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Immigration Policy and the Homeland Security Act Reorganization:

An Early Agenda for Practical Improvements

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SUMMARY

Congress adopted a massive reorganization of immigration functions as part of the Homeland Security Act (HSA).[1] The Act already projected a highly ambitious changeover, but President Bush then adopted essentially the speediest possible timetable for the transition by submitting a broad reorganization plan on the very day he signed the bill, November 25, 2002. As a result, functions were transferred from the Immigration and Naturalization Service (INS) to the new Department of Homeland Security (DHS) on March 1, 2003, and INS was then formally abolished. (The President could have set a transition date as late as January 2004. HSA § 1502(d)(1).) Incongruously, the changeover date was actually three months before the date when the Act required a detailed implementation plan, including precise specifications for the new structure of immigration offices and for the division of INS personnel. HSA § 477(b), (c). The plans publicly available as of this writing, a few weeks after the transition, are scarce and sketchy. Nonetheless, drawing on what is available, I describe here the current changes and then identify areas where special attention is clearly needed. Finally, I suggest early modifications or refinements of the current plans that might be especially profitable in achieving successful immigration policy and operations over the long run.

BACKGROUND

Extensive reorganization of INS had been debated and planned for since at least 1998.[2] Virtually all plans called for some kind of split between immigration enforcement functions and immigration

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service functions.[3] But as the debate stretched out over several years (owing to real differences of view and also to petty sniping from Congress), many of the key players came to understand that too complete or rigid a split would present real difficulties. For example, some functions, particularly inspections at the ports of entry (which can include attention to asylum claims), are not easily pigeonholed as either service or enforcement. Inspectors both adjudicate and enforce. Many other INS responsibilities involved close linkages as well. Consider the outcry when men called in for the special registration program of the last few months[4] were taken into custody - an enforcement measure based on their formal overstays - even though they had fallen out of status because of delays on the service side in ruling on their legitimate applications for permanent residence. Effective enforcement, in other words, must link with services if it is to maximize public credibility. Equally revealing are the connections viewed from the services side. In the post-September 11 environment, Congress and the public will demand that no immigration benefit be provided by service officers without close attention to security concerns, through careful screening of the person using enforcement-generated information. Effective services must link with enforcement.

A great many versions of INS reorganization legislation have been forwarded over the years, but the models that were furthest along in the legislative process, before President Bush unveiled his sweeping proposal for a Department of Homeland Security in June 2002, reflected growing attention to the need for better linkages. The Senate bill envisioned a large centralized office of the Director, with direct responsibility for inspections and for shared services (e.g., records management and forms development), and considerable supervisory responsibility over the two newly separated bureaus for enforcement and services.[5] The House bill preserved a more complete split, with relatively meager provision for centralized functions - but it compensated for that meagerness somewhat by elevating the key management and policy position to the level of Associate Attorney General.[6] That official would have occupied one of the top four or five positions in the Department of Justice.

Immigration Functions after the Homeland Security Act

The contest between these two visions was wholly reshaped by the President's bold proposal for a new DHS. To the President's and Secretary Tom Ridge's credit, the Administration's plan did keep nearly all immigration functions together in the same department - a step I view as a crucial minimum if we want to develop and sustain sensible and coherent immigration policy. (Some earlier trial balloons would have moved only border functions - i.e., Inspections and the Border Patrol - to a DHS.) In fact, the President's proposal went a step further in the direction of consolidating immigration-related functions by transferring considerable responsibility for visa policy and monitoring from the State Department to DHS. Even after the President introduced his proposal, however, battles over the shape of the immigration offices raged on in the House and Senate. The House at that point moved toward far greater fragmentation of immigration functions (perhaps as part of an effort by the Judiciary Committee to retain as much power as possible over immigration), while

the key Senate players continued to fight for a more unified immigration policy and management structure. Final agreement was not achieved until the lame duck Congress passed the Homeland Security Act in November.[7] The enacted bill, though generally fairly close to the President's initial proposal, unfortunately leans in the direction of the less tightly coordinated plan that the House came to favor over the summer. Moreover, it lacks the compensating grace of the spring 2002 House bill. There is nothing remotely equivalent to the Associate Attorney General for Immigration Affairs, as a focus for integrated operations and comprehensive policy development - though an equivalent DHS position had been sought by leading Senators through the summer and fall.

Broad Structure of DHS

Figure 1 (page 22) depicts the main structural outlines as enacted in the Homeland Security Act. The key operational units are headed by Under Secretaries.[8] The Act lodges immigration enforcement functions in the Directorate for Border and Transportation Security (BTS), the largest unit in the department, headed by Under Secretary Asa Hutchinson. That Directorate also includes Customs, Agricultural Inspections, the Federal Protective Service (split off from the General Services Administration), and the highly visible Transportation Security Agency, among others (see Figure 2, page 23). As set forth in the original Act, INS enforcement functions were to be lodged in the Bureau of Border Security (BBS), headed by an Assistant Secretary who would report to the Under Secretary for BTS. HSA §§ 441, 442.

A wholly separate unit, not under any Under Secretary, inherits INS's service functions, the Bureau of Citizenship and Immigration Services (BCIS). Its responsibilities include naturalization, asylum, and adjustments of status. HSA § 451. The legislative intention in making this special institutional arrangement for BCIS, rather than placing it under an Under Secretary, was evidently to help elevate the importance of immigration services. The Director of BCIS reports directly to the Deputy Secretary - the same as the Under Secretaries. Moreover, in the statutory section designating Executive Schedule levels, the Director is listed as being ranked with the Under Secretaries. HSA § 1702(a)(3). Whether this structural placement and rank will truly work to sustain the prominence of immigration services remains to be seen.[9] My guess is that it will be hard for immigration services to compete successfully for a major piece of the Deputy's time and attention, but in the end the Bureau's clout will depend greatly on the people who first occupy the positions of Deputy Secretary and Director, as well as the patterns and practices they establish. (The Deputy Secretary is Gordon England, and Eduardo Aguirre has been nominated for the post of Director.)

Immigration Functions as Enacted in November 2002

Figures 2 and 3 (page 23) provide a more complete schematic diagram of the distribution of immigration functions in the Act that passed last November. Figure 2 sets forth those that are in DHS, depicting the structure set forth in the Act, a structure that has since been importantly modified with regard to the Bureau of Border Security and allied units (discussed below). With regard to immigration enforcement, the Act placed nearly all such func-

tions together under a single Assistant Secretary for Border Security, reporting to the Under Secretary for BTS. The BBS would have been one of seven roughly comparable units reporting to the Under Secretary. The Act also makes important changes affecting visa issuance, historically a function of the Department of State, by giving the Under Secretary of BTS the overall authority to adopt the governing regulations and policies, as well as defined jurisdiction to monitor visa issuances. HSA § 428. Limited exceptions reserve specific visa policy authorities for the Secretary of State, such as designating proscribed terrorist groups whose entry is barred, INA[10] § 219(a), or specifying when the entry of a particular individual would have serious adverse foreign policy consequences, INA § 212(a)(3)(C). Consular officers remain officers of the State Department, and the visa-related authorities of the DHS are to be "exercised through the Secretary of State." The two departments are now hashing out the exact significance of that phrase. In any case, the Under Secretary for BTS is authorized to station DHS officers in consulates he selects. These latter officers are to provide advice and training, monitor the visa process, and even veto the issuance of visas they believe should not be granted. (They would have no authority, however, to grant a visa to someone denied by a consular officer.) The DHS office overseeing the visa process was apparently meant to report to the Under Secretary directly and was not placed under the Assistant Secretary for Border Security.

