a long time and having worked with people like Peter Rodino and Ham Fish and people like Jerry Tinker and others who led us in the early 1980s—I have a belief we have people in this Nation, Senator, who can be involved in that and would happily help to move this debate forward.

I think the only way we can help INS help itself is certainly by reorganizing it, giving it modern tools, whatever the agency is going to be named. But in the last analysis, we have to be sure to give it a clear-cut mission and mandate and a series of definable goals and a timetable to reach them. That is not easy, but I think it is something that this individual who will head up this agency can at least begin doing.

Chairman LEAHY. They have law enforcement and also immigration services, and you can't rob one to support the other. You have got to have adequate resources in both.

Mr. MAZZOLI. That is exactly right, and you brought up something that is important and I would like to extend it just a little bit further, and that is the fact that processing the paper is not what you would call in a career sense sexy work. Enforcement is, and I think somehow we have to make the processing of paper, the adjudication phase of it, the service to the public phase, as important, as rewarding, and as rewardable as doing something at the border.

Beyond that, I think with regard to the Consular Service, Secretary Ryan is one of my great friends. I think she is one of the great people in Government of all time, but people in the Consular Service don't always get the attention they need to get within their own cones, as they call them, for their own career advancement.

So in a parenthetical sense, anything that can be done to raise the stature and status of consular officers who are doing this work abroad—they are the first point of defense, if you will, to our homeland right there in some foreign capital. That, along with raising the stature and status of people who work in the service sector of this new agency, I think would be extremely helpful both in eliminating backlogs, but also in making sure that the funds, as you say, are adequately disbursed and allocated.

Chairman LEAHY. Thank you very much, and thank you, Mr. Chairman. Attorney General Ashcroft is downstairs. We are doing an Appropriations Committee meeting on the same thing, and I am going to go back down there.

Senator KENNEDY. Thank you very much.

Mr. MAZZOLI. Thank you. It was great to see you, Senator.

Senator KENNEDY. The good Congressman wanted to be out at 3:15, so we have 5 minutes left for Senator Feinstein and Durbin. I apologize to them, but we thank you so much for being here.

Senator FEINSTEIN. I just want to thank you for caring about this and being here today. It is very much appreciated.

I was just reading a CRS analysis of the various proposals that have been put forward, and one of the things that CRS says about creating two separate bureaus is that the service bureaus have always been essentially fee-driven, while the enforcement bureaus essentially appropriations-driven. You alluded to that.

Mr. MAZZOLI. Yes.

Senator FEINSTEIN. You really want to have equal branches here, if there is going to be a division. CRS seems to say that it could create some problems by having separation because to run the adjudication, let's say, for naturalization, you have got to do the background checks which require the Enforcement Division.

How do you see that working?

Mr. MAZZOLI. I am not sure I see it any way more vividly than the people at CRS do. It is murky. We will be feeling our way through, and I think that is why it is important to have coordination, to get back to Senator Kennedy's earlier question about putting all enforcement in one box and all service in the other box.

They work together. Whether it is a situation at the border or whether it is a situation in the interior or whether it is the processing of a piece of paper, both sides have to be able to work together and talk with one another, despite any sorts of firewalls you might build.

You shouldn't necessarily totally abandon fees. That is all part of it, and service to the public. If it is a worthy service and done timely, it is worth something, but clearly just to have it by fees alone diminishes that aspect of the work. It makes it not of the same stature, if you will, as where you get appropriations from the Appropriations Committee.

So I would think that the final outcome here will be more a look at appropriations, more a pooling of money, even though you have separated agencies. This is where the important thing that you have in your bill is, is the director has budget authority, which I don't think is in the House-passed version, or at least not to that extent, so to give that budget authority. And then the disbursal and the allocation can be more easily made between fees and appropriations so that you don't abandon either one of them.

Senator FEINSTEIN. Just quickly, another thing that I think was very disappointing to some of us was that there are 4 to 5 million biometric border-crossing cards. The border-crossing cards were actually given to people, but the readers were never put in place.

It seems to me, from a management perspective, don't distribute the cards until you have the system in place able to function so that the cards function. They don't really function in the way they are supposed to, and so I am very grateful for the comments you made with respect to management because we can reform the system and have the same problems unless we are really able to bring in modern management techniques of setting goals and holding people responsible for achieving them.

Mr. MAZZOLI. This may be something new and different for Government. You may be on the verge of doing something that hasn't been done in Government reorganization up to now. It is not going to be easy, but I think it is very important.

Senator FEINSTEIN. Thank you very much.

Senator KENNEDY. Senator Durbin?

Senator DURBIN. I don't want to hold you if you have to leave.

Mr. MAZZOLI. I do, but I would be happy to answer any questions.

Senator DURBIN. I will be very brief. Thank you for being here.

Mr. MAZZOLI. Well, thank you very much. It is always good to see you.

Senator DURBIN. Ron Mazzoli's name has been synonymous with a thoughtful approach to immigration for decades and your service to Capitol Hill, and we are glad that you are with us today.

I think one of the observations which I have made and I think you would agree with is that technology has to be a major part of improving the service at the INS. One of the most stunning things I learned as a United States Senator representing 12.5 million was that 75 percent of my case work involves one agency, the INS.

This is the only agency where I can consistently expect at least one call a month that I have to make to the commissioner to deal with a problem that I can't resolve otherwise. I can't say that for any other agency of the Federal Government.

Mr. MAZZOLI. I think if there is anything that sticks in my mind after all these years is the number of hearings we had, which are legion, on this whole issue of mechanization, of using electronic devices. Somehow, nothing ever seemed to quite get done, so what-

ever you do has got to be strongly assertive in this area of using modern-day technology.

It seems to me that there is no reason why we are in this predicament that we are in today, and a good leader with the proper management tools would be able to move the agency forward.

Senator DURBIN. I really dislike this stovepipe cliche, but it seems to be an apt characterization, where we don't have agencies in communication with one another. It is hard to criticize what happened on September 11 when we realize that there was literally no computer communication between the FBI and most of the other agencies. That has to change if we are going to do this in an effective manner.

The last point I will make to you is this: I hope we don't oversell what we are about to do. As important as it is and as good as it is, America is still in a struggle somewhere between love and loathing when it comes to immigration, depending on the economy, depending on terrorism.

We have to really come to grips as a Nation with where we are headed. I don't think we are looking at it honestly and realistically. In fact, I think we avert our eyes from the real problem. You didn't, and as a leader with Senator Simpson you really brought us all to the point where we started thinking about it more seriously. I thank you for joining us today.

Mr. MAZZOLI. Thank you very much, Senator. I appreciate it.

Senator KENNEDY. We kept our word. You are going to get back there. We thank you so much.

Mr. MAZZOLI. Thank you.

Senator KENNEDY. As we move along, we will consult with you because we value very much your presence and your friendship and your continuing involvement.

Mr. MAZZOLI. Thank you so much.

Senator KENNEDY. I will excuse you, and if you come right through here, we have got someone who is all set for you.

Mr. MAZZOLI. Thank you very much. I appreciate it. It is nice to be here.

Senator KENNEDY. Thank you very much for being here.

On our next panel, Paul Virtue is a partner with the law firm of Hogan and Hartson, at which he represents individual, business, and institutional clients related to immigration law and policy. He has more than 18 years of experience in immigration law, policy, and regulation. Before joining Hogan and Hartson, he served as General Counsel of the Immigration and Naturalization Service, where he served as the agency's chief legal officer.

Stephen Yale–Loehr is with the American Immigration Lawyers Association. He is the co-author of "Immigration Law and Procedure," the leading 20-volume treatise on immigration law which is considered the standard reference in this field of law. He also teaches at Cornell Law School. Previously, he worked in immigration policy at the Carnegie Endowment for International Peace. He is co-editor and executive editor of two leading immigration law newsletters.

They are both highly respected in their fields and I am pleased they are here with us today to share their insights on this important subject. I thank the witnesses very much for being here.

Mr. Virtue, do you want to start?

STATEMENT OF PAUL W. VIRTUE, FORMER GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C.

Mr. VIRTUE. Mr. Chairman, distinguished members of the committee, I am honored to be here today to offer my thoughts on the efforts to improve the structure by which our immigration and nationality laws are administered.

As I mentioned in my written testimony, after having left the Immigration Service my practice is limited to immigration and nationality law. The majority of that involves filing petitions, filing applications for benefits before the Immigration and Naturalization Service, as well as the Department of Labor and the Department of State.

But also, for our firm at least, we represent a significant number of people on a pro bono basis who are in detention facilities who are appearing before immigration judges in immigration court. Nobody really practices in this area for very long without having spent a significant amount of time on the telephone with enforcement personnel at the ports of entry, usually in the begging in the position. So we have a great deal of exposure to both the adjudications responsibilities of the Immigration Service as well as the enforcement areas.

My written testimony talks about the mission of the agency and the numbers and just the daunting task that the agency faces. So I won't repeat that here, but it is there and I think the committee well recognizes it.

In my view—and these are my thoughts; they don't represent the views of the firm—any restructuring plan has to have certain components in order for it to accomplish the goal. The goal that I think a restructuring plan should have is an organization, as I mentioned, that will operate with a clearly defined mission, and that mission developed with its customers' needs in mind, administered in a fair, prompt—I can't oversize prompt—and consistent manner, and just in terms of those components, a clear line of authority and accountability.

As you all know, the INS has more than doubled in size during the last 10 years, to about 37,000 employees, and the agency may add as many as 10,000 more employees over the next couple of years. The goals of consistency and accountability would be impossible to achieve in such a large and diverse organization without a clear understanding from the head of the agency down to the clerk in the mail room of who is in charge and who has responsibility for what issues—very important and, in my opinion, critical to the running of the agency.

I have talked in my written testimony about our experience in 1990 with an organizational structure that had all field offices reporting directly to one person in headquarters. The scope of responsibility was dramatic and, in fact, it simply didn't work. Calls to headquarters went unanswered and it was difficult to have clear direction in policy under that structure. It was abandoned, but it does serve as an example of how a change in the management

structure of the agency can have substantial consequences for lines of authority and the establishment and implementation of policy.

The proposed division of the INS into service and enforcement bureaus will have a substantial effect on the management structure of the agency at the field offices, those people who are closest to the agency's customers. I believe that that is consistent with the committee's goals and with the goals of focusing attention and resources on the business of enforcing and administering the country's immigration laws.

A second component has to be the coordination of policy guidance, as Congressman Mazzoli mentioned, between service and enforcement components. For consistent administration of immigration policy, both functions should be retained in a single agency under the leadership of a strong director with the all-important budget authority and accountability to both the Attorney General and the oversight committees for the responsibility of establishment and implementation of that immigration policy.

One example that I gave in the written testimony was of a regulation that was recently proposed to change the structure by which people who enter the U.S. as visitors are granted periods of stay here. The standard period of stay is a 6-month stay under the current regulations. The proposal is to eliminate that and make it more consistent with the stated purposes the individual has for entering the United States.

I have pointed out here how that can affect both the inspection process which is under the INS restructuring proposal and the enforcement function, and I think most people have accepted that. Yet, the same policy will be applied by INS examiners at the field level. So there has to be coordination so that the implementation of such a policy can be consistent at the field level.

The other aspect of that, of course, is just to get to the point where the Immigration Service proposes such a change in policy requires at the headquarters level coordination between services and enforcement even to publish for a regulation for implementation.

Also, in terms of national policy we need to be able to speak with one voice. We need to have an agency that speaks with one voice with respect to immigration policy. For example, in the aftermath of the September 11 events, we saw a number of examples of anti-immigrant sentiment on our campuses, in the workplace, on numerous occasions.

It was important during that time and in that atmosphere that the INS and the Justice Department send a strong enforcement message—everyone accepts that—but at the same time continuing to facilitate entry and provide services for millions of law-abiding foreign nationals who are very important to our Nation. That, in my view, can only be done where you have strong leadership within one agency.

The third component is structural flexibility to meet unanticipated or unforeseeable challenges. The House bill that was passed, in my view, goes too far in terms of dictating the structure below the headquarters level. On a quick read, the bill introduced by the chairman and Senator Brownback would seem to strike the proper balance of congressional direction and organizational flexibility.

The fourth aspect has to be an integrated and shared information system, and few aspects of the INS really reflect its problems like the inadequacy of the agency's information systems. The INS is embarked on a modernization program and it has to receive the resources and the flexibility to build that modern system.

Finally, adequate funding and staffing levels for both bureaus. As mentioned earlier, the INS has doubled in size over the last 10 years. The agency from all sources is in excess of $6 billion. When compared to other Federal agencies the INS growth has been dramatic, but we also need to compare that to the increase in workload of the INS. When you compare that, I think we will see that the agency has had a difficult time simply keeping up, and so much attention has to be paid to providing the resources to both of these bureaus in order to do the job.

