

Testimony of

Ms. Kathleen Campbell Walker

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Mr. Chairman and Distinguished Members of the Subcommittee:

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

INTRODUCTION

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

? Congress has the important responsibility of reviewing and modifying, as necessary, the President's Homeland Security Department initiative that would implement the most far-reaching changes to the organization of our government since the Second World War. In fact, every American who seeks to make our nation safer also shares this responsibility. Questions about how best to address our security concerns must not be labeled as "special interest" griping or defending the status quo because too much is at stake to stifle or discourage debate, and all of us want the best system developed and implemented. In fact, the process by which we debate and create a Homeland Security Department will be as indicative of the state of our democracy as the final Homeland Security Department that becomes law. AILA thus welcomes the opportunity to testify on this important issue.

? AILA cautions the Committee, and Congress as a whole, to proceed deliberately and carefully. While many have urged that the formation of this new Department become law before the end of this Congressional session, we believe that getting it right is more important than proceeding quickly. And if getting it right takes more time, then Congress and the Administration should take the time needed to get it right. We cannot afford the mistakes and oversights to which a hasty examination and debate could easily lead.

? We as a nation need to enhance our security without harming our internationally based economy, our dedication to respecting individual rights preserved by the Constitution, and our tradition as a nation of immigrants. AILA strongly supported the passage of the Enhanced Border Security and Visa Reform Act (P.L. 107-173) (Border Security Act) because that measure achieves an appropriate balance between these concerns. The Border Security Act is premised on two facts. First, enhancing our intelligence capacity is key to our increased security. The face of terrorism is not tied to one nationality, religion, or ethnic group. The horrific terrorist action in Oklahoma is an ever-present reminder to us of that painful fact. Any changes in federal policies and procedures must allow our federal agencies timely access to valuable and reliable intelligence. In fact, the most important mission of the proposed Homeland Security Department is to further enhance our intelligence capacity and ensure interagency sharing of information. Our government has come a long way since September 11, with federal agencies now sharing data more frequently than in the past. However, more needs to be done, and failure to do a better job of intelligence gathering and coordinating the sharing of information will mean that we have failed to enhance our security.

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

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

Nearly 500 million entries occur annually by people who come to the U.S. as tourists, business people, students, or to visit with their families. Less than one million annually settle here as immigrants. Living in a border community as I do underscores on a daily basis the imperatives this flow creates, and the necessity of balancing our security needs with the fact that we are a nation of immigrants and that we must continue to facilitate the free flow of people and goods. In fact, our best protection is to focus our security resources where they are most needed. We must be able to identify and separate low risk travelers and facilitate their entry. Such measures are more effective and more easily implemented than measures that focus on persons after they enter the U.S. We need to make sure that we use our resources in the most effective way possible to keep out those who seek to do us harm, not those seeking to come to our country for the reasons that people have always come here, including escaping persecution, desiring to be reunited with their families, working legally in the U.S., investing or conducting business in the U.S., or visiting this country as tourists.

? The bureaucratic restructuring created through the Homeland Security Department cannot take the place of either a comprehensive homeland security strategy or the need to reform outmoded immigration laws. While the Bush Administration's proposal seeks to reorganize government, it is silent on the policies necessary to enhance our security, and the costs of such policies. Nowhere are such policies more needed than at our nation's ports of entry. And nowhere is there a greater call for change than in reforming our immigration laws to enhance our security, support our economy and American businesses, and reunite families. I will discuss both issues in more detail later in this testimony.

? In the current environment, it is especially important to reaffirm that this nation's strength and future reside in our unity as a nation, our diversity, and the democratic principles upon which our country is based. It is also important to remember that U.S. immigration policy is based on a number of values that relate to the core social and economic principles upon which our nation was founded. These values are complementary and interweave to create the rich fabric that is beneficial to all Americans. Among the most important values are: the unification of American families; employment-related immigration to keep America strong in a global economy; asylum protection for refugees fleeing persecution; naturalization based on allegiance to the principles contained in our Constitution and laws; immigration courts that are independent, impartial, and include meaningful checks and balances; and immigration policy that is implemented through a well-regulated system based on law, with fair, uniform, and predictable requirements.