On the services side, as stated, the principal functions are lodged in the Bureau of Citizenship and Immigration Services (BCIS), which inherits about 15,000 employees from INS. The Act also provides for an Ombudsman's office, with at least one officer stationed in each state, to assist individuals having difficulties with their applications and petitions, but also to perform a continuing role in identifying systemic problems and recommending changes in administrative practices. HSA § 452. Some earlier versions of reorganization legislation provided for an ombudsman with authority affecting both immigration services and enforcement, but the bill as enacted gives jurisdiction only over the actions of the BCIS. The Ombudsman reports directly to the Deputy Secretary, but also has reporting functions to Congress. The Act states that some key annual reports shall be provided directly to congressional committees without review or comment by any DHS or Office of Management and Budget (OMB) official. HSA § 452(c)(2). Another subsection states that "the local offices of the Ombudsman operate independently of any other component of the Department and report directly to the Congress through the Ombudsman." HSA § 452(g)(1)(C). In my view, such a role for an executive branch office is unconstitutional. Because the Bush Administration has never been shy about protecting executive prerogatives, we can expect solid (and justified) resistance to uncleared reporting and to any notion of the ombudsman's direct accountability to Congress.

In apparent recognition of the need for connections and coordination between immigration enforcement and services, the Act does provide for a Director of Shared Services "within the Office of Deputy Secretary." This individual's functions are given only cursory description in the statute, however. He or she is "responsible for the coordination of resources" for BBS and BCIS, including "information and resources management," "records and file management," and "forms management." HSA § 475.

Figure 3 shows three key immigration functions mentioned in the Homeland Security Act that are not transferred - or at least not fully - to DHS. First, in response to a major campaign to change the treatment of unaccompanied minors who find their way into the immigration enforcement system, the Act transfers all responsibility for their care and custody from INS to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services. HSA § 462. Unlike some earlier versions of these reforms, the bill as enacted makes no provision for appointment of counsel or a guardian ad litem for such children. It does require the ORR to submit a plan to Congress regarding timely appointment of legal counsel, consistent with existing law. (Existing law generally bars the use of public funds, however, to pay for counsel for aliens in removal proceedings.[11])

Second, the Act also makes explicit provision (for the first time in statute) for the Executive Office for Immigration Review (EOIR), and it ordains that that unit remain in the Department of Justice. The statute does not materially change EOIR's functions. HSA § 1102. Before this, EOIR had always been a creature simply of DOJ regulations. EOIR continues as the institutional home of the Board of Immigration Appeals (BIA), the corps of immigration judges, and the administrative law judges who rule on charges under the employer sanctions and anti-discrimination provisions of the immigration laws. The language of this section of the Act contemplates that the Attorney General will continue to have authority to "review administrative determinations in immigration proceedings," evidently a reference to the infrequently invoked but potentially powerful part he plays in serving as the highest administrative appeals body, under a process known as "referral." 8 C.F.R. § 3.1(h) (2002).

And third, as indicated, consular officers retain front-line responsibility for ruling on individual visa applications. These officers remain within the Department of State, accountable for some purposes to the Secretary of State, even though most authority for visa policy and monitoring has moved to DHS.

Reorganized Enforcement Functions, January 2003: BCBP and BICE Replace BBS

The Homeland Security Act provides extensive authority to the President and the Secretary of Homeland Security to reorganize or reallocate functions within the Department, without further statutory amendment. HSA §§ 872, 1502. The President's power appears to apply primarily up until the date that a particular portion of his DHS reorganization plan takes effect. HSA §1502. Thereafter, the Secretary has a similar power, but only "after the expiration of 60 days after providing notice of such action to the appropriate congressional committees." HSA § 872(a). This 60-day report-and-wait mechanism may have the practical effect, most of the time, of working as a covert legislative veto on such reorganizations (candid legislative vetoes are unconstitutional). But the Secretary has the formal authority to go ahead and reorganize following that time period, even if a committee objects, assuming he is willing to incur the political backlash, which could be manifested in later legislation or appropriations cuts. The Act does say that these executive reallocation authorities do not "extend to the abolition of any agency, entity, organizational unit, program, or function established or required to be maintained by statute," but "abolition" is not defined. HSA § 872(b). The immigration title of the Act also contains language meant to bar recombination of the separated immigration services and enforcement components, but in an apparent oversight - or at

least a curious drafting twist - this bar applies only to the use of the President's powers under § 1502, not the Secretary's 60-day notice power. HSA § 471(b). DHS's executive branch architects show no inclination to move in the direction of recombination anyway, but more modest executive reorganizations to help combine or centralize selected policy or legal functions affecting immigration management would be legally valid and should be politically viable, depending on how they are handled. I will suggest some further use of these authorities below.

The President employed his reorganization authorities on January 30, 2003, to reallocate functions among subunits of the Directorate of BTS. This plan is depicted in Figure 4 (page 24), which should be compared to Figure 2. The new plan amounts to a kind of amalgamation of Customs with INS's enforcement functions, followed by a redivision of those functions along a very different line. (Also amalgamated and re-sorted are the border agricultural inspection authority that DHS inherits from the Department of Agriculture, and - for reasons that are less apparent - the functions of the Federal Protective Service, which guards certain federal buildings.) What emerges are two new bureaus, replacing four previous components. BBS and Customs disappear from the organization charts, replaced by more of a functional division that essentially groups all border enforcement functions together and all interior enforcement functions together.[12] For over 60 years, serious proposals to merge some or all of the functions of Customs and INS, creating a single border management agency, have been put forward.[13] All of them had been beaten back by the affected departments and agencies, their officers' unions, congressional supporters, and other opponents. It is therefore striking to see that epic contest resolved and merger decreed, without public debate, through the quiet mechanism of a few brief reorganization notifications from the President and the DHS.

Border functions now fall under a new Bureau of Customs and Border Protection (BCBP), to be headed by the incumbent Commissioner of Customs, Robert Bonner. All inspectors of the three previous agencies that had inspection responsibilities, plus the Border Patrol, along with support staff, go to this new bureau. It inherits approximately 30,000 employees, including 17,000 inspectors. Their focus will be "on security at and between the ports-of-entry along the border.[14]" The plan is sometimes explained on the basis that it will allow a single port director, rather than three, to be in charge of all inspections and security functions.

Remaining enforcement functions, essentially those that operate in the interior of the country, go to the Bureau of Immigration and Customs Enforcement (BICE), which claims about 14,000 employees. This unit inherits about 5,500 investigators (from all four agencies), plus about 4,000 detention and removal officers, as well as others involved in immigration removal. They will be responsible for locating aliens unlawfully present and for inspecting places of employment to find undocumented workers, presumably including checking the employer's compliance with verification requirements. BICE will manage the nation's antismuggling programs, protect specified federal buildings (a function it receives, along with 1500 employees, from the Federal Protective

Service), and also enforce customs laws against money laundering and child pornography. In addition, the air and marine enforcement functions of the Customs Service go to BICE.[15] Apparently all INS trial attorneys who handle cases in immigration court are intended to be part of BICE. Even if a removal case arises at the border and is based on inadmissibility, if it is going to immigration court (as distinguished from being treated in expedited removal), it will be handled by BICE attorneys. The President has nominated Michael Garcia, who was the acting commissioner of INS at the time of the transition, to head BICE.[16]

The stated rationale of all these consolidations is that they will multiply effectiveness by bringing all border inspectors together in a single bureau, BCBP, along with those who police between border stations. Similarly, it will group all investigators together in BICE. In each case this reorganization plan is meant to expand the ranks of personnel that can be assigned according to DHS priorities, rather than by uniform color or agency affiliation.

It bears emphasis that this January reorganization takes place entirely within the Directorate of BTS, and does not even touch all parts of that directorate. The Transportation Security Agency, for example, remains unchanged, still reporting as a separate unit to the Under Secretary for BTS. More importantly for current purposes, the changes have nothing to do with immigration services, the ombudsman, or the functions assigned to consular officers, ORR and EOIR. And it appears that the DHS office with visa responsibilities will still be a separate unit within BTS.