For example, on the enforcement side there are still only about 2,000 investigators with interior enforcement responsibilities for the entire country. I have given an example in my written testimony about premium processing just as an example of how focusing resources on a particular issue can pay benefits. The program is working very well. I am not suggesting that it be applied across the board, but it is an indication of how resources can pay benefits.

Again, I have outlined a number of principles in the written testimony. I appreciate the opportunity to be here and will be happy to answer any of the committee members' questions.

[The prepared statement of Mr. Virtue follows:]

STATEMENT OF PAUL VIRTUE, FORMER INS GENERAL COUNSEL, PARTNER, HOGAN & HARTSON, LLP, WASHINGTON, D.C.

Mr. Chairman and distinguished Members of the Subcommittee, I am honored to be here today to offer my thoughts on efforts to improve the structure by which our immigration and nationality laws are administered. Currently, I am a partner with the firm of Hogan & Hartson, LLP here in Washington and my practice is limited to representing clients in immigration and nationality matters. Prior to returning to the private practice of law three years ago, I served as the General Counsel of the Immigration and Naturalization Service, an agency in which I held several legal and policy making positions during my sixteen-year career. My testimony today represents my own thoughts and observations and does not necessarily represent the views of my firm.

Immigration policy is among the most sensitive, emotional, and potentially divisive issues the federal government is charged with administering. The numbers of people involved are staggering. In fiscal year 2000, some 900,000 permanent residents were naturalized. Nearly 850,000 people immigrate to this country each year. Another quarter of a billion foreign nationals visit the United States annually. Some five million or so undocumented aliens call the United States their home. Our agricultural, construction, manufacturing and service industries depend on foreign labor, documented and undocumented alike. During fiscal year 2000, over 71,000 criminal aliens were removed from the United States. Fifteen of the nineteen foreign nationals directly involved in the devastating terrorist attacks of September 11, 2001, were believed to have been inspected and admitted to the United States as visitors or students by the INS.

The federal agency with primary responsibility for these and a host of related issues, the INS, has not undergone a fundamental change in its structure for the more than fifty years since it became a part of the Department of Justice. Restructuring alone will not cure the agency's ills—many of which are not a product of the agency's structure—but restructuring alone can make matters worse. Accordingly, I recommend proceeding carefully, thoughtfully and deliberately. Any restructuring proposal should have as its goal an organization that will operate with clearly defined mission objectives developed with its customers needs in mind and administered in a fair, prompt and consistent manner.

To accomplish this goal the plan should contain certain fundamental characteristics:

- 1. Clear lines of authority and accountability;
- 2. Coordination of Policy Guidance between Service and Enforcement Components;
- 3. Structural flexibility to meet unanticipated or unforeseeable challenges;
- 4. An integrated and shared information system;
- 5. Adequate funding and staffing levels.

I do not claim to be an organizational expert or to have the definitive answer to the structural problems of the INS, but I have had the privilege of serving in senior agency positions with responsibility for the development and implementation of policies that cross the agency's enforcement and services functions. I have also now had several years of experience representing clients before an agency widely criticized as being ill suited to its mission. It is from these perspectives that I offer my thoughts.

CLEAR LINES OF AUTHORITY AND ACCOUNTABILITY

The INS has more than doubled in size during the last ten years, to about 37,000 employees. The agency may add as many as 10,000 more employees over the next 18 months. The goals of consistency and accountability are impossible to achieve in such a large and diverse organization without a clear understanding from the head of the agency to the mailroom clerk in the Texas Service Center of who is responsible for a given program at every level. In 1990, the INS experimented with a structure that eliminated middle management (the regional offices) and flattened the reporting structure so that each District Director and Chief Patrol Agent reported to one individual at a headquarters office of Field Operations. The scope of that individual's responsibility encompassed the entire mission of the agency. The stated purpose of this approach was to remedy the perception within the administration and in Congress that the INS District Directors and Chief Patrol Agents were being left to fend for themselves by weak middle managers resulting in operational "fiefdoms" with as many as 55 different immigration policies.

In this case, however, the cure proved to be worse than the disease. Predictably, the scope of supervision of the Associate Commissioner for Field Operations was simply too great. Requests by field managers for policy guidance, resources, approval of operational plans and other information overwhelmed the headquarters office. Phone calls and written requests from the District Directors went unanswered and their subordinate program managers began to look to the individual headquarters program offices, e.g. Investigations, Detention and Deportation, Examinations, for answers to their operational and policy questions. Though they lacked supervisory authority over the field offices as well as the means to ensure accountability, the program offices tried their best to accommodate the need for information. The result was a weaker management structure lacking in accountability and administrative chaos. The experiment was ultimately abandoned in 1993, when the regional office structure was reinstated.

None of the proposed reorganization plans has suggested a return to such an unwieldy management structure, and we need not dwell on it, I simply offer it up as an example of how a well-intentioned change in management structure can make matters much worse. The proposed division of the INS into service and enforcement bureaus will have a substantial effect on the management structure of the field offices, those closest to the agency's customers. This is consistent with the noble goal of focusing attention and resources and clarifying mission goals and priorities. I believe it can be accomplished only with a clearly established chain of authority and the careful selection of capable leaders for all critical management positions.

COORDINATION OF POLICY GUIDANCE BETWEEN SERVICE AND ENFORCEMENT COMPONENTS

It is logical to propose to divide the agency's functions along service and enforcement lines. This approach is also consistent with existing internal delineations. However, it would be impossible (and unwise) to try to build a solid wall that divides the two functions. There will always remain many overlapping areas of responsibility between the service and enforcement bureaus. A recently proposed rule illustrates this point well. In response to concerns about the agency's ability to monitor and control the alien population in the United States, the INS last month proposed to change its longstanding policy of granting business visitors and tourists a standard six-month period of stay, irrespective of the purpose or nature of their visit. The regulatory six-month period will be replaced with a period of stay that is "fair and reasonable for the completion of the stated purpose of the visit." Inspectors at the ports of entry will make this determination on a case-by-case basis at

the time of admission. If it is not clear whether a shorter or longer period would be fair and reasonable under the circumstances, the alien will be admitted for 30 days. Once admitted, the visitor may apply for an extension of stay, which may be granted for a fair and reasonable period not to exceed six months. Applications for extensions of stay are adjudicated by INS Examiners.

The restructuring proposal offered by the INS would place the immigration inspectors within the enforcement bureau and, while applying the enforcement label to inspectors has been the subject of considerable discussion in the past, the current significance of their role in protecting the country against the admission of terrorists seems to have quieted the debate. INS Examiners are considered services bureau employees under any proposal. Thus we have two categories of employee employed by two separate bureaus applying the same regulation to the particular circumstances of the same individual. The need for policy coordination is readily apparent. For example, the enforcement bureau may decide that, for efficiency reasons, it will give every applicant a thirty-day stay preferring to allow the examiners look at the particulars of each case in the course of adjudicating the extension petition rather than backing up port of entry traffic by trying to apply a new set of complicated criteria. The predictable result would be a flood of extension applications being submitted to the services bureau leading to an inevitable backlog.

This is just one of thousands of examples. Many disputes may be amenable to resolution at the field office level, but for agency-wide consistency and accountability there must be provision for coordinating policymaking and implementation at the headquarters level. In addition to structural obstacles to policy coordination, the INS, unlike the State Department, lacks a repository for sub-regulatory policy memoranda and field guidance. Agency clearance of field manuals, which were intended to replace the outdated INS Operations Instructions, has been slow. In fact only one, the Detention Operations Manual, is available on the INS website. Issues such as this one should be fixed as they contribute to a public perception that the agency is unresponsive to the need for answers to policy questions.

STRUCTURAL FLEXIBILITY TO MEET UNANTICIPATED OR UNFORESEEABLE CHALLENGES

Congress should exercise restraint in the level of detail in which it directs a new structure for the administration of the immigration and nationality laws. Currently, the Immigration and Nationality Act contains no language dictating the structure of the agency save a relatively recent exercise of congressional will that directs the Attorney General to allocate to each State not fewer than 10 full-time active duty agents of the INS to carry out the functions of the Service, in order to ensure the effective enforcement of the Act. The structure of the agency is left, with the exception of a certain amount of overreaching reflected in the authorization and appropriations processes, to regulation by the Attorney General.

To the extent possible, this approach should be maintained. Detailed Congressional direction on the structure of field offices, in particular, can reduce rather than enhance the agency's ability to adapt to new challenges, including demographic changes. Personally, I believe that the services bureau field offices should be sufficiently flexible to serve the particular community they serve. In some locations, that may mean small storefront offices designed to address certain needs. In other communities, perhaps a larger full-service operation is needed. The agency has to have the freedom to make such choices, preferably taking into consideration the views of its customers.

AN INTEGRATED AND SHARED INFORMATION SYSTEM

Few aspects of the INS reflect its ills like the inadequacy of its information systems. The agency is embarking on an unprecedented effort to modernize its office equipment, install and integrate sorely needed enterprise architecture, improve data capture and sharing capacities and harness the fascinating array of technological tools needed to improve the delivery of services and enhance its law enforcement activities. The importance of a Chief Information Officer with budget authority and responsibility for technology improvement for both bureaus cannot be overstated.

ADEQUATE FUNDING AND STAFFING LEVELS

As noted earlier, the INS has doubled in size during the last ten years and is poised to grow by another 10,000 employees during the next year and a half. The agency's budget from all sources is in excess of $6 billion. When compared to other agencies during the same time period, the growth of the INS has been phenomenal. However, the INS had and still has a long way to go to catch up and when compared to its workload, the agency has struggled to keep up. The INS still has only 2,000 investigators to handle interior enforcement responsibilities for the entire

country. On the services side, applications for adjustment of status can still take two years or more to complete.

Last summer, the INS introduced its new "Premium Processing" program. For a premium of $1,000, the INS guarantees a response within fifteen calendar days on certain business related nonimmigrant visa petitions. I cite this program not to suggest it as an answer to backlogs, but it is a perfect example of what is possible with the focused application of resources. Indeed, one goal of the service bureau should be to retire the premium process in favor of a much faster standard process.

CONCLUSION

The dual missions of the INS are important and they affect millions of people. The Congress should exercise great care as it undertakes to outline structural reforms that will enable the INS or its predecessor(s) to better accomplish those missions. I have outlined my thoughts on several principals I believe to be essential to the undertaking. I would be happy to answer any questions you may have about those principals or any other related issues.

Senator KENNEDY. Thank you very much.

Mr. Yale-Loehr, thank you very much for being here.

STATEMENT OF STEPHEN YALE-LOEHR, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ITHACA, NEW YORK

Mr. YALE-LOEHR. Thanks for inviting me.

My oral remarks are going to focus on three themes: first, principles that should guide any INS restructuring effort; second, an evaluation of how well various restructuring proposals meet those principles; and, third, an admonition that restructuring is not a panacea and that more must be done to make our immigration system perform effectively. As you will hear, a lot of my testimony coincides with our prior witnesses.

First, I believe that reorganization has to look at four principles: first, appoint a high-level person with authority to be in charge. As stated before, the person has to integrate policymaking with policy implementation. Accountability and leadership has to come from the top.

Second, coordinate the enforcement and adjudication functions. As we all know, political consensus exists today to separate the INS enforcement and adjudication functions. But until this hearing, it seems to me too much attention has been paid to separation and not enough attention has been paid to coordination.

It is important because enforcement and adjudication are two sides of the same coin. Almost every immigration-related action involves both components. For example, a Border Patrol person picks up someone at the border says, I think you are illegal. The individual says, no, I am really a permanent resident, but I don't happen to have my permanent resident card on me.

What do you do? You need to coordinate the adjudication side to see whether the person really is a permanent resident before the enforcement side decides whether to kick the person out or not. That is an example of how enforcement and adjudication have to always work together, no matter what kind of reorganization you do.

The third principle is that you have to provide adequate resources for the two functions. As Representative Mazzoli mentioned already, you have to have direct funding of adjudications to supplement the user fees that are already going on there.

Fourth, as we all realize after September 11, we have to ensure that any reorganized immigration function contributes to our na-

tional security. We are all aware of that from the enforcement side of the immigration function, but we should also pay attention to the fact that adjudication also has an enforcement function, and some of that has been downplayed until this hearing.

Next, I want to analyze pending reorganization proposals. There are at least four types floating around in Washington. The administration's proposal includes a strong Commissioner, clear lines of authority, and separation, with coordination, of the agency's enforcement and adjudication functions. Many of these same concepts are in the bill that you have just introduced and which I commend. But it is unclear whether the administration wants to go forward with that proposal now that it seems to have tepidly endorsed H.R. 3231, the House bill.

Second, homeland security chief Tom Ridge has proposed consolidating some INS functions, including enforcement, inspections, and the Border Patrols, with those of the Customs Service. Members of Congress, including Senators Lieberman and Specter, have either introduced or are considering introducing measures that would create such an agency.