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

THE BUSH ADMINISTRATION'S PROPOSED HOMELAND SECURITY DEPARTMENT

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

AILA will focus its comments on the immigration aspects of this proposal. The Border and Transportation Security division, as proposed, would subsume our nation's immigration function. Along with all of the INS (enforcement and immigration services), and the Executive Office for Immigration Review (EOIR), currently part of the Justice Department, this division would include visa processing (from the Department of State), the Customs Service (from the Treasury Department), the Coast Guard and the Transportation Security Administration (from the Transportation Department), Animal and Plant Health Inspection Service (from the Agriculture Department), and the Federal Protective Service (from the General Services Administration). While under the Administration's proposal, the Coast Guard and the Secret Service would retain

their independent identities and agency titles, the proposal indicates that the other "units," including the INS, would be "integrated into the new organization, ensuring that there is one clear organization built on divisions with clear mission statements and lines of authority."

The Administration has indicated that this proposal is consistent with the President's "long-standing proposal to reorganize our immigration system to focus on enforcement and administrative functions separately. Under this proposal, the enforcement and administrative functions would be separated within the new Department to ensure that those on the enforcement side are free to focus on enforcement, while those on the services side are free to reform and improve the way we treat those who are seeking to immigrate legally to this country." However, it is questionable whether an agency whose overall goal is counter-terrorism and security will be able to properly fulfill the responsibility of providing timely and efficient immigration services that respect our laws.

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

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

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

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

Under the Administration's plan, visa processing would be brought within the Border and Transportation Security division so that the "new Department would consolidate the legal authority to issue visas to foreign nationals and admit them into the country. The State Department, working through U.S. Embassies and consulates abroad, would continue to

administer the visa application and issuance process." Thus, while the State Department would continue to issue and process visas, this proposal "will unify the policy authority on who can receive visas in the new Department." This proposal raises concerns about how such a division would operate and impact the process of granting visas.

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

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

HOW OUR IMMIGRATION FUNCTION CAN BEST CONTRIBUTE TO OUR NATIONAL SECURITY

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

Reorganizing our Immigration Function: AILA believes that reorganizing our immigration function and maintaining this function outside of the proposed Department of Homeland Security would achieve two results: a more effective, efficient and fair immigration process and enhanced national security. AILA greatly appreciates the hard work of members of the House Judiciary Committee, and in particular the subcommittee, who have focused on the need to restructure the INS. While their efforts have contributed much to the debate on how best to reform the INS, AILA believes that S. 2444, introduced by Senators Kennedy and Brownback, provides the best roadmap for reform.

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

? Our nation's immigration function needs to receive higher priority and more authority and resources, not less. Given the importance of immigration, AILA believes that our immigration function, as is the case with the FBI, needs to remain separate from this newly proposed, large federal bureaucracy. In fact, to achieve maximum efficiency and effectiveness, our immigration function must be given higher prominence within our government. The best way to achieve this end is to effectively reorganize the INS (as structured in S. 2444) and implement mandated cooperation between the reorganized INS and the new Homeland Security Department.

? Moving our immigration function into a Homeland Security Agency repudiates our tradition as a nation of immigrants and reflects a fundamental (and inaccurate) shift in how our nation views and treats immigrants. Placing our immigration function within a department whose mission is to "prevent terrorist attacks within the United States; reduce the vulnerability of the United States to terrorism; and minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States" repudiates our tradition as a nation of immigrants and the history that has made us strong. In fact, placing our immigration function within a Homeland Security Department sends the signal that immigrants are to be feared and not welcomed as economic, cultural, social and political assets.

? Immigration services and processing would fare poorly in the proposed new department. Under the Bush Administration's proposal, immigration services would compete for funding with entities including the Coast Guard, Customs, the Border Patrol, and Transportation Security. The services budget and policies would not fare well, resulting in a service function in worse shape than it is now and increasing backlogs. In addition, given the new department's mission, enforcement and adjudications concerns would not be balanced, leading to a reduction in the admissions into the U.S. of legal immigrants and non-immigrants (close family members of U.S. citizens and legal permanent residents, and needed workers for U.S. businesses) and refugees and asylum-seekers, with negative consequences to our economy and society.

? Placing our immigration function within the new department leads to concerns about civil rights. The new department's mission suggests that the important balance between security and due process protections and guarantees would not be maintained. It is too easy for civil liberty considerations to be downplayed within a Homeland Security Department concerned with enforcement and national security.

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

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

IMMIGRATION IN A HOMELAND SECURITY DEPARTMENT

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

If Congress and the Administration opt to include our nation's immigration functions within the proposed new homeland security department, we urge that S. 2444 be used to guide how immigration is organized within the new department. In that regard, we propose that three subdivisions should be formed headed by a strong leader with the title of Undersecretary. AILA

also strongly believes that the care and custody of unaccompanied alien children should be transferred to the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services.

