Symposium Remarks: Changing the Face of Immigration: A Year in Transition

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Good Morning. It is a pleasure to be sitting on a panel with these distinguished colleagues and I thank Peter for the invitation and I particularly want to commend Victor Cerda for attending the session. I believe it is really important for Department of Homeland Security (hereinafter “DHS”) officials to be out here in a forum like this discussing the difficult issues that confront the department as it struggles with its daunting mandate and organizational challenges. I also want to thank Victor for nicely prefacing some of my comments, although I will have to take issue with some of his optimism about the direction of DHS.

I have been asked to take a slightly different angle on today’s topic and talk a bit about the broader impact that the migration of INS from the Department of Justice (hereinafter “DOJ”) to DHS has had on policy level advocacy. I plan to highlight what I will loosely term structural obstacles that the reorganization has created or exacerbated for immigration advocates, as well as something I will call ambient impediments to effective advocacy in the new regime.

Throughout the negotiations surrounding the development of the Homeland Security Act, the American Immigration Lawyers Association (hereinafter “AILA”) maintained that an effective reform or reorganization would need to adhere to the following structural prescriptions: strong coordination between separated service and enforcement functions, a single leader at the helm of
the agency with the authority to develop and administer policy for all of the immigration functions, and adequate funding for immigration services. Unfortunately, in our view, the reorganization of our immigration functions in DHS fall short on each of the following criteria: the structure for coordinating services and enforcement is wholly inadequate; no one person is charged with policy development; and the immigration services component continues to lack adequate funding. In addition, the migration of INS's immigration functions to DHS precipitated another structural concern— the problem of concurrent jurisdiction between DOJ and DHS.2

Let us take these structural issues in turn, starting with coordination. Despite the clear differences that Mr. Cerda identified, immigration enforcement and immigration services are really just two sides of the same coin, meriting equal attention, support, and funding. For both sides to function efficiently and effectively, strong coordination is required. Unfortunately, such coordination received inadequate attention in the Homeland Security Act;3 it has not been reflected in DHS's current practices; and it does not appear to be a priority. At a minimum, the lack of coordination within DHS needs to be addressed through aggressive Congressional oversight, but that may not be enough. We believe that some formal structural changes will need to be instituted. Advocacy efforts to correct problems or improve services in the new agency are rendered exceedingly difficult when the different entities within DHS approach the same issues with different perspectives and policies and fail to speak with a common voice.

A classic example of this dilemma frequently emerges after ICE places someone in immigration removal proceedings. If that person has a petition pending with USCIS, which if approved, would permit the immigration judge to accord the person permanent resident status, ICE is not bound to, and typically

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will refuse to terminate the proceedings or close the proceedings pending the adjudication of that petition. USCIS, for its part, will not expedite the adjudication of that petition unless ICE asks them to do so directly and ICE subsequently refuses.

For their part, immigration judges do have the opportunity to stay proceedings against an individual, but they are under a lot of pressure to reduce their case backlogs and are therefore often reluctant to keep these cases on their dockets indefinitely. Thus, you have a construct of partitioned responsibilities, which by its design, limits the effectiveness of immigration advocates and immigration practitioners to represent their clients.

Our ports of entry are another example of where services and enforcement come together. Our national and economic security plainly depends on the efficient flow of goods and services through our ports. The Homeland Security Act however was largely silent on how the immigration functions should work at the ports of entry. It is critical that those responsible for inspections are fully trained and grasp the policies and practices of USCIS. The current experience of AILA members, however, is that CBP officers remain rooted in the culture of their legacy agency, U.S. Customs, and thus accord less than adequate attention to the immigration side of their responsibilities.

It is important to note that failures on this front are not simply the result of legacy Customs officers resisting change and the assumption of new responsibilities under CBP; some of the failures are the result of specific policies that fail to recognize or reflect the intricacies and complexity of our immigration laws. For example, under the “One Face at the Border” initiative that effectively eliminated immigration experts from the primary

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5 See generally Jan Crawford, Justices Clip Rights of Legal Immigrants; INS Can Jail Felons Pending Hearings on Deportation, CHI. TRIB., April 30, 2003, at C10 (citing example of detained immigrant pending adjudication).

6 See generally Otto, supra note 2, at 501 (describing port of entry procedures under new regulations).

inspection of travelers seeking entry to the U.S., no provision was made guaranteeing the availability of an immigration specialist to review cases even at secondary inspections.\(^8\)

Let us turn to another quasi-structural issue, funding. The immigration services functions have been chronically under-funded for as long as one can remember.\(^9\) It is a fact that has contributed in no small part to its deserved reputation for low and lower quality and slow services. Direct Congressional appropriations are critical to supplement user fees in order to ensure adequate delivery of services. Instead, however, the fiscal year 2005 administration budget proposal would reduce USCIS funding by 41%.\(^10\) These proposed cuts coincide with a proposal by USCIS to substantially increase application and petition fees.\(^11\) Processing backlogs have reached crisis proportions and quality of service is at a historic low. I obviously do not mean to suggest that the transition of immigration functions to DHS caused the current funding predicament - it certainly predated March 1st of 2003.\(^12\) But the fact that immigration services are now buried in a massive security agency means that services have slipped still lower on the priority totem pole and resources and funding for these functions are going to continue to receive short shrift. Without adequate funding, I think that all of our calls for reform and improvement of immigration services will be little more than empty rhetoric.