While enhanced coordination of border-related functions is important, inter- intra-agency coordination would be harmed by any proposal that splits off INS inspections and enforcement from the entity responsible for overseeing other aspects of our immigration system. As I mentioned before, it is essential to have one person in charge of all immigration functions to ensure consistency. A border security function that subsumes the enforcement of immigration but which would be separated from adjudications would lead to ineffective enforcement and adjudication.

Third, H.R. 3231, the House bill which was recently passed, has already been summarized here. I believe that the new associate attorney general that would be created under that bill would have insufficient authority, not enough clout, to be able to adjudicate and be able to function effectively under that bill. There is too little coordination between the two bureaus that would be set up there to make that effective, in my view.

Fourth, the Kennedy–Brownback bill. This bill, as you know, would abolish the INS and replace it with an Immigration Affairs Agency. I believe that this bill would get an A if it was in my immigration seminar at Cornell Law School. It separates and coordinates the enforcement and adjudications functions. It has clear lines of authority and includes helpful funding provisions. It is the only proposal that I have seen that meets all the criteria that I have outlined above.

Last, I want to talk about going beyond reorganization. Reorganization is just one component in making our system effective. We need to think about, number one, clearing up the backlogs before we can do any reorganization.

Number two, we have to have an effective reorganization plan, but then we have to have the funding to make it work.

Third, we have to have effective implementation of the reorganization plan, with clear management responsibility.

Fourth, I think Congress needs to weigh in and, as the other witnesses have talked about, we need to have a clear immigration mission statement. What does immigration mean to our society? Once

we get that clearly defined as a people and as Congress, we can then give that to the immigration system to make sure that it functions effectively.

It is a long road that we are going down. The immigration agency did not become ineffective overnight. Any one bill will not be able to correct all immigration ills. In my view, however, the Kennedy–Brownback proposal is the best first step on the long road that we have to take.

Thank you very much.

[The prepared statement of Mr. Yale–Loehr follows:]

STATEMENT OF STEPHEN YALE-LOEHR, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ITHACA, NEW YORK

Mr. Chairman and distinguished Members of the Subcommittee, I am Stephen Yale-Loehr. I teach immigration and refugee law at Cornell Law School in Ithaca, New York, and am co-author of Immigration Law and Procedure, a 20-volume immigration law treatise that is considered the standard reference work in this field of law. I am honored to be here today representing the American Immigration Lawyers Association (AILA). AILA is the immigration bar association of more than 7,800 attorneys who practice immigration law. Founded in 1946, the association is a nonpartisan, nonprofit organization and is an affiliated organization of the American Bar Association (ABA).

AILA members take a very broad view on immigration matters because our member attorneys represent tens of thousands of U.S. families who have applied for permanent residence for their spouses, children, and other close relatives to lawfully enter and reside in the United States. AILA members also represent thousands of U.S. businesses and industries that sponsor highly skilled foreign professionals seeking to enter the United States on a temporary basis or, having proved the unavailability of U.S. workers, on a permanent basis. Our members also represent asylum seekers, often on a pro bono basis, as well as athletes, entertainers, and international students.

Given AILA's concerns with all aspects of our immigration function, I am especially pleased to be here today to express AILA's views on how best to restructure the Immigration and Naturalization Service (INS). This is neither an academic exercise nor one with solely bureaucratic implications. Rather, reorganization has consequences for U.S. citizens, legal permanent residents, refugee and asylees, American business and our national security. What is at stake here is whether people will be able to naturalize, get their green cards, and find safe haven; whether our economy will be strengthened by needed foreign workers; and whether the INS will contribute its share to enhancing our security.

INS restructuring tops the congressional agenda for many reasons, not the least of which is that the agency has been unsuccessful in fulfilling its dual missions of enforcement and adjudications and is ill-equipped to respond appropriately to our nation's security needs post-September 11. Several bills have been introduced to reform the agency that reflect these concerns, and the INS is in the process of implementing the Bush Administration's own administrative proposal.

ESSENTIAL ASPECTS OF A SUCCESSFUL REORGANIZATION OF THE INS

As Congress and the Administration address restructuring the INS, it is important to emphasize the following points:

- Passing legislation to restructure the INS is one step in a multi-step process, the end result of which needs to be effective, efficient, and fair adjudications and enforcement. Before restructuring, the agency needs to eliminate its current huge backlogs. The INS also must implement internal management and cultural changes essential for meaningful reform.
- Congress can either make or break any restructuring plan due to its central role in creating and maintaining our federal immigration function. Congress must end its practice of sending the agency conflicting, complicated, unfunded and incomplete mandates that have severely diminished the INS's ability to fulfill its missions. Furthermore, many of these mandates stem from rapid and often contradictory changes in our immigration laws and reflect the absence of an enduring consensus on immigration issues and priorities. Congress cannot expect the INS to effectively implement policies that are contradictory and change rapidly. No reorganization can succeed

if Congress does not change its relationship with the INS. In fact, without such change, we will be right back to where we are today, no matter which reorganization plan is implemented.

• Any meaningful restructuring of the immigration function needs to include adequate funding, especially given the increased demands resulting from the September 11 attacks. Since the INS's enforcement and adjudication functions are both in the national interest, each should receive from congressional appropriations the funding needed to fulfill mandates. While the enforcement function now receives appropriated funding, the adjudications function is supported largely through user fees. The funding level achieved through these fees is inadequate and must be supplemented by direct federal appropriations. Finally, adequate funding needs to be appropriated to create reliable information systems that are regularly updated.

• While an effective, efficient and fair INS restructuring is essential, such reform will not in itself address many pressing concerns. Reforming the INS 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. Reforming the INS will not address these and other concerns, but leaving these concerns unresolved will stand in the way of a successful reorganization of the agency.

The Administration and Congress need to undertake INS reorganization in a way that takes into account, and does not disrupt, the enforcement and adjudication requirements of our post-September 11 world. In our world of security concerns, it is necessary to fully integrate our immigration functions. Accordingly, the terrorist attacks reinforce the need for someone in charge with clout who can articulate our nation's immigration policies, someone with more power than the current Commissioner. They also reinforce the fact that both adjudications and enforcement are equally in the national security interest and are most effectively implemented when they are closely coordinated and based on a common understanding of the law and policy.

• Reorganizing the INS can and should be a nonpartisan effort that brings together the best thinking from Republicans and Democrats, experts in the field, and the INS's customers.

WHY WE NEED TO RESTRUCTURE THE INS, AND WHAT DIRECTION AN EFFECTIVE RESTRUCTURING SHOULD TAKE

As the federal agency responsible for both enforcing U.S. immigration law and adjudicating applications for naturalization and family and business immigration, the INS needs to function efficiently, effectively, and fairly, and with our national security concerns in mind. The September 11 attacks underscore the fact that the agency's two functions, enforcement and adjudications, are both in the national interest and merit the attention of and support from Congress.

The INS has been severely criticized for failing to effectively, consistently, professionally, and humanely enforce immigration laws through nationally set priorities. Since September 11, many have concluded that the agency is not up to the challenge of protecting us from terrorists because of fears that we cannot control our borders and reports that some of the terrorists were in legal status, others had overstayed their visas, and the status of others is unknown because of the lack of records.

"Fortress America" is impossible to achieve and not in our national interest, but we can better equip our immigration function to help make us safer. A smart reorganization of the INS will help accomplish that goal, as will the passage of the Enhanced Border Security and Visa Entry Reform bill. That legislation will enhance our intelligence capacity and develop layers of protection so that our land borders are not our first line of defense. AILA applauds Senators Edward Kennedy (D–MA), Sam Brownback (R–KS), Jon Kyl (R–AZ), and Dianne Feinstein (D–CA) for their groundbreaking efforts on the Border Security measure, and supports its swift passage into law.

Why has the INS faltered in carrying out its missions? Both the INS and Congress are to blame. First, the agency needs to better manage its enforcement and adjudications responsibilities, which themselves need to be both better differentiated and coordinated. Second, the agency has had problems dealing with the vast and complicated changes in immigration law and the unprecedented growth in its size and responsibilities. Third, the continued absence of adequate resources for adjudications makes it difficult for the INS to fulfill its responsibilities in this area. Finally, Congress has contributed to the agency's problems because of conflicting, com-

plicated, unfunded, and incomplete mandates. As a result, people wait years to reunite with close family members and obtain U.S. citizenship, and businesses are forced to wait years to fill jobs with needed legal immigrants. Moreover, the INS has been crippled because it is granted neither the financial resources nor adequate authority (such as access to relevant databases of other federal law enforcement agencies) to carry out its functions successfully.

AILA is on record urging the creation of a new, independent cabinet-level department or agency combining all current immigration-related functions of the INS and the Departments of Justice, State, and Labor. Such an agency should separate, but coordinate, immigration services and enforcement functions. Just as we have an Environmental Protection Agency to coordinate all environmental issues, we also should have a single, cabinet level immigration agency to handle all immigration issues. If a new, independent agency is unfeasible, AILA urges the creation within the Department of Justice (DOJ) of two separate, but coordinated, entities for services and enforcement. These two bureaus should be staffed by trained individuals who can rise within the ranks of their respective bureaus based on their experiences. (Unlike current circumstances, the two bureaus would need to offer their employees similar benefit and retirement packages.) Someone in charge who reports directly to the Attorney General should oversee these bureaus. Having such a person in charge would improve accountability by fully integrating policy making with policy implementation, coordinate the efforts of the two bureaus, ensure direct access to high-level officials within the executive branch, and attract top managerial talent.

PROPOSED INS RESTRUCTURING PLANS

Several plans have been proposed to restructure the INS. These plans reflect different visions of how best to restructure the agency. Most reflect the consensus that the enforcement and adjudication functions should be separated. The plans differ, however, on whether there should be a strong central authority, what the role and responsibilities of the enforcement and adjudications divisions should be, and whether these two functions should be coordinated. Such differences are significant and can play a leading role in determining whether reorganization efforts will ultimately succeed or fail.

The Bush Administration Plan:

Bush Administration officials have emphasized the need for fundamental reform of the INS, and support separating enforcement and adjudications to address competing priorities and problematic chains of command. On November 14, 2001, the Administration announced a reorganization plan, the details of which include many provisions that were part of the bipartisan legislation introduced in 1999 by Senator Edward Kennedy (D–MA) and former Senator Spencer Abraham (R–MI). Many of these same provisions are included in the bill soon to be introduced by Senators Kennedy and Brownback. The Administration's plan includes a strong Commissioner, clear lines of authority, and separation (with coordination) of the agency's enforcement and adjudications functions.

The Border Security Agency Proposal:

Homeland Security Chief Tom Ridge reportedly has proposed a plan to consolidate some of the functions of the INS, including enforcement, inspections and the Border Patrol, with those of the U.S. Customs Service. Other reports indicate that the Coast Guard and some Department of Agriculture programs would be included in this consolidated agency. Some Members of Congress have introduced measures that would create such an agency.

While enhanced coordination of enforcement functions (and border-related functions, specifically) is vitally important, any inter- and intra-agency coordination would be harmed by any proposal that splits off INS inspections and other aspects of INS enforcement from the entity responsible for overseeing our nation's immigration system. Such splitting off runs counter to an effective reorganization of our immigration functions, and would threaten the necessary balance between enforcement and adjudications. It is essential to have one person in charge of all immigration functions to ensure the consistency of legal opinions, interpretation, and implementation. A border security function that subsumes the enforcement aspect of immigration but which would be separated from adjudications would lead to ineffective enforcement and adjudications.

Rather than moving boxes around an organizational chart, some form of unified port management may offer an effective solution, and merits further investigation. But unified port management does not require the reinvention of the proverbial wheel by forming a new single federal agency. Instead, it would involve individual agencies reporting to a single port director at the ground level for major port oper-

ation decisions. Efficiencies could be achieved through community and agency involvement to create a port authority reporting to a governing body comprised of agency and Administration members. Such a body would clearly and decisively react to port of entry security, staffing, infrastructure, and policy needs. All of these needs must be coordinated to achieve the goal of enhanced border, and hence, national, security.

The Sensenbrenner/Gekas Bill (H.R. 3231):

Insisting that the Bush Administration's proposed reorganization of the INS could not be effective, Representatives James Sensenbrenner (R–WI) and George Gekas (R–PA) introduced H.R. 3231. The version of H.R. 3231 passed by the House on April 25 does include some positive improvements on the legislation as originally introduced. We commend Representatives Sensenbrenner and John Conyers (D–MI) for their hard work to reform a deeply troubled agency.

H.R. 3231 would abolish the INS and create an Office of Associate Attorney General for Immigration Affairs (AAG). It also would create two Bureaus within the Department of Justice: the Bureau of Citizenship and Immigration Services and the Bureau of Immigration Enforcement. While the relationship between the AAG and the two bureaus is unclear, it appears that the AAG would have insufficient authority, especially when compared to the clout that the bill would give to the Directors of the two Bureaus. The Directors of the two bureaus would be charged with establishing immigration policy. In addition, while the bill would separate the agency's competing functions, it provides little, if any, coordination between the two.