Establish an Undersecretary for Immigration Services and Security: The primary responsibilities of the Undersecretary for Immigration Services and Security would be to secure our borders, prevent the entry of terrorists, and administer the Customs laws of the United States; administer the immigration and naturalization laws of the United States, including establishing the rules governing the granting of visas and other forms of permission to enter the U.S. to individuals who are not citizens or lawful permanent residents; enforce our immigration laws within the interior of the United States; ensure oversight of our immigration laws and the protection of civil and due process rights in carrying out these responsibilities; and ensure the speedy, orderly, and efficient flow of lawful traffic and commerce in carrying out these responsibilities. Given these responsibilities, this Undersecretary must have experience in both enforcing U.S. immigration law and adjudicating immigration benefits.

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

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

S. 2444 is the Appropriate Model for Structuring an Immigration and Border Security Division. S. 2444 provides for the necessary person in charge and coordination, which is why AILA urges that it be used as the model for organization of immigration functions within a Homeland

Security Department. The other congressional proposal, H.R. 3231, does not create a strong person in charge and does not provide for adequate coordination. While H.R. 3231 separates enforcement and adjudications by creating two separate Bureaus, there is little coordination between the two, save a General Counsel placed in a weak suboffice. This coordination is largely lacking because there is no high level official given sufficient authority over the two bureaus who would be able to integrate shared information systems, policies, and administrative infrastructure, including personnel and training. The divisions would likely end up working at cross-purposes, with the leaders from each sending conflicting messages on policy matters pertaining to complex laws.

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

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

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

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

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

mean to do us harm, inspectors must also allow entry into this country of people who help build up America and are central to who we are and to our country's continued economic vitality.

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

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

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

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

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

While the proposed Department of Homeland Security does not focus on how our ports of entry would be managed, the proposal assumes that entities under one command would coordinate and cooperate, and that policies and procedures, as well as staffing and infrastructure needs, would be approved and coordinated by a central management body. However, such an initiative will fail if it does not uphold the important balance between enforcement and adjudications in the context of INS inspections (and thus the division maintained here between primary and secondary

inspections). Furthermore, Congress and the Administration must adequately fund and staff our ports of entry, and each port must be held accountable for its performance. No advancement in grade should occur unless performance merits such advancement in conjunction with continuing training achievement. Regular training must be timely provided and required. Adequate support staff must also be provided, and precious supervisory and adjudicative time must no longer be wasted on clerical functions, including fee intake. As a very simplistic example, it makes sense to test the use of ATM-like machines to intake fees and issue more secure I-94s (Arrival/Departure Record).

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

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

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

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

Secondary inspections at ports of entry should also be part of Immigration Services. Primary inspection is where an applicant for entry into the United States is initially reviewed to see if there is any enforcement or eligibility reason to refuse entry. It is not uncommon for questions to arise as to whether the individual meets the criteria for entry. For example, it may not be clear whether an individual seeking entry for business is coming for a bona fide business trip, allowing him to enter on a business visitor's visa or under the visa waiver program, or whether the purpose of the trip might cross the line into employment in the United States, requiring a visa that

includes appropriate work authorization. This is an adjudicative function, requiring an examination of the totality of the circumstances that cannot be made in the context of the pressures of primary inspection and requiring a decision-maker who is fully trained in adjudicative standards. Thus, it will be critical for Immigration Services to have a role in Inspections, and secondary inspection is where this role is usually played.

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

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

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

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

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

Intelligence: As the principal source of immigration-related intelligence, the INS Intelligence Program currently provides analyses to INS staff at all levels to aid in making day-to-day, mid-term, and long-term operational decisions; acquiring and allocating resources; and determining policy. Intelligence is as important to the adjudications side of the immigration function as it is to

the law enforcement side. In fact, adjudications include a strong security component for which intelligence is key. The recent implementation of IBIS checks that INS is currently conducting exemplifies the need for coordination between both sides of the INS house. In addition, the INS's forensics document laboratory, which is part of the INS intelligence program, assists INS adjudicators in detecting document fraud in petitions filed with the INS.

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

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

The Homeland Security Department will fail in its mission if it does not pay close attention to another mission that belongs to all government agencies: the upholding and advancement of the Constitution and of the basic rights and liberties of all persons. Nothing could be more fundamental to any American undertaking. AILA therefore urges that a Division of Civil Rights and Oversight be formed within the Department of Homeland Security to ensure that the Department protects these rights. This Division is especially important given that the mission of the Homeland Security Department would prioritize enforcement and national security, leaving it questionable how civil liberty concerns and considerations, as well as the protection of the provision of services for people seeking immigration benefits, would be addressed.