The DOJ Regulations Issued February 28, 2003

One day before the migration of most immigration authorities to DHS, the Department of Justice (DOJ) issued regulations restructuring title 8 of the Code of Federal Regulations, largely in order to reflect the new division of responsibilities between the two departments.[17] These regulations create a new Chapter V of 8 C.F.R., beginning with Part 1001, and they transfer to this chapter all authorities that relate to the ongoing role of EOIR, which is the principal immigration-related unit that remains in DOJ.[18] It appears that for the present no substantive change is intended, although the notice clearly contemplates later changes and refinements as DHS and EOIR develop their new roles. Regulations that deal only with EOIR are transferred and redesignated with a new number. For example, former 8 C.F.R. § 3.1, describing the organization and jurisdiction of the BIA, now becomes 8 C.F.R. § 1003.1, in Chapter V. All of former Part 3, which primarily describes the role of the BIA and the immigration judges and sets forth their rules and procedures, is treated in this manner, becoming Part 1003. Part 3 henceforth disappears from the Code. The same treatment applies to most of former Part 240, which contains provisions governing removal hearings before immigration judges. The transferred portions become 8 C.F.R. Part 1240. There are also several authorities that will henceforth relate only to the responsibilities of DHS. They remain where they are in 8 C.F.R. and have no counterpart in Chapter V.
But a great many of the sections of 8 C.F.R., including some highly significant ones, relate to functions for

which EOIR and DHS will have overlapping jurisdiction. In these instances, the February 28 regulations follow a plan of duplicating the full section in Chapter V. For example, asylum applications can be ruled on by asylum officers who are part of BCIS, but can also be heard by immigration judges. For this stated reason, Part 208 of 8 C.F.R., which sets forth the provisions governing asylum, is duplicated and appears verbatim as a new Part 1208. The old Part 208 survives as before, however, serving as the part that governs DHS operations relating to asylum. The same is true of Part 245, governing adjustment of status; it is now duplicated as Part 1245 in Chapter V.[19]

All this renumbering may prove confusing for immigration practitioners (and officers), but the drafters tried to facilitate understanding by making the new numbering parallel to the old numbering, for either transferred or duplicated sections. All the new sections in chapter V are given a number that is the sum of the old section number plus 1000. But even if numerical confusion can be avoided, this approach to the regulations seems to open up the possibility of unnecessary conflict over future regulatory authority, and possible substantive confusion, if implementation practices or later formal amendments to the regulations begin to drift apart. These potential problems will receive closer attention later in this essay.

Points of Concern, and a Sketch of What to do About Them

The basic DHS organization scheme for immigration enforcement and services, especially after the January changes, places emphasis on grouping like job functions together - inspectors with inspectors, investigators with investigators, adjudicators with adjudicators. This not only has the virtue of tidiness and logic, but it also offers the advantage of being able to draw on a wider pool of resources to meet unexpected demands. And perhaps only by combining and then re-sorting these various Customs and INS jobs does the system have any prospect of breaking away from the multiple, confusing, and counterproductive personnel systems, each with its own special wrinkles and windfalls, that we have inherited from earlier generations.[20]

Certain real problems are nonetheless foreseeable. The reorganization seems premised on the notion that the process involved, or the generic type of job, is more important than the substance of the laws that are being applied. But is the inspection of persons, for example, really so similar to the inspection of goods or plants or animals? This kind of amalgamation would appear most likely to work if the criteria governing each of the processes were stable, simple, and straightforward. Then over time each inspector or investigator could be expected to gain sufficient mastery over all the applicable provisions and the accompanying skills. But stable, simple, straightforward? No one applies those adjectives to today's immigration laws. And although I hope that customs standards and agricultural inspection standards are more enduring over time than immigration law provisions have been for the past 15 years, I suspect that their complexity is also daunting. I would guess that we will continue to see an important measure of continued subject matter specialization within BCBP and BICE, largely according to the prior realms of expertise. At the very least, one would expect that a referral to second-

ary inspection will bring to bear the expertise of veteran specialist inspectors, according to whether a question about people, goods, or agricultural items generated the referral to secondary. No BCBP inspector should conduct an expedited removal interview, where the stakes are potentially high, without specialized training and significant experience applying the immigration laws.

Still, what I have mentioned so far should probably be seen as details that can be worked out as the transition unfolds. The leaders of the new Department have made a firm and crisp choice for a distinctive and somewhat radical reorganization model (particularly with the last-minute shift that created BICE and BCBP). Whatever one might have thought of the merits of the competing models considered over the past five years, one must be thankful that the debate over models is at an end, and we can now move into detailed implementation. Critics, including the shrill voices sometimes heard from Capitol Hill, should give the implementers some trial-and-error breathing room as they carry their vision into execution.

Nonetheless, there remain a few key respects in which the current organization plans raise significant problems. They deserve comment now, because a few early steps can go a long way toward an enduring remedy. This section spells out the problems and sketches suggestions for fixes that can usually be implemented without statutory changes (and within the basic framework of the Administration's preferred model, as reflected in the January reorganization).

A Unified and Comprehensive Immigration Policy Structure

A look at the figures depicting DHS prompts one unavoidable question: Where will immigration policy be set? Who is in charge of this cluster of issues that the public and the Congress tend to consider as a separate policy realm all its own and that Congresses and codifiers for nearly a century have dealt with via a separate immigration code? Who will be on the lookout for ways in which immigration policy intersects with the business of other departments? And if the current ills of our immigration system are not solely problems of structure and fine-grained management, but instead derive as well from choices about substantive policy - which I believe is clearly the case - which office will be thinking systematically about new policy initiatives?

That important policy questions cut across the lines dividing BCBP, BICE, and BCIS, can be illustrated readily. Consider first a somewhat narrow issue that would seem initially to be primarily an enforcement question: How hard a line should be taken on minor omissions in visa petitions or visa applications (e.g., failing to list all organizations the applicant has belonged to), or such post-admission defaults as failure to file a timely address change form with INS? For many years INS has tended to overlook these matters, or at least not to base deportation or criminal prosecution on such violations. But since September 11, at least in some circumstances, a much harder line has been taken. If those changes truly reflect a considered policy shift, it has implications not only for BICE,

which would presumably be the entity referring prosecutions and initiating deportation. The officers in BCBP should also be applying a consistent standard in conducting inspections at the border, lest a person be misleadingly admitted despite discovery of incompleteness in responses, only to find him- or herself forever vulnerable to deportation. If instead BCBP were to conclude that the traditional, more relaxed standard makes policy and operational sense, the Department needs a mechanism both to identify and then to resolve such policy disparities. The same consistent policy should also be reflected in the regulations or other guidance adopted by the DHS visa entity, for application by consular officers ruling on visa applications. BCIS also needs to be on board, for it too applies the inadmissibility grounds in considering applications for adjustment of status. Small-bore policy decisions on how to interpret and apply inadmissibility grounds, in short, immediately affect the business of four different offices or bureaus within DHS. (And they could also have a bearing on decisions by EOIR in the Department of Justice.)

Or, to take a larger-scale policy question, consider an issue that at one time seemed likely to be the major immigration focus of the nascent Bush administration - amnesty and guest worker programs - and recall those early meetings between President Bush and President Fox of Mexico, shortly after the U.S. inauguration. President Bush well before he had even the rudiments of an immigration team on board, allowed himself to be drawn pretty far down the road, at least rhetorically, toward an amnesty for Mexicans in the United States, or at least a guest worker program that would provide temporary legal sanction for their staying and working. But as the Administration later proceeded to staff up and look more closely at such a policy change, it began to notice just how many complex questions were stirred up, each with its own set of political fallouts. Amnesty may once have seemed like a simple gesture to a valued neighbor. But within the premises of our immigration heritage, at least as we have known them since we erased the stain of the national origins quota systems in 1965, could or should an amnesty be confined only to Mexicans? With or without other nationalities, exactly what would be the standards for deciding who would be legalized? How would this large new immigration benefit be administered? In fact, either legalization or a guest worker program would raise not only challenging questions of management and administration in these narrower "services" realms, but also profound questions about impact on enforcement, past, present, and future. The experience of other nations, and indeed this nation's own 1986 experience (of which the earliest Bush Administration team seemed to take little heed), suggests that amnesties make sense only when coupled with serious, visible new enforcement steps, carefully designed, in order to avoid setting off on an unending cycle of amnesties. As it happened, these complexities apparently came more firmly into view as the Administration pursued the Fox proposals - and by September 5, 2001, when Fox undertook a state visit to Washington, President Bush was backing off considerably from his early pledges.