The Bush Administration, while issuing a statement urging House passage of H.R. 3231, noted its concern with several provisions in the bill, including the weakened authority of the new AAG in comparison to the authority of the existing INS commissioner.

The Kennedy/Brownback Bill:

This bipartisan measure, entitled the Immigration Reform, Accountability and Security Enhancement Act of 2002, would dismantle the INS and establish in its place the Immigration Affairs Agency (IAA) within the DOJ. A Director of Immigration Affairs who is tasked with full responsibility and authority to administer the agency would head the IAA. The bill also would establish a Bureau of Immigration Services and Adjudications and a Bureau of Enforcement and Border Affairs, each headed by a Deputy Director. The Kennedy/Brownback reorganization plan creates an immigration agency headed by a Director with clout, separates and coordinates the enforcement and adjudications functions, has clear lines of authority, and includes helpful funding provisions. As such it is the only legislative proposal that fulfills the criteria reviewed below.

In summary, both the Bush plan and the Kennedy/Brownback bill would place someone in charge with clout and would separate, but coordinate, the agency's two functions. H.R. 3231 does not create a strong central authority. Nor does it provide for coordination between the two functions. The Ridge plan, by consolidating INS enforcement and border functions with functions now housed in other agencies, would separate these functions from adjudications, making a consistent interpretation of the law and any coordination between the two extremely problematic. The Ridge plan also appears to contradict the INS reorganization plan that the Administration has advanced and has begun to implement. That plan, in contrast to the Ridge border security plan, is based on a strong central authority with direct lines of command over the enforcement and adjudications functions.

INS REORGANIZATION WOULD AFFECT REAL PEOPLE

Any reconfiguration of our immigration function will work only if it successfully serves real people. Here are some examples of why it is vital to have a single person in charge and close coordination between adjudications and enforcement:

- The Border Patrol picks up a suspected illegal alien. He claims to be a lawful permanent resident, but does not have his green card in his possession. The Border Patrol needs to check his status with Adjudications before determining whether to release or detain him.
- Immigration Adjudications receives a petition for H–1B status and suspects fraud. The INS Service Center wants to check on the employer's record with INS and determine whether it has been found to hire undocumented workers in the past. The Adjudications division would need to access enforcement records to check on the employer's work site investigations records.
- An applicant for adjustment of status claims to have no periods of unlawful presence. The Immigration Adjudicator suspects otherwise based upon

claimed dates of entry. Without easy access to entry/exit records from Inspections, the adjudicator cannot confirm her suspicions.

• There is a discrepancy regarding whether the physical presence requirement in an application for Temporary Protected Status (TPS) has been met. INS needs to examine entry databases. Without easy access to those inspections records, the application cannot be properly or efficiently adjudicated.

• An individual applies for a green card after marrying a U.S. citizen. She arrived legally, but overstayed her tourist visa. INS adjudications needs to check with the enforcement branch to make sure there are no issues precluding her from obtaining a green card.

• A Canadian computer systems analyst applies for a TN visa at the U.S.–Canada border. He has a minor conviction from 20 years ago for possessing a small amount of marijuana. He needs a waiver under INA § 212(d)(3) to be able to enter the United States. Under any reorganization, the service and enforcement branches need to coordinate efforts to allow this person entry.

These examples underscore the need for restructuring to be based on the principles discussed below.

PRINCIPLES THAT SHOULD GUIDE INS RESTRUCTURING

AILA believes that any successful reorganization of the INS must be based on the following four criteria:

• Appoint a high level person with clout to be in charge of both the adjudications and enforcement functions.
• Coordinate the separated enforcement and adjudications functions.
• Provide adequate resources.
• Ensure that a reorganized immigration function contributes to our national security.

1. Appoint a high level person with clout to be in charge of both the adjudications and enforcement functions. This person must integrate policy making with policy implementation and lead and coordinate the separate service and enforcement functions. Accountability and leadership must come from the top.

A successful reorganization of our immigration functions hinges on the appointment of one full-time, high-level person with line authority. Such an office would improve accountability, especially critical after the September 11 terrorist attacks, by fully integrating policy making with policy implementation, ensuring direct access to high-level officials within the executive branch, attracting top managerial talent, having authority both horizontally and vertically, and leading the efforts of the two bureaus. Especially after September 11, it is vitally important that one person at the top articulates 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 two rival bureaucracies that will create balkanized immigration policies. Given this need for accountability and coordination, AILA also would support placing the inspections function in the office of the person in charge. Given that enforcement and adjudications come together in the inspections process, it is important that the person in charge oversees the exercise of this procedure and that inspectors receive training in both adjudications standards and enforcement procedures. In contrast, the Bush Administration plan and H.R. 3231 both would place inspections in the Bureau of Enforcement.

The need for someone in charge of national policy with direct authority over the two immigration functions is evident in other areas as well. For instance, immigration enforcement officers interdicting or inspecting asylum seekers will likely have a different interpretation than would immigration service personnel as to whether the asylum seeker is eligible for protection under U.S. laws and treaty obligations. One central authority would help ensure consistent interpretations of the law.

2. Coordinate the separated enforcement and adjudications functions.

A consensus has 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. The Kennedy/Brownback bill, H.R. 3231, the Bush Administration's plan, and the Ridge border security plan all are based on such a separation.

However, coordination of the two 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. The INS's recent blunder in notifying a Florida flight school regarding the agency's approval of student visa applications for two of the now-deceased September 11 terrorists reinforces the need for these two functions to be even more closely coordinated than they are today. 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 referrals into Kafkaesque nightmares.

The Kennedy/Brownback bill and the Bush Administration plan provide for this coordination. H.R. 3231 and the Ridge proposal do not. While H.R. 3231 separates enforcement and adjudications by creating two separate Bureaus within the Department of Justice, there is little coordination between the two, save a General Counsel placed in a weak Office of the Associate Attorney General. 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 two bureaus likely would end up working at cross-purposes, with the leaders from each sending conflicting messages on policy matters pertaining to complex laws.

The absence of coordination can lead to inconsistent opinions and policies, and result in each bureau implementing laws differently, thereby creating ongoing difficulties. The absence of coordination will exacerbate these concerns even more and raise additional questions. For example, since border inspections combine both adjudications and enforcement functions, how will 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 will be forced to deal with two separate bureaus that implement different policies and practices, making their jobs much more difficult and time-consuming.

3. Provide adequate resources for the adjudications and enforcement functions and ensure that direct congressional appropriations are available to supplement user fees.

As the reorganization debate continues, we urge Congress to review how immigration functions have been and should be funded. Currently, enforcement functions are supported by congressional appropriations, while adjudications are largely funded by user fees. 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. AILA supported the establishment of the Examination Fee Account when it was first created. However, given the history and status of that account, we have revised our views and urge Congress to supplement user fees with congressional appropriations to ensure that an appropriate level of service is achieved.

In addition, adjudication fees paid by applicants for immigration benefits should be used solely to adjudicate those applications. In practice, a large share of the user fees has been diverted to support other functions. Immigrants, particularly when they already are experiencing lengthy delays and unacceptable levels of service, should not be forced to pay for programs unrelated to the processing of their applications. The responsibility for programs that do not generate fees should be shared among all taxpayers.

Both the Kennedy/Brownback bill and H.R. 3231 include important first steps in this area. But we believe that Congress should go beyond the measures included in both bills and dramatically increase its appropriations role.

4. Ensure that a reorganized immigration function contributes to our national security.

Our immigration function, whatever shape it takes, has an important role to play in helping our nation enhance its security. To aid in that effort, a restructured im-

migration agency needs a strong leader at the top who can quickly undertake decisive actions, especially in periods of emergency. To be effective, particularly in times of crisis, a reorganized agency also must have accountability. Creating an agency with a weak position at the top, and empowering the heads of two conflicting bureaucracies, as envisioned in H.R. 3231, is a recipe for conflict and dysfunction, especially in times such as these when the need for quick and effective decision-making is essential to protecting our national interests.

Any restructuring of our immigration function to enhance our security must reflect the importance of both adjudications and enforcement and include adequate funding for both. While the importance of enforcement is obvious in this regard, the security-related aspects of adjudications have been downplayed during the restructuring debate. As important as it is to enforce our laws as a means to enhance our authority, it is equally crucial that we distinguish those who mean to do us harm from those who seek entrance into our country, much as our ancestors did, to help us build this nation. Provisions in the Border Security and Visa Entry Reform bill reflect the importance of both functions and the need to pay for initiatives in both areas. Any INS reorganization bill should do the same.

Given our nation's enhanced security needs after the September terrorist attacks, it is important that Congress and the Administration support direct federal appropriations for the kinds of technological, staffing, and infrastructure needs that both the INS (in its enforcement and adjudications capacities) and the Department of State will require. The security agendas of these two agencies cannot be supported through user fees alone. The enhanced capacity to meet our security needs is an important national function best supported through the federal government and will require such support on an ongoing basis.

RESTRUCTURING MUST BE BASED ON RELIABLE INFORMATION

The information Congress needs to help determine the best reorganization plan must be reliable. AILA urges Congress to seek this information from many sources, including INS staff at headquarters and in the field and those who use the agency's services. AILA member attorneys have much experience dealing with the INS at headquarters and in the field (at service centers, district offices, and ports-of-entry, for example). We stand ready to relay to Congress information concerning the agency's failures and successes based upon the hundreds of thousands of encounters our members have had with the INS over the years.

Such anecdotal information serves a useful function. However, it is precisely that: opinions of AILA members based upon their experiences. Rigorous study would be needed to determine if these opinions are fact. The General Accounting Office (GAO) did not exhibit such caution when it recently issued a report entitled "Immigration Benefit Fraud: Focused Approach Is Needed to Address Problems." The GAO report was supposed to review information on the nature and extent of immigration benefit fraud at the INS.

Fraud should not exist within the INS or any agency. Immigration benefit fraud threatens the integrity of the legal immigration system. It cannot and should not be tolerated. Like the GAO, many, with good reason, have found fault with INS management. Certainly, there is much room for improvement. We all want an agency that works, and works well. However, any investigation of fraud must be conducted fairly and use methods that are above question. Based on these criteria, the GAO has failed. Its report presents opinions as facts, makes no attempt to corroborate allegations raised, and portrays the INS's successful efforts at fraud detection as examples of a broken system. In fact, the report really is two reports: one focusing on alleged fraud based on uncorroborated opinions, and the other detailing procedural changes from which any agency would benefit.

What did we learn from this report?

The report repeatedly cites opinion as fact, appears to fault the INS when the agency successfully detects fraud, and suggests that simply because the agency has found fraud, such fraud is pervasive. Phrases such as "one official told us," "views of INS officials," "district officials told us" and similar attributions are repeated throughout the report, with anecdotal data treated not only as fact, but as pervasive fact. In addition, when citing to various instances of fraud throughout the report, the GAO, instead of crediting the INS for having mechanisms in place that have been successful in uncovering such fraud, criticizes the agency for the existence of the problem. The GAO could have concluded instead that current INS procedures to detect fraud are working. At the very least, these procedures are not as ineffective as the GAO alleges them to be. Finally, the report's tone and conclusions do not reflect what the GAO itself admits, that the "estimates provided by INS supervisors and managers were not based on scientific studies."

The GAO has raised serious charges. Such charges need to be based on fact, not allegations or conjecture. There is room for improvement in any agency, especially the INS, but any successful reform must be guided by accurate data.

The GAO report reinforces the need for someone in charge and a reorganized agency that coordinates the two functions of enforcement and adjudications. While not focusing extensively on INS reorganization, the GAO emphasizes the importance of coordination in a reorganized agency that separates the enforcement from the adjudications function: "Organizational crosswalks would need to be devised to assure that the two primary functions were still being effectively coordinated and balanced, that is that the enforcement concerns were considered in performing service functions and vice versa. Our intention is that these primary functions be coordinated and balanced, regardless of how the agency is structured." (GAO report at pg. 34). The GAO's recommendations also support the need for one person at the top who has the authority to coordinate all activities and goals. Such coordination, achieved both through the person in charge and through the structure of the reorganized agency, is critical throughout the INS.

Importance of Adequate Funding for Adjudications: The GAO report was silent on one of the most important issues needing to be addressed: the importance of adequate funding for the INS in general, and adjudications in particular. While the GAO criticizes the agency for doing too little to combat immigration benefit fraud, the Service has not received adequate funding to undertake this task in a comprehensive and effective manner. Especially in this time of enhanced security, the INS needs the funding and technology that are critical for the agency to do a good job. The report also raises concerns about the INS's ability to balance its dual responsibilities of application processing and fraud detection, and states that "unless INS can devote additional resources to processing applications, its efforts to expedite application processing will mean that the quality of adjudication will most likely be sacrificed." (GAO report at pg. 27). Again, the most effective response to this concern is adequately funding the agency so that the competing goals of quality and timeliness can be achieved. Such funding must come from direct congressional appropriations that would supplement user fees.