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

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

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

Indeed, a department devoted to internal security is best operated internally. But there are functions of the current INS that require a presence outside the United States. Primarily, these are

refugee processing, orphan/adoption processing and the adjudication of waivers. AILA proposes that these functions be transferred to the State Department, which already possesses related expertise and has the needed infrastructure in the countries where these activities take place. In addition, to maintain a fair and reasoned process for visa issuance, decisions regarding visa eligibility must be subject to appellate review. This review must apply to all of the functions transferred to the Department of State, which already are subject to such review, as well as to consular decisions. For example, as we have seen with recent decisions regarding international adoptions, checks and balances are needed to ensure that the legally correct decision is made.

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

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

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

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

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

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

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

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

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

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

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

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

- o Proposed changes must facilitate, not erode, immigrants' access to the BIA and federal courts, consistent with due process considerations in our justice system; and

- o Such changes must also enhance efficiency, increase accuracy, acceptability, accountability and consistency, and facilitate oversight and review.

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

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

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

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

1. Approaching Immigration Reform in a Comprehensive Manner: The United States' current immigration system needs to be reformed to reflect current needs and realities. Due to our current system, families are separated for long periods of time and U.S. employers cannot bring in needed workers. People are forced to live an underground existence in the shadows, not making themselves known to the government for fear of being separated from their families and jobs. The current enforcement system has failed to prevent illegal immigration and precious resources that should be spent on enhancing security are wasted on stopping hard-working people from filling vacancies in the U.S. labor market. Border enforcement efforts that do little to enhance our security have led to people losing their lives, while current laws make it difficult for many to enter legally. Our immigration system needs to be reformed so that legality is the norm, and immigration is legal, safe, orderly, and reflective of the needs of American families, businesses, and national security.

2. Implementing Immigration Reform as an Important Component of our Enhanced National Security. Immigration reform that legalizes hard-working people already here and that creates a new temporary program will help the U.S. government focus resources on enhancing security, not on detaining hard-working people who are filling vacancies in the U.S. labor market or seeking to reunite with their close family members. In addition, reform that includes a new

legalization program and a temporary worker program will encourage people to come out of the shadows and be scrutinized by our government. The legality that results from these initiatives will contribute to our national security.

3. Developing a Regularization Program for People in the U.S. without Authorization: People who work hard, pay taxes, and contribute to the U.S. should be given the opportunity to obtain permanent residence. This legalization would stabilize the workforce of U.S. employers, encourage people to come out of the shadows to be scrutinized by our government, and allow immigrants to work and travel legally and be treated equally. Many have been here for years, are paying taxes, raising families (typically including U.S. citizen and lawful permanent resident spouses and children), contributing to their communities and are essential to the industries within which they work. In order to unite families and keep them together, liberal and generous waivers must be made available for grounds of admissibility and deportability. It is neither in the best interests of the workers nor of their employers for this situation to remain unaddressed.

4. Creating a New Temporary Worker Program: Current immigration laws do not meet the needs of our economy for short- and long-term employees in those sectors currently experiencing worker shortages and others that are expected to experience shortages when the economy rebounds. A new temporary program would give workers the opportunity to work in areas of the country where they are needed and would give employers experiencing shortages the workforce they need. Current programs have often proven unusable by both employees and employers, and do not accommodate employers facing longer term, chronic labor shortages. The framework for a new temporary worker program must differ significantly from existing programs, and must respect both the labor needs of business as well as the rights of workers.

5. Opening Up Legal Channels for Family- and Business-Based Immigration: Our immigration system has been characterized by long backlogs in family-based immigration and long delays in business-based immigration. Illegal immigration is a symptom of a system that fails to reunify families and address economic conditions in the U.S. and abroad. To ensure an orderly future process, it is critical to reduce bureaucratic obstacles and undue restrictions to permanent legal immigration. Developing an increased legal migration flow will make immigration more orderly and legal. It will also allow more people to reunite with their families and work legally in the U.S., and will facilitate fair, equitable, and efficient immigration law, policy, and processing. It is essential to make legal future immigration that otherwise will happen illegally.

6. Adequately Funding Immigration Reform Initiatives: Immigration reform must include adequate funding to implement reform. Congress frequently passes new immigration laws without including adequate funding. Lack of adequate funding has contributed to the long backlogs and ineffective, inefficient and unfair services that currently characterize the Immigration and Naturalization Service (INS). Whether funds are directed to the INS or other entities to implement reform, any changes in the law must be accompanied by adequate funding, in the form of direct congressional appropriations.

CONCLUSION

The same criteria that are essential to an effective reorganization of the INS are key to immigration in the context of any national homeland security department discussion: It is

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

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

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

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