September 11 has apparently put further policy moves in this direction in the deep freeze. But the larger point remains warmly alive. Immigration policy is sprawling and complex and needs to be thought of as a whole. Who is going to superintend that process within DHS?

There is no obvious answer. The statute does expressly provide for a Chief of Policy and Strategy in each of the two main immigration bureaus it created, BBS and BCIS. HSA §§ 442(b), 451(c). In nearly identical terms those sections state that the Chief shall make policy recommendations and perform policy research and analysis on immigration issues within each respective bureau's field, and also shall "coordinat[e] immigration policy issues with the Chief of Policy and Strategy" for the other bureau. This segmentation, even with its nod in the direction of coordination, hardly promises a broad and comprehensive view of overall immigration policy.

The only place that all the immigration policy threads come together in DHS is in the office of the Deputy Secretary, as Figures 1, 2, and 4 reveal. But if that high official, who will inevitably have a great many other issues on his agenda, is to serve as the focal point for unified immigration policy, we ought to equip him better for the job. He already has a Director of Shared Services "within" his office - details generally left unspecified in the statute - but as of now that office is given no policy role.

I recommend expanding and reconceiving the office of shared services, and probably renaming it, by including a significant policy capacity there. The whole operation should be headed by a single, high-level officer, called something like the Chief of Immigration Policy, reporting directly to the Deputy Secretary. The full immigration policy and strategy capacity of the Department should be lodged there, under the supervision of this Chief, in order to provide for the best possible coordination and use of analytical capacities. This change can be effectuated without statutory amendment. The Secretary could use his 60-day-notice reorganization authority (HSA § 872(a)(2)) to move the two statutorily designated chiefs of policy and strategy out of their respective bureaus and into the Deputy Secretary's office, reporting directly to the departmental Chief.[21] Such a change would give the Department far better capacity to think comprehensively about immigration policy. I envision that the director of shared services would also report to the Departmental Chief of Policy. Figure 5 (page 24) provides a possible organization diagram.

Unified and Independent Legal Advice

A similar process of reasoning leads to the conclusion that the legal advice function should be unified as well. As indicated in Part IIIA, four different DHS units apply the inadmissibility grounds of the Immigration and Nationality Act. BCBP and the DHS visa office do so the most directly, in admission decisions and visa monitoring. But BCIS must apply these grounds in considering adjustment applications, and BICE does the same in considering deportation charges on the ground that the person was inadmissible at the time of entry. Clearly these offices need to apply a consistent legal interpretation of the meaning of those provisions, and they cannot usually wait until BIA or federal court case law settles the issues. Or consider asylum cases. Given the potential sensitivity of such claims, it would be unacceptable if the legal advice guiding the decisions of asylum officers in the BCIS were to conflict with the legal positions being argued by BICE lawyers in immigration court. Lawyers at INS headquarters have histori-

cally played a key role in assuring consistent and humane interpretations of asylum and refugee law.

Statutory changes will pose the need for unified legal advice most starkly and urgently - a process I experienced as INS General Counsel in 1996 and 1997. A teeming host of interpretive questions arose in rapid succession then as planners, regulation writers, and field offices worked to implement the intricate new provisions of the 1996 immigration amendments within tight statutory deadlines. Some interpretive decisions implicated larger policy decisions. For those, our teams tried to identify and summarize the issues, and we then took them to meetings of high-level INS or DOJ officials for the key policy decisions that would then shape the drafting of legal guidance. But for a great many legal issues, there was no high policy involved. The interlocking provisions of the Act could be read in either of two equally plausible ways (or three or four), and it was of paramount importance to settle on one for uniform application by all of INS - ideally the one that made for the most sensible implementation in light of the realities of operations in the field. We developed a process in the General Counsel's office for a weekly legal interpretation meeting, involving key field attorneys via teleconference, where the pros and cons of going one way or the other could be aired. Often a consensus emerged on which interpretation made the most legal and operational sense. If not, the General Counsel decided, and further implementation proceeded on the basis of that legal position. Having a single decision-making venue helped assure speedy, stable resolution. Speed and stability were important because often one legal question had to be resolved before the regulation writers could proceed to settle other interlocking issues.

I therefore recommend a unification within DHS of legal advice on immigration law that would be quite similar to the earlier suggestion for policy. The Homeland Security Act now provides, in generally parallel terms, for a legal advisor in BBS and BCIS. HSA §§ 442(c), 451(d). In my view, there should be an overall General Counsel for Immigration, and both (or now, all three?) bureau legal advisors should report to this General Counsel. Whether the latter should be lodged in the Deputy Secretary's office or instead within the office of the DHS General Counsel is less clear, and probably depends more on other parts of the plans for legal structures within the DHS, which have not yet been publicly clarified. But the key point is to have a single, high-level attorney at the apex of a hierarchy of legal advice for all immigration-related functions.

Making all immigration-related attorneys report to the General Counsel for Immigration would also preserve one of the great advantages, often overlooked, of the 1980-82 reorganization of the INS legal program. Before that changeover, attorneys in INS district offices were under the supervision of the district directors. After that date, all attorneys in the district offices reported to a District Counsel, who in turn reported to the INS General Counsel in headquarters, through Regional Counsel. None of the attorneys were beholden to the district director for job evaluations or resources or advancement. Therefore they were much better positioned than before to provide independent legal advice - and to say a firm "No" when necessary to a district director who proposed a course of action that went

beyond legal authority. The Regional Counsel or General Counsel could also then be engaged if the director seemed to want to persist in the proposed action. Creating a similar safeguard for independent legal advice within DHS would afford an important set of checks and balances. It would also improve the odds that the Secretary and Deputy Secretary are timely apprised of possible mistakes that can be curbed before they escalate into major problems.

A Lean Ombudsman's Office

The Homeland Security Act creates an office of ombudsman with responsibility in the field of immigration services. HSA § 452. It mandates at least one officer per state, and large states will surely have a great many more officers. Just to meet the Act's requirements will mean assigning several hundred personnel to the ombudsman's office.

The congressional frustration that led to the creation of this office is understandable. But I fear that its creation postpones the day when we fix the primary underlying problems of immigration adjudications. The chief objective has to be timely decisions on all immigration applications, with constant attention to quality control in the decision-making. Simplifying the law and reducing the number of special benefits categories (which have proliferated remarkably over the last decade) would contribute greatly toward achieving that end. Absent simplification, simple stability in the legal provisions would help a lot. But I leave aside those substantive issues - because they are matters for Congress and fall outside the jurisdiction of DHS alone. For DHS management, the main contribution to fixing the problems must come through additional resources at all levels of the adjudication process, plus the elimination of unnecessary steps that divert staff time from the core elements of adjudication.

Seen in this light, the ombudsman's office is a step in the wrong direction. Because no such office currently exists, its full staff must be drawn either from the ranks of those currently working in immigration services (or related functions), or from new outside hires. Either course represents lost opportunities. Imagine the boost in productivity that could have resulted from applying several hundred new staff to the primary adjudications function, particularly since the ombudsman's offices will doubtless include a high proportion of well-trained professionals. Further, although an ombudsman can help selected individuals eventually reach a more satisfactory result with their own applications, that outcome is likely to come at the expense of system-wide improvements. Every time a local ombudsman office calls to inquire about a delayed application or intervenes to suggest correction of a seemingly erroneous outcome, the adjudications staff will have to take time to respond Those are staff hours that cannot be used to process other applications, reach timely decisions, or apply internal quality controls.