Importance of Enterprise Architecture and Information Technology: The GAO report recognizes the importance of agency-wide case tracking, information technology, and management capability to help ensure the effective use of resources, and that necessary coordination occurs and accurate immigration benefit decisions are made in a timely manner. The INS, recognizing that the agency could achieve these goals through enterprise architecture and information sharing, was moving in those directions even before September 11. Since that date, the Service has accelerated work in those areas, which will help ensure the quality of adjudications as well as enhance our security efforts. Once again, adequate funding will be critical to the ability of the Service to develop and implement the needed improvements.

CONCLUSION

INS restructuring is not a dry exercise involving reform of a government bureaucracy. Decisions in this area will impact directly on our national security, as well as the lives of hundreds of thousands of American citizens, businesses, and legal immigrants who daily interact with this system. Making the wrong decisions can weaken our security through less effective and unfair enforcement, and result in unconscionable delays in citizenship processing, reuniting families, and helping American business to acquire the workers they need.

Mr. Chairman, thank you very much for this opportunity to share my thoughts and perspectives with the committee. AILA remains available to discuss these matters with you at any future time, and is dedicated to working with Congress and the Administration to ensure that reorganization succeeds. Thank you.

Senator KENNEDY. Thank you very much. You are asking a lot to get that mission statement out which we can all agree on and get through and it is a real challenge.

I am going to just come back to the coordination of the border security agencies because this is one of the major kinds of issues. You give the example of the individual who is caught at the border and whether they are a permanent resident or a trespasser into this country, and we ought to be able to make that determination.

Why wouldn't someone be able to say, well, if you have interoperable commuters on this, why wouldn't the enforcement agency be

able to make that determination? Why wouldn't they be able to take the name of that person and plug it into their computers and find out what the status of this individual is? Wouldn't we get much greater efficiency if we brought all of these agencies together rather than having them all out there working in different ways at the border?

We are going to have this and we are going to have to deal with it, and both of you are important authorities on this and I would like to hear you.

Mr. YALE-LOEHR. If I could answer first, I think that is a very good question, but I think it is more than just records-sharing that is important here. It is also policymaking and implementation.

For example, if you had one agency that was in charge of the border and another agency that was in charge of immigration interior inspections and adjudications, you could have a problem. For example, an asylum seeker who ended up coming at the border and wanted to apply for asylum at the border would be dealing with this border agency and they may have their own policy as to whether a particular person would qualify for asylum or not.

The exact same individual, if they were in the United States and overstayed their visa and applied for asylum, might have a different kind of outcome because of the policy that the interior agencies have. So that is why coordination is important, and I don't think any border agency that deals with part but not all of immigration is going to be ultimately effectively.

Senator KENNEDY. Mr. Virtue?

Mr. VIRTUE. Another example would be the fact that the inspectors at the port of entry who would be considered enforcement officers also adjudicate waivers on a daily basis. Many of the grounds of inadmissibility are minor ones and people are eligible for waivers, and those are the same exact adjudications being performed in our regional service centers and right now in our district offices for grounds of inadmissibility. The coordination and consistent application of those policies is important and really requires coordination.

Senator KENNEDY. Mr. Virtue, one of the differences between the House and Senate bills is our treatment of the Office of General Counsel and legal advisers in each of the bureaus. Both bills have an Office of General Counsel, but the House bill also has legal advisers in the bureaus.

How important is it for the general counsel to have the authority to issue consistent legal opinions for both the adjudication and enforcement functions of the agency, and that these opinions are reflected in the policies and practices of the agency?

Mr. VIRTUE. I think it is going to be critically important because, as I mentioned, there are people proposed to be in the enforcement bureau and people in the services bureau who are administering the same law, and many times making decisions based on the same policies.

Interpretation of that policy has to be centralized in terms of the legal interpretation. We could have real problems if you had different legal interpretations on the enforcement side and the services side with respect to the same provision of law or the same constitutional issue, very difficult issues and ones that could lead to unnecessary hardship, first of all, but also potential litigation and

a real waste of time for the agency. So I think it is critically important to have that general counsel.

The general counsel also is responsible for supervising the attorneys who appear in immigration court. Again, in immigration court you are dealing with an enforcement issue, but many times you are also dealing with requests for relief, asylum, adjustment of status, cancellation of removal, and other benefits that are being adjudicated both in immigration court and elsewhere. So those issues also cry out for coordination.

Senator KENNEDY. Also, you warn that detailed congressional direction on the structure of INS can reduce rather than enhance the agency's ability to adapt to new challenges. What are some of the potential pitfalls that we should avoid?

Mr. VIRTUE. One of the issues is simply that we just don't know what future challenges there may be. Before September 11, I don't think any of us could have imagined what we would have to deal with, so there are those problems.

Also, I am not sure if it is necessarily pitfalls, but I think an important aspect of flexibility is to have the offices reflect the needs of the customers in a particular area, and that may be different for different geographic areas, different demographics. I can see in some places, for example, as I mentioned in the testimony, where you might want to have a small storefront office that is similar to a Social Security office, for example, that provides primarily information.

In other locations, you may need full-services offices because the regional adjudication centers or remote adjudication centers can't deal with some of the issues, the need for fingerprints or the need for positive identification. So the agency should have the flexibility to design those offices, hopefully with the customer's input in mind.

Mr. YALE-LOEHR. If I could add a historical precedent that you have all dealt with, and that is the legalization program of 1986, I am not sure that if we had the House bill enacted today that you would be able to do legalization without having to re-legislate the whole purpose of the agency.

You had both enforcement and adjudication functions in legalization. The agency had to deal with over 3 million applications in a very short time frame. You don't want a statute to say you have to do it a certain way, and have a new program like legalization come down the pike and say, no, it is not going to work. So I think that is why you have to have flexibility in whatever structure you set up.

Senator KENNEDY. Senator Brownback?

Senator BROWNBACK. Thank you, Mr. Chairman.

Thank you for the grade on Senator Kennedy and my term paper. We appreciate that, to be able to get an A together. That was excellent staff work, too, I might point out.

I noted at the outset that the lead case work that I get in Kansas in my offices—most people might think, well, okay, it is veterans' benefits, Social Security, farm program payments, something like that, and it is immigration work, by some distance even, and a lot of it is poor communications, backlogged cases. Why is this taking place?

Mr. Virtue, you used to be GC at the INS. Professor, you are the most well-written person in the field in the country. Why am I having that level of problems, structurally, from the INS?

Mr. VIRTUE. Well, maybe I will take a shot at that one first. I think, first of all, the information about pending applications is not readily made available to the public. I don't think that is a function of the agency not wanting to make that information available. It is simply that the systems aren't there to provide that information.

I depend in my practice a lot on the Web, on the Internet, and getting information about a whole host of Government agencies. The technology is certainly there for people to be able to go to a Web site and get information about the current status of their case, and that simply isn't available right now outside of—well, it still isn't even available in the naturalization area, but it can be. So I think that is probably the single most important reason that immigration case work leads the case work in your office, because of the lack of information.

Senator BROWNBACK. Let me hone the question a little bit further. Is there something structurally within INS that we should be changing to deal with this backlog and poor communication problem that I have that my constituents are experiencing?

Mr. YALE-LOEHR. I don't think it is anything structural. I think it is a combination of factors that have grown over time. I remember 15 years ago I had an interview with a high-ranking INS official who said, you know, within the next 2 years we are going to jump from the 19th century to the 21st century. They had this great plan, but there was no one person at INS with authority to look at all of the information systems.

There are like 14 or 15 different databases within the INS, and as those grow over time it gets harder and harder to put those systems together so that everybody is accessing a common database in a real-time format. So I don't think there is anything structural about the problem. I think it is a combination of lack of resources, lack of attention in the early days to computerization, and growing mission creep of the agency. With new things put on it all the time, it makes it harder and harder for it to get out of the hole that it has been in for so long.

Senator BROWNBACK. Are we going to want more centralized authority? You have both talked about a strong and elevated position within the INS. We have held some hearings here, and then also as I have traveled and visited with some people on immigration, they talk about different regional authority, decisions made in one place, one region, and differently in another region.

Are we going to want to see that changed and addressed in this process?

Mr. YALE-LOEHR. I think you do. I think immigration is a national function, and you want one person speaking with authority and you want people in all the different branch offices to understand that mission and to react the same way with the same interpretation. So I think any reorganization should centralize and strengthen the authority of the person at the top.

Senator BROWNBACK. Do you think there is too much decentralization of that sort of policy-type decisionmaking presently within INS?

Mr. YALE-LOEHR. Yes, I do.

Senator BROWNBACK. Mr. Virtue?

Mr. VIRTUE. I have to agree with that. If you look at the district directors, for example, at the field level, they have to prioritize the need for competing resources. So I think they have to do the best they can, but they are looking at their particular area and trying to prioritize their own resources between services and enforcement.

Under this bill, you will have clear lines of authority and the person at the field level will be responsible for prioritizing the enforcement mission. At the same time, the person who is responsible for services will be focused on priorities within that service and you won't have the same competition in 34 different offices, or more even.

Senator BROWNBACK. I would like to invite both of you as you get more time to look at the bill, to think about it and to comment on it, to get back to us about what you think we ought to be doing, because it is a serious issue. I think it is an issue that we are going to be able to get up, I hope, on the floor here because there is a national emphasis to deal with it. We really would like the best minds we possibly can get and people with experience giving us good thoughts on the broad basis and on the narrow issues as well.

Thanks for being here today.

Senator KENNEDY. Senator Feinstein?

Senator FEINSTEIN. Thanks very much, Senator Kennedy.

I want to just share with you a couple of my observations. I have been on this committee now for almost 10 years. In all the hearings, I have never ever heard the words "national security" mentioned as any part of the mission of the INS, and yet now it clearly is part of the mission. So, in a way, the mission of the INS to some extent is changing. However, there have been signs all along for many years that things were awry. Statistics are 3 years behind.

You mentioned, Mr. Virtue, that there are 850,000 people coming in under the quota system legally a year, but every year families are coming in of people that have come in in prior years. So the numbers essentially are substantially above 850,000, but we can't get an up-to-date figure.

On the student visa program, there have been warnings that the student visa program was in disarray for a decade as I look back. You have had people convicted for fraud, for falsifying applications. You have bogus schools set up. You have had teachers in colleges convicted because they have falsified applications and grades. You have had a person convicted because he ran a ring; for so many dollars from each individual, he could get 100 people in on student visas.

To talk about tailoring the mission to meet the ability of the agency has been a kind of heresy because immigration policy has been driven by humanitarian and economic concerns. Maybe that is right. I am not challenging that, but in everything that we hear, all the lobbyists at least that I have heard, nobody has ever said constrain it, modify it, secure it. It has always been do more, do more, do more. So the system has no real advanced systems for control measures, for tracking measures, for real investigatory measures.

We can enact this bill, which we very well may, and it won't solve the problems that are out there, and I am very concerned by it because you have had the biggest tragedy, bigger than Pearl Harbor, that has happened to America and it all happened from people who had legal visas. Even after two of them were dead, and dead above the fold on the front page of the newspapers, they get extensions. That ought to be real documentation that we are really over-extended, even with 35,000 employees.

How do you check out 500,000 students a year? How do you do it? It is impossible. Schools, of course, get premium tuition, so they all want them—a very difficult problem.

You all in a way have a conflict because you represent people who come into the system, and I recognize that, but you also must see a system that is overloaded and severely at risk, if you add the words "national security" to our mission.

I would like you to comment on that.

Mr. VIRTUE. Well, that is absolutely right, and certainly none of our clients benefit from a system that is overloaded and has some of the problems that you point out. I think the reason why the bill that has been introduced here by the chairman and Senator Brownback is preferable to the House bill or any of the other proposals——

Senator FEINSTEIN. No, no, don't mistake me. I am asking you to go beyond the bill.

Mr. VIRTUE. Okay.

Senator FEINSTEIN. I mean, you are for the bill, I am for the bill, we are all for the bill. I am asking you to use your expertise as people who deal in this arena as professionals all the time as to how do we handle the future once we add national security to immigration policy, as a part of bona fide immigration policy.

Mr. VIRTUE. Well, on that point I think our ability to check people's backgrounds and verify their identity is only going to be as good as the information that we have available from intelligence sources, foreign law enforcement agencies, and both the development of that information as well as a system for collecting, maintaining, and distributing that information to the decisionmakers.

Senator FEINSTEIN. So you would put it on an interoperable database?

Mr. VIRTUE. Absolutely, and the decisionmakers are at the State Department in terms of issuing visas and at the INS in terms of admitting people who appear at the ports of entry. That has to be a critical backdrop for any structure within the agency. So I think that is what we need.

Senator FEINSTEIN. In other words, what you are saying is you really need top managers in both of those areas. One of them is to see that the databases function and the materials communicate from one department to another, which we know they do not now. That was part of the Border Security and Visa Reform Act to provide the money for that interoperable system, which we have done.

Mr. VIRTUE. And somebody who can be responsible for that interagency coordination and take responsibility and accountability for it.