I want to turn briefly to the issue of concurrent jurisdiction. On February 28th, 2003, in a rulemaking purporting to transfer the immigration authorities from DOJ to DHS, the Attorney General asserted that DOJ retains concurrent authority to


\(^12\) See Tyche Hendricks, *Immigration Proposes to Raise Fees; Move Greeted by Protests; Agency Must Cover Costs*, S. F. CHRON., Feb. 4, 2004, at A7 (discussing the need for more funding to keep the backlog from growing).
engage in substantive rulemaking in a number of areas. The rationale behind this asserted authority was that the Homeland Security Act left the immigration court system, known as the Executive Office for Immigration Review (hereinafter “EOIR”), housed in the DOJ. The implications for this assertion of concurrent jurisdiction are considerable with the potential for DOJ and DHS to issue conflicting regulations in a variety of areas. The concern is that dual rulemaking authority could precipitate cabinet-level institutional power struggles and paralyze the government’s ability to administer the immigration laws effectively. Indeed, such a scenario is not merely theoretical conjecture at this point, we are potentially on the cusp of such a problem emanating from an asylum case known as Matter of R-A.

After the case percolated up through the immigration courts, the Attorney General certified the case to himself in order to issue a precedent decision on whether gender can form the basis for asylum. Given the posture of the case and reports from inside the DOJ, the decision to certify strongly suggested that the Attorney General would reject gender as a cognizable ground for an asylum claim. DHS, however, responded by filing a brief with the Attorney General stating that it believes gender is an appropriate basis for asylum and recommended against making Matter of R-A a precedent decision. Instead, it argued that forthcoming DHS policy guidelines should establish the rules for this type of case. If the Attorney General ultimately proceeds to

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13 See MIA: Terror Database, USA TODAY, Aug. 12, 2003, at 12A (pointing to ongoing turf wars between the Department of Justice and the Department of Homeland Security).
14 See Mitch Gelman, Showcase For Our Nation’s Values, NEWSDAY (New York), Feb. 25, 1996, at A5 (mentioning that the Executive Office of Immigration Review (EOIR) in the Department of Justice oversees the immigration court system).
17 See generally Paul Salopek, Political Asylum; The Latest Exiles: Abused Women, CHI. TRIB., Apr. 21, 1996, at C1 (indicating that gender-based asylum is just another bow to political correctness).
deny asylum in this case, concerns about a counterproductive institutional power struggle will have materialized. So you see the tension that this concurrent authority causes and the type of predicaments that it can lead to.

The most complete solution to that specific structural problem would be to reconstitute the EOIR as an independent adjudicative body with no substantive rulemaking authority. Unleashing it from its current moorings in the DOJ would eliminate concerns about conflicting interagency authority and would further other important goals. It would provide immigration adjudicators with the independence necessary to conduct fair and impartial hearings which, in turn, would significantly enhance the perceived legitimacy of immigration court decisions. 18

My time is running short, so I want to briefly turn to some post-transition ambient impediments to immigration related advocacy. Specifically, I want to address an issue alluded to by my fellow panelists concerning the predominance of the agency's national security mission and the attendant culture of “no” that has developed. With immigration functions now housed in DHS, it is critically important that the new agency's policies and practice balance national security goals with laws and policies that welcome newcomers and recognize the strong and vital connections that the United States has to nations around the world.

In the post-9/11 era, national security has overshadowed all other policy objectives. This emphasis is perfectly understandable, especially in an agency called the Department of Homeland Security, but you can see the problem it raises for immigration advocates. In response to pressure for direly needed reforms in immigration policy, the government reverts to knee-jerk homeland security justifications, a justification that, even when fallacious, is exceedingly difficult to overcome. For example, there was an article just yesterday in a Pittsburgh

newspaper describing how USCIS errors in processing a world famous Bulgarian opera singer’s visa application caused her to miss a production of Julius Caesar. The USCIS spokesman, Christopher Bentley, responded to complaints with the following comments:

We slowed the process down, we run through National Security databases to ensure that that individual is entitled to the service. We make no apologies for that; we need to safeguard the homeland. Have we seen processing times increase? Have we seen the backlog as a result of that? Yes. National Security is paramount. We will do nothing to jeopardize that in the name of speed.

That telling quote illustrates the challenge confronting us; all immigration related policy arguments have to be framed in terms of national security. That pervasive national security focus has engendered what I would call an ambient impediment to immigration advocacy, the agency’s culture of “no”.

Widespread reports of unfair, arbitrary and inconsistent adjudications have reinforced the perception that adjudicators’ fail-safe position now is “no”, notwithstanding the merits of an individual application or petition. Further buttressing that view is an overwhelming increase in the number of unnecessary requests for additional evidence issued by USCIS adjudicators. USCIS headquarters to its credit has tried to solve the problem, but so far to no avail. The default position of adjudicators is that they will not be the person who lets in the next Mohammed Atta.

While my comments, and those of others here, have highlighted some of our immigration system’s serious structural flaws, the problems in our system run deeper still. We cannot expect structural reforms to cure the ills of our system without changing our failed immigration laws themselves. With


20 See id. (responding to complaints about the process).

21 See generally Martin, supra note 11, at 1 (revealing that the USCIS often requests evidence of good moral character).

approximately nine million undocumented immigrants in the United States,23 and CBP and ICE stretched thin in their efforts to try to enforce the laws we have, it is clear to nearly everyone that we need an overhaul of our immigration laws.

We need comprehensive reform that acknowledges the economic, social, and geographic realities of migration patterns from our southern border so that enforcement resources can be trained on terrorists and criminals, not hard-working, tax-paying individuals. We need reform that makes legality the norm and enables the people who seek entry into this country for a shot at the American dream to do so in a safe, legal, and orderly fashion. We need reform that respects our heritage as a nation of immigrants by embracing their initiative and their contributions instead of treating them as outcasts and second-class citizens. Until then, changes to the organizational structure of our immigration agencies will produce little more than cosmetic results.

Thank you very much.