The same is true of the other primary function assigned to the Ombudsman's office, that of identifying systemic problems in BCIS operations and recommending solutions. Those matters are to be reported on at least annually to Congress, and the Act requires the Director of BCIS to create procedures requiring a bureau response to all such recommendations within three months. HSA § 452(c), (f). But does anyone seriously think that the ills of the immi-

gration services functions result from a lack of reports and studies on the problems? The DOJ Inspector General, the General Accounting Office, INS Internal Audit, outside consultants and scholars, and a host of congressional committees have documented weaknesses in our immigration management system and mapped out suggested fixes. The problem is not a lack of such reports; it is instead their hyperabundance.

Virtually every suggested fix, no matter how straightforward it appears in the clinical prose of the authors, in fact requires enormous energy and focus to implement. For one thing, the suggested reform is almost always contestable; sometimes outside reviewers overlook certain key operational elements well known to those who carry out immigration tasks in the field day-in and day-out. Different schools of thought have to be heard out; a decision on reforms must be made by high-level officials who obviously have numerous competing demands on their time; and then new regulations, forms and practices have to be put in place, often including thousands of hours of retraining. No commissioner, director, or under secretary can be successful at this kind of reform if spread too thin. Choices have to be made about which reforms to press first, so that they can be seen through to actual realization on the ground. Other reforms will simply have to wait.

My point is that we must take care lest audits, investigations, and reports claim a disproportionate share of the time and resources that have to be used in implementation. We also need to be realistic about the need to prioritize these smaller scale, but vital, fixes to our immigration machinery. Some fixes will not get implemented right away because the agency has chosen to focus its energies on some other correction that it judges more important.

Despite my concerns, the ombudsman's office obviously will be implemented, under the statutory mandate. The best that can be expected now is to make it as lean an operation as possible, so as to divert the minimum amount of time and energy from the primary work of BCIS. For this approach to remain politically viable, the Administration will have to show visible progress toward its oft-stated goal of timely decisions on immigration adjudications. It cannot afford to stint on the long-promised resource enhancements for immigration services.

The Respective Authorities of the Attorney General and the Secretary of Homeland Security: the Desirability of Statutory and Regulatory Changes

Delegation complexities. The HSA employs a curious mechanism to transfer the functions performed by INS to the new Department. With a few exceptions, it does not amend the Immigration and Nationality Act, which has been for 50 years the primary source of immigration authorities. Instead the HSA includes generic provisions transferring specified broad functions "from the Commissioner of Immigration and Naturalization" to the relevant official of DHS - the Under Secretary for BTS in the case of enforcement functions, the Director of BCIS in the case of services. HSA §§ 441, 451(b). The problem is that the INA vests very few authorities directly in the Commissioner. Almost all of the relevant authorities are instead vested in the Attorney General (AG). It is true that the AG dele-

gated most of his powers under the INA to the Commissioner by regulation - these are doubtless the powers now transferred to DHS - but the regulation expressly reserved concurrent authority as to all such functions to the AG.[22] As a technical legal matter, it may well be that the Attorney General retains that complete concurrent authority even after the HSA.[23]

It would have been cleaner and far more sensible to transfer the functions directly from the AG to the Secretary of DHS. The members of Congress who played the key roles in shaping subtitles D through F of Title IV of the HSA, the chief immigration provisions, however, evidently saw such an approach as running counter to their intention to assure a clear split of immigration services and enforcement, in a manner that would be hard to undo administratively. Had the statute said nothing further on these matters beyond what appears in Title IV, the express vesting of authorities in lower ranking officers within DHS might have posed modest complications for the Secretary's role in leading and directing the Department and in assuring unified and consistent policies and operations.[24] But other general provisions of the HSA almost surely overcome these effects and give the Secretary ample authority to order the Under Secretary or the Director to follow his policy direction, even when exercising a function explicitly transferred only to the latter officers. See HSA §§ 102(a)(3), 103(e), 402, 872, 1511(d)(2), 1512(d), 1517.

Indeed, these sections are probably best read to go even further. For example, HSA § 102(a)(3), which was not drafted specifically with immigration authorities in mind, provides: "All functions of all officers, employees, and organizational units of the Department are vested in the Secretary." DHS apparently reads this provision, coupled with the general provisions cited in the previous paragraph, to give the Secretary the clear primary role - basically the full equivalent of the AG under the pre-HSA regime. The Department's first regulations governing immigration matters after the March 1 changeover replace the AG's delegation regulation, referred to above, with a new delegation regulation that begins with this assertion: "All authorities and functions of the Department of Homeland Security to administer and enforce the immigration laws are vested in the Secretary of Homeland Security.[25]" Because this conclusion is at least strongly defensible as a legal matter, it probably will become customary in the future to refer to the Secretary of Homeland Security as the key possessor of immigration authorities, in much the same way as insiders now refer to the AG.[26] But there remain some further oddities and points of potential and unnecessary conflict, to be examined in the following sections.

Powers of the Attorney General

As indicated above, the distinctive transfer language of the HSA, coupled with the former regulation delegating certain powers to the Commissioner, has arguably left the AG with full concurrent INA authority over immigration.[27] If this were simply a drafting oversight, it could be overcome by means of a Memorandum of Understanding or an Executive Order specifying that the Secretary of DHS would henceforth exercise such powers exclusively. But matters are not that simple, because the AG clearly was meant to retain a defined measure of authority in immigration

matters - albeit something well short of plenary concurrent authority. Congress deliberately chose in the HSA expressly to vest in the AG all those authorities and functions previously exercised by the EOIR, including all authority of the BIA and the immigration judges.[28]

The question is how extensive a range of authority over immigration policy and immigration regulations this vesting in the AG must or should bring with it. If a wide range, then the potential for conflicts with DHS - and consequent hobbling of sensible and unified immigration policy and operations - increases considerably. The first assertions of DOJ authority under the HSA, as embodied in the February 28 regulations, pose exactly such a risk. But we are at an early stage of the transition, and the departments can still rethink those regulations and structure their relationship differently, reinforcing the centrality of DHS, with a circumscribed but still important role for the AG. To explore these questions fully, we must first examine the previous EOIR framework, together with objections that have long been raised about the AG's supervisory role, consider the oddities of the current division of adjudication and enforcement responsibilities between two Cabinet-level departments, and assess the possible desirability of further statutory changes to this part of the structure. This section will close, however, with a suggestion for more modest changes within the current statutory provisions.

The previous framework for EOIR, and the justifications for that structure. For most of the work carried out by the BIA and the immigration judges, it will not matter in what department or agency the functions are lodged. Most immigration court cases simply do not pose significant issues of policy or legal interpretation. The BIA and the immigration judges will decide these cases based on the facts presented in the proceedings, as tested against well-established doctrine. This has been true for 60 years, and it will not change under the new arrangements or other possible variations on the adjudication structure.

Sometimes, however, more is at stake in an immigration case. The adjudication structure historically has been designed to give the AG a more direct and personal decision-making role in these circumstances, under a process known as "referral," which is usually invoked after the BIA has ruled. 8 C.F.R. § 3.1(h) (2002). This procedure has been employed, on average, only once or twice a year. Although Attorney General Ashcroft has resorted to it somewhat more frequently, referral still comes into play in only a tiny fraction of the over 200,000 decisions initially entered by immigration judges annually. But the cases where it is employed tend to be ones presenting controversial or difficult issues, or issues implicating major questions of law and policy. Such AG rulings then serve as precedents that may affect hundreds or thousands of future cases.

The pre-DHS referral regulations allowed for such personal consideration of an immigration case by the AG when the AG so directed, when the Chairman or a majority of the BIA requested referral, or when the INS Commissioner referred the case. In the latter scenario, the referral procedure operated essentially as an INS appeal to the AG, who would then act as the highest administrative tribunal for immigration decisions. Preserving some such government appeal right is functionally important. An individual who loses before the BIA can almost

always go to federal court to pursue a claim of error. But because the BIA and INS were parts of the same department, it was never thought appropriate for INS to appeal a BIA decision to the federal courts. Hence, without the availability of referral, INS would have been wholly bound by BIA decisions, at least in the absence of a formal amendment to either regulations or statute - a far more cumbersome path to pursue.