Mr. YALE-LOEHR. I agree entirely with that, and I think part of it is we also as a Nation have to decide what we believe about im-

migration. It is too important for us to sort of talk about it here and there or jump from one crisis to another.

Speaking from a more academic perspective, I would say I would convene something again like the Hesburgh Commission and try to have leading people—academics, practitioners, members of Congress—say what does immigration mean to this society after September 11. If we could come up with a consensus that the American people would believe in, then I think we could move forward with any kind of system and say, okay, this is what we plan to do. I think that could go a long way to making sure that we are effective, whatever system we enact today.

Senator FEINSTEIN. I think that is a good point because we are a Nation of newcomers. That is what we stand for, and I think we should continue to be, but I think there are limits on what we can do and how we can manage what is a new area of terrible vulnerability for the Nation. That is sort of up in the air.

In any event, thank you, Mr. Chairman.

Senator KENNEDY. Well, thank you. You know, looking back—and I would be interested in whether I am right—until we started having the hearings on that 1965 Act, I think we were 10 or 20 years without hearings. We can go back to the McCarran–Walter Act. I don't think we had very much.

This has been much better that this issue has been up front. I mean, I differ with the 1996 Act, but what we actually passed on the floor of the Senate was, I think, a credible bill. It passed 97 to 3, and then we were excluded, at least our committee was, from any conference, and then it ended up being part of the budget and we were forced to vote for the budget and this bill.

Quite frankly, immigration has not been a high priority of many Attorneys General, Democrats and Republicans. It has been a stepchild. They haven't had the support, they haven't had the technology. They have been a real punching back for members of Congress. There is enough blame to go around.

We have got an interesting opportunity now and we have got to focus on it. Americans understand this, and I think the Congress understands it, and we want to try and get this as right as we can now. I welcome the comments of my colleagues who say that we are not going to be able to solve all the problems just with legislation, but I think if we build on our border security and try and get this straight and try and do what you have outlined and understand what our mission is with regard to it—and I think Senator Durbin mentioned the different swings and moods which you both have seen in the Congress over a long period of time; this issue goes back and forth with the sentiment of the American people—then I think we can really make some sense of it.

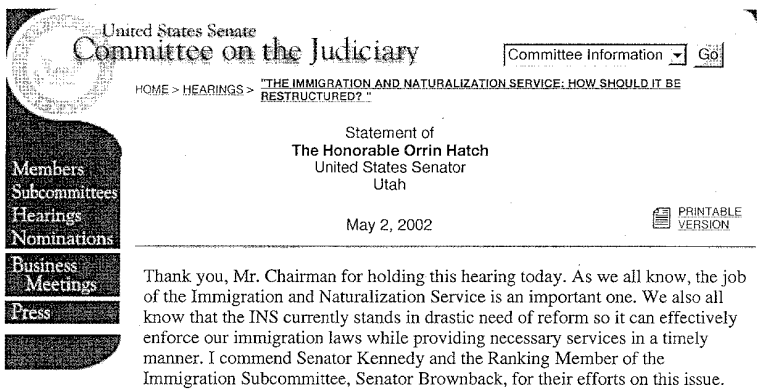
I want to thank both of you. It has been enormously helpful to me. We have been very lucky to have both of you, and I join my colleagues in saying that we are going to leave you an open invitation at any time as you see this whole process move along to give us your best judgment on these recommendations that come up. We are very, very grateful to both of you for your help and your comments here today.

The committee stands adjourned.

[Whereupon, at 3:56 p.m., the committee was adjourned.]

[Submissions for the record follow:]

SUBMISSIONS FOR THE RECORD



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Statement of
The Honorable Orrin Hatch
United States Senator
Utah

May 2, 2002

PRINTABLE VERSION

Thank you, Mr. Chairman for holding this hearing today. As we all know, the job of the Immigration and Naturalization Service is an important one. We also all know that the INS currently stands in drastic need of reform so it can effectively enforce our immigration laws while providing necessary services in a timely manner. I commend Senator Kennedy and the Ranking Member of the Immigration Subcommittee, Senator Brownback, for their efforts on this issue.

Marked by massive backlogs and conflicting missions, the INS has long been in need of reform. Reorganization has been a priority for some time, and several attempts, both administrative and legislative, have been made. One of the most significant improvements is President Bush's nomination of James Ziglar, who was unanimously approved of by this Committee and the Senate just last July, specifically with reform of the INS in mind. I commend Commissioner Ziglar, who is clearly making his best efforts to rescue the INS, not only for his attempts to build a better immigration service, but also for his leadership following the September 11th terrorist attacks. Those attacks, combined with recent INS blunders, have subjected the INS to an even more critical examination. I realize that especially since September 11th, Mr. Ziglar's position has not been an easy or particularly enviable one.

With regard to specific restructuring proposals for the Immigration and Naturalization Service, I believe it is important to be cautious. The bill that the House passed is significant, but does have room for improvement. The proposal we have been crafting here in the Senate adds some improvement, and I look forward to working more closely with Chairman Sensenbrenner and Senators Kennedy, Brownback, and Leahy to get consensus legislation to build the very best agency possible.

In any INS reform measure we pursue, we must stay focused on what is broken and what is not. While some practices within the INS require a specific repair, such as the clear separation of the enforcement and service missions, some are working generally well and should not be tinkered with. For example, I feel very strongly that critical field offices for services and enforcement, which provide immigrants with realistic access to service centers and the federal government with the necessary tools to enforce immigration laws locally, should not be sacrificed in the name of consolidation. I understand the need to draw clear lines of authority, but we should not trade smaller, more accessible field offices for super-sized offices unless there is a clear reason to do so. I appreciate the

sponsors' willingness to work with me to protect local offices, and I thank them for agreeing to include such a provision in the Senate bill.

Again, I want to thank the Chairman and Senator Brownback for turning the Committee's attention to this important issue. I believe that we have some real potential to make a difference here, and I am proud to be an original cosponsor of this legislation.

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PRINTER FRIENDLY VERSION

Statement of

The Independent Monitoring Board members on "The Immigration and Naturalization Service: How Should It Be Restructured?". Before the Senate Judiciary Committee on May 9, 2002.

Mr. Chairman and Members of the Committee, we, the Independent Monitoring Board located in Chicago, are honored to present this testimony. We would particularly like to make some comments about the creation of an Ombudsman as a catalyst for systemic change in the Immigration and Naturalization Service.

The Independent Monitoring Board[1] came into existence as a consequence of major problems in the Chicago District Office of the Immigration and Naturalization Service (INS). These were documented in a citizenship case study in 1999 where 1,031 cases were compiled and analyzed. Many of the problems stemmed from poor record keeping, lost files and failures to update changes of address. The Chicago Office had a very substantial backlog, with 95,000 applicants awaiting interviews, some for as many as four years.

This case study became a catalyst for change. A grass roots protest involving thirty-three organizations throughout the Chicago area collected over nineteen thousand signatures in three weeks on a petition for change. An August 1999 press conference (attended by US Congresswoman Jan Schakowsky, representatives of US Representatives Luis Gutierrez and Danny Davis and local community-based organizations) in front of the Chicago INS office denounced the ongoing problems, mistreatments and poor service. The momentum from the successful petition campaign led to hearings by the City of Chicago Commission on Human Relations, which denounced the injustice and mistreatment by the Chicago INS office and supported changes to the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRAIRA Law).

One of the demands of the petition was the creation of an Independent Monitoring Board to ensure that the INS responds to its customers with fairness and respect, and in a professional and timely manner. The Independent Monitoring Board (IMB) was founded in August, 2000 by 44 community organizations, led by the Coalition of African, Asian, European and Latino Immigrants of Illinois (CAAELII). It consists of 11 representatives of community-based organizations, 3 immigrants' rights advocates, 2 immigration attorneys, 2 past and 2 current INS customers and 3 member-at-large. The endorsing organizations elect the IMB members and the membership term is for two years.

The objectives of IMB are:

- To provide a forum where local INS clients, INS staff, and the public can report their experiences and grievances;
- To monitor and review the functioning of the local INS office to ensure compliance with all pertinent new policy and program directives; and

- To report findings and provide recommendations to the INS Commissioner, Congress, and the general public.

In order to achieve these objectives, the Independent Monitoring Board held two "No More Waiting Day" workshops where INS customers could fill out complaint forms about the INS service they received. The first workshop took place on November 12, 2000 at Truman College in Congresswoman Jan Schakowsky's 9th District. The second workshop took place at the Instituto del Progreso Latino on December 2, 2000 in Congressman Luis Gutierrez's 4th District. Both workshops included interpretation into several languages and represent the first attempt to document in a systematic and quantifiable manner INS service of immigrants living in the Chicago area.

One of the outcomes of these workshops, detailed in a report[ii], was recognition that the Immigration and Naturalization Service could not be reformed by minor administrative changes but needed a focus for systematic and long-term change, an Ombudsman.

The term "Ombudsman" originated in Sweden in the 1700s and was formalized in the Swedish constitution of 1809. The function of the Ombudsman was to insure that individual rights were protected in an increasingly complex governmental structure. An Ombudsman deals with complaints received from persons affected by any administrative act or omission of a governmental organization, or investigations started on the Ombudsman's own initiative. The issues involved may range from concerns related to one individual situation to concerns of a broad systemic and/or system-wide nature. Typically, an Ombudsman issues nonbinding reports, with recommendations addressing problems or future improvements deemed to be desirable. An Ombudsman is not an advocate for complaints nor a substitute or duplication of appeal rights to courts or administrative tribunals, rather an impartial investigator. The object of the Ombudsman's involvement is not to affix blame or assess penalty, but rather to resolve a complaint in a manner, which is fair, just and practical. If the facts warrant, the Ombudsman may dismiss the complaint as unfounded or find that there are factors beyond the agencies immediate control, for instance insufficient funding or staffing.

Over the last 50 years the Ombudsman concept has spread around the world. There are currently general governmental Ombudsman offices in over 100 countries on all continents. The numbers of Ombudsman offices continue to grow as governments realize they cannot be judge and jury as well as defenders of their own interests. For instance, the European Community has a trans-national Ombudsman[iii] to investigate complaints about misadministration by institutions and bodies of the European Community, and Eastern European countries are increasingly turning to the concept of Ombudsman as a means of speeding up the transition from state bureaucracy to public service. In North America several states and nearly all Canadian provinces have an Ombudsman, as do many counties, cities, corporations, professional organizations, and about 200 colleges and universities. In 1969 the American Bar Association[iv] suggested that the Federal government should experiment with the establishment of an Ombudsman or Ombudsman for limited geographical area or areas. In 1990 the Administrative Conference of the United States[v] urged the President and Congress to support federal agency initiatives to

create and fund an effective Ombudsman in those agencies with significant interaction with the public. There is a growing use of Ombudsmen in Federal Agencies.

Many variations of an Ombudsman position are possible. However, if an Ombudsman is to be successful, it must have certain fundamental elements[vi]:

1 The Ombudsman must be accessible to all. It is especially important that the Ombudsman meet the challenge to be accessible and responsive to persons who are particularly vulnerable to unfairness in public administration.

2 The Ombudsman must be, and be seen to be, independent of government and free to carry out investigations without interference.

3 The Ombudsman must be provided with broad investigative powers such as unrestricted access to government documents, officials, offices and institutions. Typically, this includes the power to issue or have issued subpoenas.

4 The Ombudsman must have the power to assist agencies and members of the public in resolving conflicts through facilitation and by recommending solutions to any problems uncovered and confirmed by investigation. In addition, the power to make appropriate reports when the recommendations are not followed by a governmental organization must be provided.

5 The Ombudsman must have the power to launch investigations stemming from three sources:

- Complaints from individuals or community based organizations
- Investigations started on the Ombudsman's own initiative
- Complaints referred to the Ombudsman by Congress

6 The Ombudsman's position as a recourse of last resort must be protected by provisions shielding the Ombudsman and his or her staff, and information collected or produced by them, from civil action or disclosure orders (whether court subpoena or orders under Freedom of Information legislation).

7 It is essential that the Ombudsman be provided with sufficient resources to function effectively.

We have read the recently introduced Senate Bill S-2444 entitled the "Immigration Reform, Accountability, Security, and Enforcement Act of 2002", which is a major step forward, a much needed reform of the Immigration and Naturalization Service. An important element of the Bill is the inclusion of accountability, particularly the Office of Ombudsman within the Department of Justice. This creates an independent office that can receive complaints and make recommendations to remedy the complaints, both systemic and specific to improve the operations of the Immigration Affairs Agency.

Unfortunately, while the Bill creates an Ombudsman with responsibilities, particularly that of reporting to Congress, it fails to provide the Ombudsman with authority. It also does not clearly define the duties and responsibilities of the Ombudsman, and does not include the key elements known to be essential for a successful office as mentioned earlier. As currently structured the Ombudsman merely receives complaints and requests for assistance, and then reports to Congress on how well the agency responded to what the Ombudsman forwards to it. Without the authority to investigate, one cannot presume that the Ombudsman either can or will investigate, resolve complaints or be a true stimulus for systematic changes. We fear that the reality would be little change from the current situation, with resolution of immigration problems remaining an issue largely handled by Congressional staff.