The assignment of this ultimate adjudication authority to the AG - as well as his management oversight of EOIR - has often drawn criticism. The claim has been that these authorities allow the chief prosecutor (because the AG also oversaw INS) to control the adjudicators and to serve as the final appellate body. Such criticisms have usually been coupled with calls to make the BIA and the immigration judges wholly independent.[29] Such a complete separation of charging and enforcement functions from adjudication functions, to be sure, could provide greater assurances of fairness to the individual and of adjudicative independence in assessing facts and law. Whether that admitted gain would be worthwhile when balanced against other disadvantages of such separation is the real question.

As a practical matter, potential unfairness from the mixture of functions was mitigated by other features of the former system. The AG was almost never personally involved in decisions to initiate a specific removal proceeding, much less one that wound up ultimately being decided by the infrequently invoked referral procedure. Moreover, his formal management and oversight responsibilities over the BIA and the immigration judges have not been deemed to include the authority to influence or dictate a ruling through ex parte contact.[30]

Further, when referrals occurred, they were usually handled in a highly formal, court-like manner. The parties were often given an opportunity for additional briefing after the AG took jurisdiction, and the AG ultimately issued a formal opinion, which reads exactly like an appellate court opinion. This formal discipline has imposed genuine constraints on Attorneys General, for it has required them to take public and visible responsibility, with a fully developed statement of reasons, for the final results and for the legal rulings. A significant number of referral decisions over the years, moreover, resulted in rulings favorable to the individual. Finally, AG decisions on referral have always been reviewable in the federal courts in the same manner as BIA decisions. Therefore the individual could ultimately pursue a claim of error, even in a decision handed down by the AG personally.[31]

This long-standing structure for administrative adjudication of removal cases, wherein enforcement staff and adjudication officers all are ultimately accountable to the same official or body, actually conforms rather well to the most common model for American administrative agencies. The Federal Trade Commission, for example, combines rulemaking, enforcement, and ultimate adjudicative authority (usually on appeal from ALJs). In fact, some observers believe that it is one of the strengths of American administrative procedure that expert agencies have such diverse authorities, and can adopt and amend policy either through rulemaking or adjudication[32] (though this claim too is contested). In such a unitary agency, the commissioners can apply the experience gained in carrying

out their myriad other responsibilities - experience that arises from action in settings far more varied and numerous than those that can resolve themselves into contested adjudications - in order to make well-informed decisions when construing ambiguous legal provisions in the course of adjudication. In any case, systems that fail to provide strict separation of enforcement and adjudication functions have frequently withstood attack in the Supreme Court.[33]

A similar rationale has usually been advanced to justify the classic placement of immigration judges and the BIA under the ultimate reviewing authority of the AG, rather than in an independent agency. Under this view, the AG has been the equivalent for the immigration field of the Federal Trade Commission within its domain. The AG's broad policy perspective, derived from wide-ranging authority over nearly all aspects of immigration policy and operations, justified his jurisdiction as the final administrative word on significant questions of law, policy, and discretion as they arose in adjudicating removal cases. Proponents of this historical unitary system sometimes bolstered their arguments by observing that immigration may implicate particularly sensitive foreign policy dealings or law enforcement decisions, meaning that immigration policy may have to adapt quickly in response to events.[34] For these reasons, they argued, all relevant decisions wherein law is interpreted and policy set, including adjudications, should ultimately be under the authority of a Cabinet official, who has wider horizons and more immediate political accountability than the usual independent tribunal.

One further argument was sometimes offered in the past for keeping EOIR under the AG, an argument based not on adjudication outcomes per se, but on the virtues of unified managerial authority over all parts of the immigration apparatus. Under the former system, the AG could respond, for example, to a massive influx of migrants into the country by deploying not only Border Patrol agents, detention officers, and investigators, but also immigration judges. Timely assignment of the latter would assure that immigration court proceedings could keep pace with the added business generated by the other deployments. Failure to assure such coordinated staffing could easily defeat key strategic responses to major immigration challenges.

The situation after the transition to a Department of Homeland Security. Much of the rationale sketched in the preceding section for the AG's adjudicatory role has been undercut by the transfer of nearly all other immigration functions to DHS. Managerial unity has been lost. The Secretary of DHS cannot order the assignment of immigration judges as part of the response to an immigration crisis, but instead would have to negotiate with another department, or else resolve differences over response strategy through appeal to the President. Furthermore, AG decisions on referral from now on will not be informed by his ongoing involvement in a wide range of other immigration policy decisions, for he has been shorn of those other responsibilities.

Additional concrete problems resulting from the current structure may become apparent before long. Consider a situation where DHS disagrees with a legal ruling of the BIA. Although DHS will usually simply acquiesce and

accept the outcome (as INS did), sometimes the decision may have wider application that will make further contest worthwhile. As a first step, DHS will be empowered to deal with the issue as INS used to. That is, the February 28 regulations make clear that the Secretary of DHS, perhaps in addition to other DHS officers to be designated later, inherits the former power of the INS Commissioner to refer an immigration case to the AG for decision.[35] If DHS prevails and the AG overrules the BIA, then of course the immigration judges and other officers are bound by the AG ruling, and DHS will be satisfied. But if the AG rejects the DHS position, from that point on, the old and new scenarios diverge. Under the former system, if INS lost, it would of course acquiesce; the AG was its boss too. But that is not true of the Secretary of DHS. Situations could easily arise where DHS concludes that the AG's ruling takes insufficient account of the needs of the day-to-day management of immigration - something about which DHS officials will soon be the real experts and for which the AG will have no ongoing responsibility. What then? Should the Secretary of DHS try to resolve the dispute through a phone call to the AG? Bring the question up at a Cabinet meeting? Refer it in writing to the President for resolution? None of these options is really satisfactory. Some seem quite unseemly. Alternatively, can the Secretary take the matter to court? Cabinet agencies are often authorized to appeal rulings of independent commissions to court - a step that is wholly congruent with the independent nature of the commission, but seems at least an odd fit when the dispute is among Cabinet departments both directly answerable to the President.

Moving beyond an unsatisfactory compromise. For all these reasons, the retention of EOIR in the DOJ, when virtually all other operational authority over immigration has moved to DHS, is an unsatisfactory and probably unstable compromise. Severing enforcement responsibilities from adjudication cannot help but complicate the development and maintenance of legal doctrine that meshes well with operational realities. In other words, the severance created by the HSA clearly entails the loss of some of the main benefits of unitary administration as it has developed in American administrative law. On the other hand, separation of those functions is meant to offer other benefits, primarily greater fairness to the individual, by helping to assure that the adjudicator will not be biased toward the enforcing agency. But if that vision of fairness is the objective, then placing adjudication in another Cabinet department rather than in an independent body - and at that a Cabinet department deeply involved in general law enforcement - is at best a curious step.

Both camps, the partisans of unitary administration and the fans of strict functional separation, are likely to find the present structure increasingly unsatisfactory. Maybe we should consider it a mere way-station, adopted in a lame-duck session by weary legislators who thought they could placate both sides and ran out of time and energy to think through the full implications of either alternative. If such a change is likely to come - either making EOIR independent or alternatively transferring it to DHS - it would be better for the adjudication system to move on to its final structural destination sooner rather than later.

Improvements in the absence of a statutory amendment

But of course Congress might not act, or at least not promptly, on these issues. In the meantime, the approach already staked out by the February 28 DOJ regulations seems likely to maximize potential conflicts between the Departments and minimize the opportunities for efficient decision-making. It does not have to be that way. There is another model that could be followed in sorting out the relative responsibilities of EOIR and DHS under the current statute - a model that does not seem to have received careful attention as yet. DHS has a major stake in pressing for its adoption.

Before examining the alternative model, one should be clear about what appear to be the premises of the current shared system under the new DOJ regulations. As indicated earlier, the regulations transferred to or duplicated in a new Part V of 8 C.F.R. all previous immigration regulations that might still be administered or implemented by EOIR after the March 1 changeover. The regulations that are simply transferred, such as the sections governing only the jurisdiction and procedures of EOIR, should pose no problems; it is the duplicated regulations that raise the issues. The governing assumption here seems to be that each department can or will enforce only its own regulations. Obviously this model poses real risks of inconsistency as time passes. The departments might come to employ different interpretations of identically worded provisions. Or DHS might modify a section over which it has jurisdiction, even while DOJ makes no comparable change in its cognate section.

The preamble to the February 28 regulations acknowledges this possibility for inconsistency in the future, stating that these duplicated provisions "require coordination between [DHS] and EOIR." It also states that "the Secretary and the Attorney General can consult each other when contemplating changes in those rules that affect both EOIR and [the transferred INS functions].[36]" Of course they can. But they might not - as apparently already happened once, within the first week of the transfer of immigration functions. (The divergence in resulting regulations was trivial this time, but it foreshadows deeper difficulties down the road.[37]) The real question is why the two departments should have to consult or agree in this cumbersome fashion at all. In essence, the duplicated regulation system seems to contemplate a veto by each department over any change in duplicated regulations.[38] Avoiding inconsistent regulations is of course valuable. But a bilateral veto power risks locking in undesirable or unworkable regulations. To be sure, the immigration system has functioned for decades with two departmental sets of regulations implementing certain provisions of the INA-namely the regulations of the State Department and the INS dealing with admission and exclusion. But the overlap is not nearly as extensive as that created by the February 28 regulations. In any event, Congress obviously wanted to embark on a different course when it adopted the HSA. Precisely in order to streamline decision-making, unify policy, and enable agile response to changing circumstances, Congress reached out and brought into DHS the visa policy responsibility, including the writing of visa regulations, which was previously lodged in the State Department. It is wholly out of keeping with that statutory move for DOJ to retain its own separate set of substantive regulations and to insist on a coequal role with DHS in amending any such provisions.

There is another way to conceive of the respective roles of DHS and EOIR that would greatly alleviate these difficulties - another model that could still be followed instead of the approach reflected in the February 28 regulations. The current division of authority amounts to what is sometimes called a "split enforcement" regime, which is unusual but not unknown in prior administrative practice. The Occupational Safety and Health Act pioneered this approach, giving the power to promulgate regulations and initiate enforcement actions to the Secretary of Labor, but vesting adjudication in an independent three-member body, the Occupational Safety and Health Review Commission (OSHRC).[39] The point of this structural innovation was, in the words of the Supreme Court, to "achieve a greater separation of functions than exists within the traditional 'unitary' agency," which typically combines all three functions - rulemaking, enforcement, and adjudication.[40]

But crucially, the split-enforcement model does not presuppose that the adjudicator has any role whatsoever in promulgating the regulations to be applied in the cases it adjudicates. OSHRC has no such rulemaking role. In fact, the Supreme Court has held that the OSHRC must ordinarily defer to the Secretary's interpretations of governing regulations, because the Commission enjoys only "the type of non-policymaking adjudicatory powers typically exercised by a court in the agency-review context,[41]" not the type of policymaking or lawmaking authority held by the traditional unitary agency.

The Supreme Court emphasized that it was only interpreting the governing statute at issue there and that Congress could choose to divide administrative powers differently. Nonetheless its unanimous opinion went on to articulate several impressive functional reasons why the primary enforcement agency in a split-enforcement regime is deserving of this kind of policy primacy - not only the exclusive authority to promulgate substantive regulations but also a leadership role in interpretation, which would be entitled to deference from the adjudicative body. The Fourth Circuit summarized these reasons in a later case construing a similar split-enforcement scheme governing the mining industry:

> *In order to promulgate health and safety [regulations] in the first instance, the Secretary must evaluate a wide variety of information regarding the operation of the mining industry. And in enforcing these standards - through, for instance, periodic inspections of mines and issuance of citations - the Secretary comes into constant contact with the daily operations of the mines. In short, developing rules and enforcing them endow the Secretary with the "historical familiarity and policymaking expertise," that are the basis for judicial deference to agencies.*[42]

Although the statutory framework dividing immigration functions is decidedly different, these same functional reasons apply with equal force - or at least will do so as DHS grows into its role as the agency with principal responsibility for immigration policy and operations. Therefore DHS should henceforth have sole responsibility for the issuance and amendment of substantive regulations, and the duplicated sections should simply be removed from Chapter V of 8 C.F.R. EOIR, like OSHRC, is perfectly capable of construing and applying regulations that emanate from a separate administrative unit. This change would not freeze the DOJ out of all consideration of future regulatory amendments, of course. New DHS regulations would remain subject to the normal OMB clearance process, in which DOJ would undoubtedly remain an important player. But that process is

a far cry from DOJ veto power based on some supposed equal interest in the subject matter. DOJ no longer has an equal interest in immigration policymaking and operations, and it should acknowledge that fact. Whether EOIR should be required to defer to the interpretations of ambiguous statutory and regulatory provisions adopted by the primary policy agency, as the Supreme Court decreed for OSHRC, is a closer question. The functional arguments set forth above are applicable, and I am inclined to think that over the long run such deference would lead to sounder policy.[43] But however the deference question is handled, there is no good reason to sustain two duplicative versions of substantive immigration regulations.

CONCLUSION

The Department of Homeland Security was created precisely in order to improve the odds for efficient and coherent federal policies, by combining in a single agency a wide range of security-related functions previously scattered among disparate departments. As part of this transformation, the Homeland Security Act clearly assigns the primary role in immigration policy and operations to DHS. The suggestions offered here are designed to help DHS organize internally, and also structure its relationship with DOJ, in a manner that will maximize the coherence and effectiveness of immigration law and policy.