As Americans, we are proud of our tradition of setting an example to the world of justice. We need to set an example for the emerging democracies of the world of how we believe the rights of immigrants should be respected, not simply the creation of an analyst to collate complaints. We urge you to push to add authority to this new Office, in particular:

a) Include specific confidentiality provisions to protect complainants who contact the Ombudsman. Without this many complainants will be scared of coming forward, fearing it will prejudice their case.

b) Provide the Ombudsman with specific authority to investigate and pursue resolution of complaints, and specific authority to access records.

Without these, we fear that the Ombudsman will end up as a hollow step, not a profound change to add true accountability in the new Immigrations Affairs Agency.

Conclusion:

In the Independent Monitoring Board members view, any reform of the INS should include a strong, independent Ombudsman with the authority to investigate as a catalyst for long-term, systematic change. Without this, the reforms may just be replacing one inefficient beaurocracy with another. With this mind, we urge the Senate Subcommittee on Immigration to reinforce the Ombudsman position in the Senate Bill.

Thank you very much.

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[i] See http://www.imbchicago.org

[ii] See http://www.imbchicago.org/reporttoc.htm

[iii] See http://www.euro-ombudsman.eu.int/media/en/default.htm

[iv] See http://www.abanet.org/admin/ombuds/home.html for the American Bar Association Ombudsman Committee, including more recent information.

[v] Administrative Conference of the United States, C.F.R. s 305.90-2, see http://www.law.fsu.edu/library/admin/acus/305902.html

[vi] Adapted from "A Federal Ombudsman for Canada: a Discussion Paper", The Canadian Ombudsman Association, 1999

U.S. SENATOR PATRICK LEAHY

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STATEMENT OF SENATOR PATRICK LEAHY,
CHAIRMAN, SENATE JUDICIARY COMMITTEE
HEARING ON
"THE IMMIGRATION AND NATURALIZATION SERVICE: HOW SHOULD IT BE RESTRUCTURED?"
May 2, 2002

We are here today because everyone agrees that the Immigration and Naturalization Service needs to be overhauled, a view that was dramatically reinforced by the September 11 attacks. The question we face today is *how* to reorganize the INS, a very important question that this Committee will devote itself to answering. I appreciate Senator Kennedy's leadership on this issue, and his willingness to chair this hearing. I also appreciate Senator Brownback's efforts – this is not a partisan issue but a matter of making government work.

To put it mildly, the last year has not been a good one for the INS. But although the political climate may call for a sudden response, Congress must keep its perspective and not simply embrace change for change's sake. We should also remember that even in an agency as troubled as the INS, there are many great employees whom we need to retain if we are ever going to get a handle on our immigration problems. I know this from firsthand experience in Vermont. I know that the Eastern Service Center in St. Albans, Vermont, has done a remarkable job in providing immigration services and in trying to weed out those who would fraudulently obtain immigration benefits. As their workload has increased under new laws we have passed, they have converted their cafeteria into additional office space, pioneered highly effective work-at-home policies, and retained their very impressive record.

Similarly, the Law Enforcement Support Center in South Burlington, which provides criminal background information about aliens to Federal, State, and local law enforcement agencies, has proven its effectiveness anew since September 11. The LESC is on duty every minute of every day to respond to queries from law enforcement officers. The Center's employees are unsung heroes, identifying potential terrorists and other safety threats to cops on the beat in cities and towns across the nation. Vermont is also home to the Swanton Border Patrol Sector, the Debt Management Center, and an INS Sub-Office, all of which provide critical services. Finally, the Eastern Regional Center – slated for elimination under the Administration's reorganization plan – also includes many fine employees whose skills should not be squandered.

The fine work of these Vermonters is achieved in spite of the fact that the INS as a whole is in

need of repair. Having witnessed his tremendous organizational skills in the Senate, I was confident that Commissioner Ziglar would do an excellent job in reorganizing the agency. The problems at the INS were not of his own making, and I believed that he should have a chance to remake the agency in consultation with Congress. Although I had reservations about the Commissioner's plan, I discussed them with him and he was quite responsive. But now that the House has passed legislation – soon after the Administration announced an abrupt 11th-hour conversion as to the merits of that bill -- I cannot tell whether the Commissioner's plan remains in effect. I hope that the Administration stands behind the Commissioner and behind his commitments to a fair, smart restructuring. He, and those who work for him around the nation, deserve nothing less.

I would like to say a few words about the House-passed restructuring legislation. I know that Chairman Sensenbrenner made this issue a major priority, and I applaud him for his success and his willingness to craft a bipartisan bill that passed the House by such a substantial margin. I am worried, however, that the bill will create brand new problems in its attempt to rectify existing ones.

First, I am concerned that its failure to establish a strong central authority to supervise immigration policy could prove fatal to its effectiveness. The House bill creates a weak Associate Attorney General for Immigration Affairs, with limited supervision of the law enforcement and immigration services bureaus established by the bill. Prudent management practice suggests the need for a strong central figure who can direct immigration policy and make decisions in the many areas where law enforcement and benefits overlap.

Second, the bill threatens to create a larger, more cumbersome bureaucracy than under current law, as each immigration branch would have its own Office of Policy and Strategy, Legal Advisor, Chief Budget Office, and Congressional affairs office.

Third, I am concerned that the Service Bureau would end up with insufficient funding. Congress and the Administration need to ensure that separating enforcement and services will not result in a drastically underfunded services branch. The INS already faces severe backlogs in processing applications for naturalization and other benefits, and Congress should continue to work to mitigate them, not worsen them.

Fourth, asylum seekers need more protection than the House-passed plan provides them – we must not treat asylum as purely a law enforcement matter, but should instead ensure that those who arrive here fleeing persecution receive a full hearing and are not perceived simply as security threats.

I understand that Senators Kennedy and Brownback introduced INS reorganization legislation of their own earlier today. From what I know of their bill, I believe it is a substantial improvement over the House legislation, and I look forward to reviewing it further.

More than ever since September 11, it is critical that we effectively police our borders and keep out those who would harm America. I have worked to increase the number of INS Inspectors and Border Patrol officers along our Northern Border and to improve the technology we use to monitor our borders. And I will work to see that the INS undergoes a common-sense reorganization that will meet the needs of U.S. citizens and legal aliens alike. I look forward to hearing from today's witnesses and to an open discussion of these issues in the weeks and months to come as we work toward real, commonsense and lasting solutions to INS' problems.

STATEMENT BY SENATOR STROM THURMOND (R-SC) BEFORE THE SENATE JUDICIARY COMMITTEE, REGARDING THE RESTRUCTURING OF THE IMMIGRATION AND NATURALIZATION SERVICE, THURSDAY, MAY 2, 2002, SD-226, 2:30 PM.

Mr. Chairman:

Thank you for holding this important hearing on the restructuring of the Immigration and Naturalization Service (INS). For some time, we have known that the INS needs fundamental reform, and the events of September 11 have served to highlight the problems that plague this agency. In addition to suffering from significant backlog problems, the INS has recently committed several embarrassing missteps. For example, media reports revealed that a Florida flight school received visa approvals for two of the known hijackers months after the terrorist attacks.

First, I would like to note that INS Commissioner James Ziglar has performed admirably, despite inheriting an agency rife with problems. Additionally, last year's terrorist attacks presented enormous challenges. Commissioner Ziglar cannot be faulted for every INS mistake because the agency has serious structural deficiencies that cannot be solved overnight.

To improve the administration of immigration laws, both

houses of Congress have addressed reform measures. On April 25, the House of Representatives passed a bill that would abolish the INS and restructure both immigration enforcement and services. The Senate is also considering similar proposals. It is my hope that Congress will reach a consensus and pass a bill that improves the Government's ability to enforce immigration laws and to provide services to those aliens who have been lawfully admitted into the Country.

Most experts agree that the first step in meaningful reform must be the separation of immigration enforcement and adjudication services. I agree that this is the right approach. There are fundamental differences between enforcement of immigration laws, encompassing functions ranging from border control to intelligence gathering, and immigration services, which include adjudications such as naturalization and change of status proceedings.

Currently, INS does an inadequate job of separating the two, resulting in the inefficient implementation of immigration laws. Both aspects of immigration policy are highly important, and they must both receive the necessary attention and resources if we are to ensure the effective

administration of immigration laws. It is important to note, however, that while enforcement and services must be kept distinct, restructuring must not hamper policy coordination. We must prevent the two arms of immigration policy from developing conflicting and inconsistent interpretations of the law.

I am interested in proposals that would establish both an enforcement bureau and a service bureau. Under one such proposal, both bureaus would be headed by Deputy Directors who would report to a single Director of Immigration Affairs. This structure would allow the bureaus to operate independently, but the Director of Immigration Affairs would exert control over both.

I am willing to consider these types of proposals, but I think that it is important to provide any newly created Director with the necessary stature and authority to perform the job effectively. By doing so, Congress will send a signal to the American people that immigration issues are important to the security of our Nation.

In addition, the power of the Director would also be enhanced by improved information sharing in the Federal government. I have been advised that INS data sharing

should be improved. We have made significant strides towards enhanced information sharing in both the PATRIOT Act and the visa reform bill, but we must ensure that the relevant databases are effective tools for the swift sharing of information. A Director who has access to timely and accurate information will be better able to implement and coordinate immigration policies.

Mr. Chairman, I appreciate your interest in this area of critical importance to our national security. We have before us the challenge of keeping those people out of the Country who would do us harm, but at the same time welcoming those who will contribute to American society. I hope that today's hearing will prove beneficial in our efforts to improve the administration of immigration laws.

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May 9, 2002

To: Members of the Senate Judiciary Committee

From: The United States Ombudsman Association

Re: Written Testimony Related to May 2, 2002 Hearing

Introduction

I am submitting this statement on behalf of the United States Ombudsman Association (USOA), for purposes of the hearing before the Senate Judiciary Committee held on May 2, 2002 concerning the Immigration and Naturalization Services (INS). This statement concerns the provisions in Senate Bill S-2444, entitled "Immigration Reform, Accountability, and Security Enhancement Act of 2002," that pertain to the establishment of an ombudsman.

Background

For as long as government has existed, it has struggled with the issue of guaranteeing persons whom it serves or regulate that they will be treated fairly, reasonably, and within the law. Various protections have been utilized over the years. Ever since the first ombudsman was created by the Parliament in Sweden in 1809, ombudsman offices have been successful and valuable resources towards achieving those objectives. Through impartial and independent investigation of complaints, they provide an informal and accessible avenue of redress.

Founded in 1977, the USOA is our Nation's oldest and largest organization of individuals who work in ombudsman offices to address complaints from citizens or the public. Our membership includes practitioners at all levels of government. Some have broad jurisdiction (e.g., over all executive agencies except the governor) and others have jurisdiction over a limited subject matter or agency (e.g., ombudsman for child welfare issues, or ombudsman for corrections).

In addition to assisting existing ombudsman offices in improving their operation, the USOA is dedicated, through its outreach efforts, to encourage the establishment of ombudsman offices at the international, national, state, and local levels. As stated in its by-laws, the USOA promotes the establishment of offices that manifest the following characteristics:

1. a governmental office created by constitution, charter, legislation or ordinance;

2. an office with the responsibility to receive and investigate complaints against governmental agencies
3. an office with freedom to investigate on its own motion
4. an office which may exercise full powers of investigation, to include access to all necessary information both testimonial and documentary
5. an office with the authority to criticize governmental agencies and officials within its jurisdiction and to recommend corrective action
6. an office with the power to issue public reports concerning its findings and recommendations
7. an office directed by an official of high stature who
    - is guaranteed independence through a defined term of office and/or through appointment by other than the executive and/or through custom.
    - is restricted from activities constituting a personal, professional, occupational or political conflict of interest
    - is free to employ and remove assistants and to delegate administrative and investigative responsibility to those assistants.

These characteristics reflect the essential characteristics outlined in a Resolution of the American Bar Association, adopted in 1969 and amended in 1971. (See, Attachment 1). This Resolution remains a model for the establishment of governmental ombudsman offices.

Comments on Senate Bill S-2444

Key to the ability of an ombudsman to function effectively is independence. Several of these characteristics contribute to ensuring the independence of the ombudsman. An ombudsman whose position, budget, staff, and investigations can be controlled or supervised by persons who (or whose actions or decisions) may be the subject of an investigation or who may be impacted by the investigative findings, is not independent and will not be perceived as being independent. The degree of independence correlates with the extent of the control or oversight.

While the House of Representatives was considering H-3231 and prior to the introduction of S-2444, the USOA wrote a letter to Senator Kennedy, Chairperson of this Committee, urging that any legislation to establish an ombudsman for INS-related issues *maximize the ombudsman's independence to the extent feasible.* A copy of that letter is attached. (See, Attachment 2).

The USOA believes that Senate Bill S-2444 is an improvement over H-3231 in terms of independence. However, we urge you to consider enhancing that independence even further. We also urge that certain provisions relating to the functional authorities or powers of the ombudsman be added or strengthened.

Structural Location

Senate Bill S-2444 establishes the Office of the Ombudsman within the Department of Justice. The Office of the Ombudsman would have greater independence if it were placed outside of the Department of Justice (DOJ), since officials, employees, and program (immigration) within the DOJ are subject to the Ombudsman's review or investigation. The optimal location is an

legislative branch, with similar independence given to the General Accounting Office (GAO).

Appointment and Supervision

Senate Bill S-2444 provides for the Ombudsman to be appointed by the Attorney General and to report directly to the Attorney General. This is preferable to H.R. 3231, which has the Ombudsman under the supervision and direction of an Associate Attorney General who oversees the day-to-day operation of immigration affairs. This places the Ombudsman in the awkward position of investigating and potentially criticizing his/her own supervisor.

While the Attorney General may not have as much day-to-day oversight of the immigration program, the Attorney General nevertheless has authority to act on issues or make decisions relevant to the program and is the person ultimately accountable for policies and decisions made by the immigration officials or employees under his/her supervisions. Therefore, requiring the ombudsman to report directly to the Attorney General does not guarantee the necessary independence. This predicament is at the center of a current dispute involving the administrator the Environmental Protection Agency (EPA) and the EPA's Hazardous Waste and Superfund Ombudsman, which Senators Crapo and Allard are attempting to address through legislation.

The Ombudsman needs to be able to conduct investigations and make recommendations without fear or concern that what he/she says or does in regard to the officials who supervise him might affect his/her job or job performance. For this reason, it is preferable that the Ombudsman not be appointed nor directly supervised by any official within the Department of Justice.

To safeguard the Ombudsman's independence, it would be best for the Ombudsman to be appointed by Congressional action. If that is not feasible, an alternative would be for the Ombudsman to be appointed by the President, with the advice and consent of the Senate (like the requirements for appointment of the Inspector General) or a Congressional committee. Similar provisions assuring the Ombudsman's independence should be added to S-2444 regarding the removal of the Ombudsman from office.

Likewise, the Ombudsman's independence would be preserved by providing for the Ombudsman to report directly (in terms of supervisory oversight) to a Congressional committee or to an entity or official in the legislative branch. If that is not feasible and if the Ombudsman is to report to the Attorney General, the USOA urges that language be added (similar to that in the Inspector General's statute) providing that neither the Attorney General nor any official below the Attorney General shall prevent or prohibit the Ombudsman from initiating, carrying out, or completing any investigation, nor in making any reports or recommendations related to an investigation, nor from issuing any subpoena that the Ombudsman determines is necessary in the course of an investigation.

Authority to Investigate

Historically, the primary functions of an ombudsman are to *investigate* complaints about the administrative acts of government, and if the complaint is substantiated or if problems are

identified, to make recommendations to the agency and to other appropriate officials (including the executive and legislators) to correct or make the changes necessary to resolve the problem.

Nowhere is the word "investigate" present in Senate Bill S-2444. Simply stating that the Ombudsman shall "assist" individuals in resolving problems does not imbue the Ombudsman with investigative authority. The USOA urges the section of the bill entitled "Functions of Office" be amended to provide the Ombudsman with specific authority to conduct investigations.

Authority to Have Access to Information and Subpoena Power

The investigative and recommendations functions serve to resolve complaints or disputes informally (as opposed to contested case proceedings). Based on experience, the Ombudsman generally will be able to obtain information from an agency on an informal basis. However, there may be occasions when the agency may resisted or deny information that the Ombudsman needs to complete an investigation. In such instances, it is beneficial for the Ombudsman to have subpoena power. The fact that the Ombudsman has the ability to exercise that power also promotes agency cooperation with informal requests for information.

The USOA urges that Senate Bill S-2444 be amended to clearly state that the Ombudsman shall have assistance and access to all information relevant to an investigation, and further provide the Ombudsman power to subpoena testimony or documentary information when necessary (again, similar to the authorities granted to the Inspector General).

Authority to Issue Public Reports

Senate Bill S-2444 requires the Ombudsman to submit an annual report that accounts for the initiatives and activities taken, the problems identified, and appropriate recommendations. The Ombudsman should also have the authority to issue public reports regarding any investigation or other information the Ombudsman determines to be beneficial. The Ombudsman does not have enforcement authority and therefore relies on the ability to persuade an agency to take corrective action. The option to publicly criticize an agency enhances that ability. In addition, public reports can educate and inform those interested in or may be affected by the issues involved.

The USOA urges that Senate Bill S-2444 be amended to allow the Ombudsman to issue investigative and other periodic reports as the Ombudsman deems appropriate.

Confidentiality and Immunity

Senate Bill S-2444 contains no provision protecting the Ombudsman from being compelled through legal process to disclose information relevant to complaints or investigations. Confidentiality is needed for the Ombudsman to resolve complaints or disputes informally. The Ombudsman needs both the complainant and the agency officials to speak candidly, without fear that certain admissions or information may be used against them in any other legal proceeding.

The USOA urges that Senate Bill S-2444 be amended to include a provision authorizing the Ombudsman to keep complaint and investigative records confidential, except as necessary to

perform the investigative and reporting functions required of the Ombudsman. The bill should also grant the Ombudsman immunity from being compelled to testify or produce such records in any legal proceedings, except as necessary to enforce or defend the authority of the Ombudsman.

Closing

The USOA strongly supports the establishment of an ombudsman to address complaints and concerns related to federal government's immigration program, regarding both service and enforcements issues. The USOA believes the provisions concerning the ombudsman in Senate Bill S-2444 have taken a good step towards that effort. The USOA believes, however, that amendments are needed to the bill to further maximize the Ombudsman's independence and to give the Ombudsman the authorities and protections necessary to function effectively. The USOA respectfully urges the members of the Senate Judiciary Committee to incorporate into Senate Bill S-2444 as many of the amendments the USOA has recommended as possible.

Thank you.

Ruth H. Cooperrider

Ruth H. Cooperrider
On behalf of the United States Ombudsman Association,
as member of its Board of Directors, and
as chairperson of its Outreach and Development Committee

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Section of Administrative Law (Midyear Meeting 1969)

BE IT RESOLVED, That the American Bar Association recommends:

1. That state and local governments of the United States should give consideration to the establishment of an ombudsman authorized to inquire into administrative action and to make public criticism.

2. That each statute or ordinance establishing an ombudsman should contain the following twelve essentials: (1) authority of the ombudsman to criticize all agencies, officials, and public employees except courts and their personnel, legislative bodies and their personnel, and the chief executive and his personal staff; (2) independence of the ombudsman from control by any other officer, except for his responsibility to the legislative body; (3) appointment by the executive with confirmation by a designated proportion of the legislative body, preferably more than a majority, such as two-thirds; (4) independence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause, determined by more than a majority of the legislative body, such as two-thirds; (5) a high salary equivalent to that of a designated top officer; (6) freedom of the ombudsman to employ his own assistants and to delegate to them, without restraints of civil service and classification acts; (7) freedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee; (8) access of the ombudsman to all public records he finds relevant to an investigation; (9) authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; (10) discretionary power to determine what complaints to investigate and to determine what criticisms to make or to publicize; (11) opportunity for any agency, official, or public employee criticized by the ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement; (12) immunity of the ombudsman and his staff from civil liability on account of official action.

3. That for the purpose of determining the workability of the ombudsman idea within the federal government, the Administrative Conference should (a) experiment by constituting itself an ombudsman for limited areas of federal activity, and (b) encourage and study experimentation by particular agencies with the ombudsman idea.

4. That establishment of a federal government-wide ombudsman system, whether or not designed to assist congressmen in handling constituents' complaints about administration, should await findings based upon the experimentation recommended.

BE IT FURTHER RESOLVED, That the Section of Administrative Law is authorized to present the views of the Association and to encourage the establishment of ombudsmen in accordance with the provisions of this Resolution, by all necessary and appropriate means.

Section of Administrative Law (Annual Meeting 1971)

BE IT RESOLVED, That the American Bar Association recommends that the resolution dealing with the establishment of an Ombudsman, which was adopted by the House of Delegates at its mid-year meeting in 1969, be amended in the following respects:

A. That Paragraph 2(3) be deleted and there be substituted in lieu thereof the following Paragraph 2(3):

"2. (3) appointment by the legislative body or appointment by the executive with confirmation by a designated proportion of the legislative body, preferably more than a majority, such as two-thirds; two-thirds; "

B. That Paragraph 3 be deleted and that there be substituted in lieu thereof the following Paragraph 3:

"3. That for the purpose of determining the workability of the ombudsman idea within the Federal government, the Federal government should experiment with the establishment of an ombudsman or ombudsmen for limited geographical area or areas, for a specific agency or agencies or for a limited phase or limited phases of Federal activity."

C. That Paragraph 4 be deleted and that there be substituted in lieu thereof the following Paragraph 4:

"4. That establishment of a Federal government-wide ombudsman program should await findings based upon the experimentation recommend."

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April 1, 2002

The Honorable Edward M. Kennedy
315 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

As President of the United States Ombudsman Association (USOA), I am writing to express the USOA's support for establishment of an independent ombudsman for the Immigration and Naturalization Service (INS). In view of recent concerns about the operation of the INS and the extent of the INS's interaction with the public, the USOA believes an ombudsman can assist that agency by serving as an independent office to address not only individual concerns, but also to review systemic problems and recommend improvements in policies, procedures, and practices.

The USOA is our Nation's oldest and largest organization of ombudsmen working in government to address citizen complaints. The USOA's membership includes practicing ombudsmen at all levels of government, some of whom have general jurisdiction, and others who have jurisdiction over a specified subject matter or agency. Information regarding the USOA can be found at its website: http://www.usombudsman.org/

The USOA is aware of pending proposals in Congress (H.R. 3231) and by the INS ("The INS Restructuring Proposal" released on November 14, 2001) to restructure the INS. One component of those proposals is the creation of an ombudsman. In both proposals, the ombudsman would be structurally situated within the INS or similar agency that would be subject to the ombudsman's reviews and investigations. In addition, the ombudsman would be under the oversight and supervision of and report directly to the official responsible for administering the immigration program or a component of it. The USOA is concerned that these proposals do not provide the ombudsman with the necessary independence to function effectively.

It is widely understood by students and practitioners of the ombudsman institution that both real and perceived independence is a critical element of any effective ombudsman's office. To the extent possible, an ombudsman should be structurally separated from the entities that are subject to the ombudsman's review or investigations. An ombudsman should also be free to hire and fire his or her own staff, manage the budget, select and prioritize the issues to be investigated and determine how they should be investigated. This independence allows the ombudsman to act and to be viewed by the public as acting as an impartial official who reports findings and recommendations based on an objective review of the facts and the applicable law.

The USOA believes that the best way to make an ombudsman truly independent is by situating the ombudsman's office in the legislative branch of government. If that arrangement is not feasible, then we believe that everything reasonably possible should be done to maximize an ombudsman's independence within the branch of government and the agency where the office is situated.

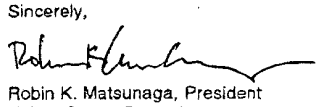
The USOA has learned you plan to re-introduce a prior bill regarding the INS (S. 1563) in the Senate. Ruth Cooperrider, a member of the USOA Board of Directors and chairperson of the Outreach and Development Committee, spoke this week with a Judiciary Committee staffer, Stephanie Teaford, regarding inclusion of an ombudsman for INS-related issues in your bill.

Ms. Teaford has also spoken with Dr. Laurence Marks, a member of the Chicago-based Independent Monitoring Board which has drafted a legislative proposal that deals only with establishment of an ombudsman office for INS-related issues. That organization has communicated with Illinois Representatives Danny Davis, Luis Guitierrez, and Jan Schakowsky regarding its proposal. Dr. Marks has also been consulting with the USOA regarding the proposal. Although the proposal creates an executive ombudsman (rather than the optimally independent legislative ombudsman), the USOA believes it would give greater independence to the ombudsman than that provided by H.R. 3231 and the INS's restructuring plan.

In summary, the USOA supports action by Congress to establish an ombudsman to address issues involving the INS. The USOA urges that, as various proposals are considered, Congress give particular attention to and act favorably to enact legislation that would maximize the independence of the ombudsman to the extent feasible, and that would provide the ombudsman with the necessary investigative authority, powers, and protections to function effectively.

If the USOA can provide any information or assistance as you consider and evaluate the viability of various options for establishing an independent ombudsman to deal with INS issues, please contact Ruth Cooperrider or me. The USOA appreciates and thanks you for the time and resources you are devoting to this issue.

Sincerely,



Robin K. Matsunaga, President
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