FIGURE 1

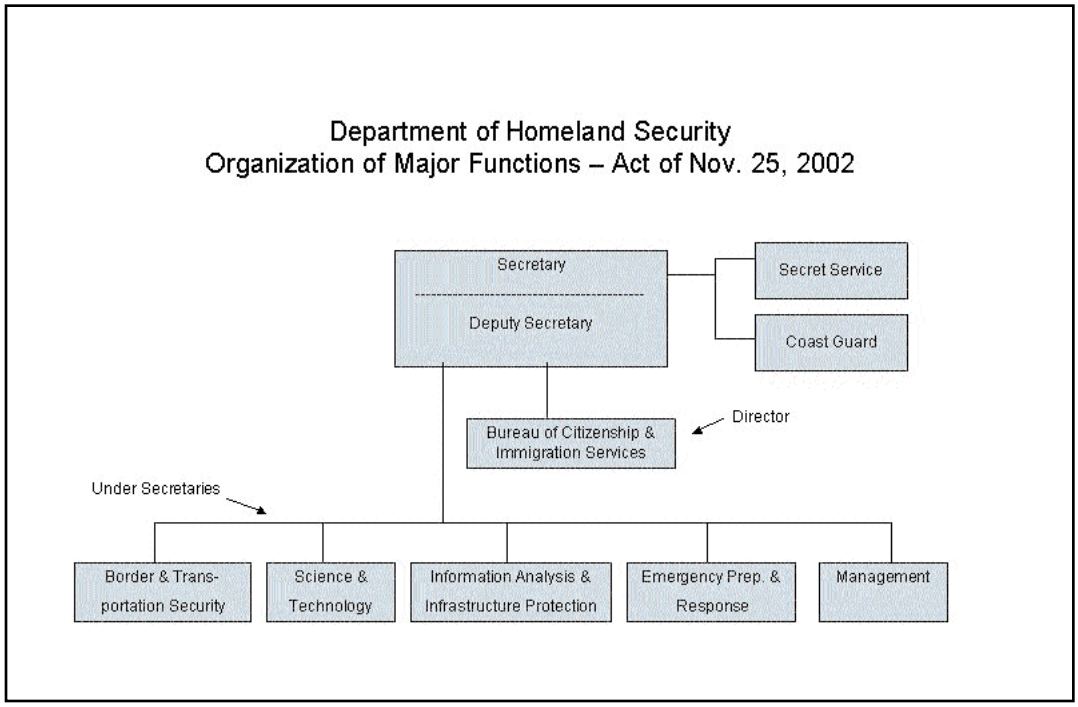


FIGURE 2

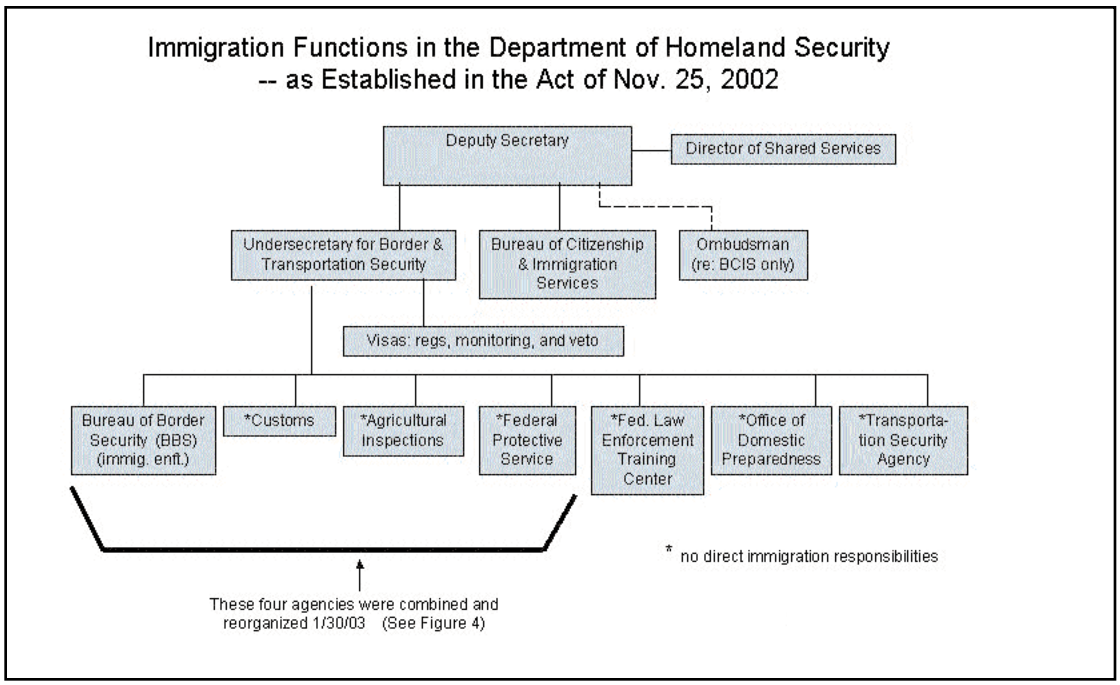


FIGURE 3

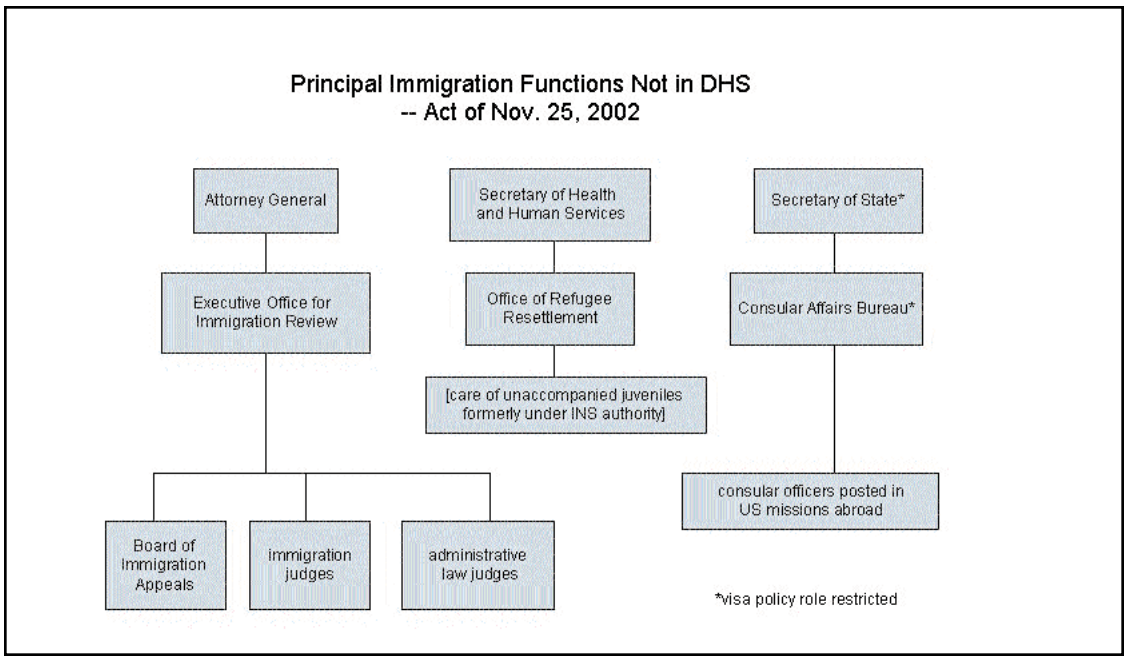


FIGURE 4

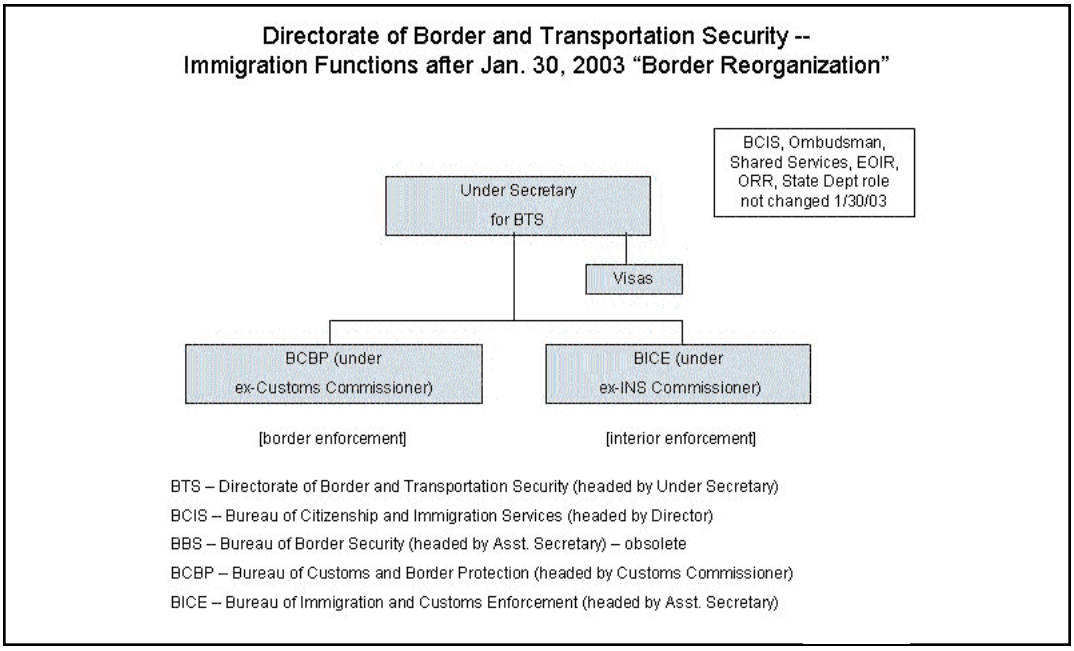
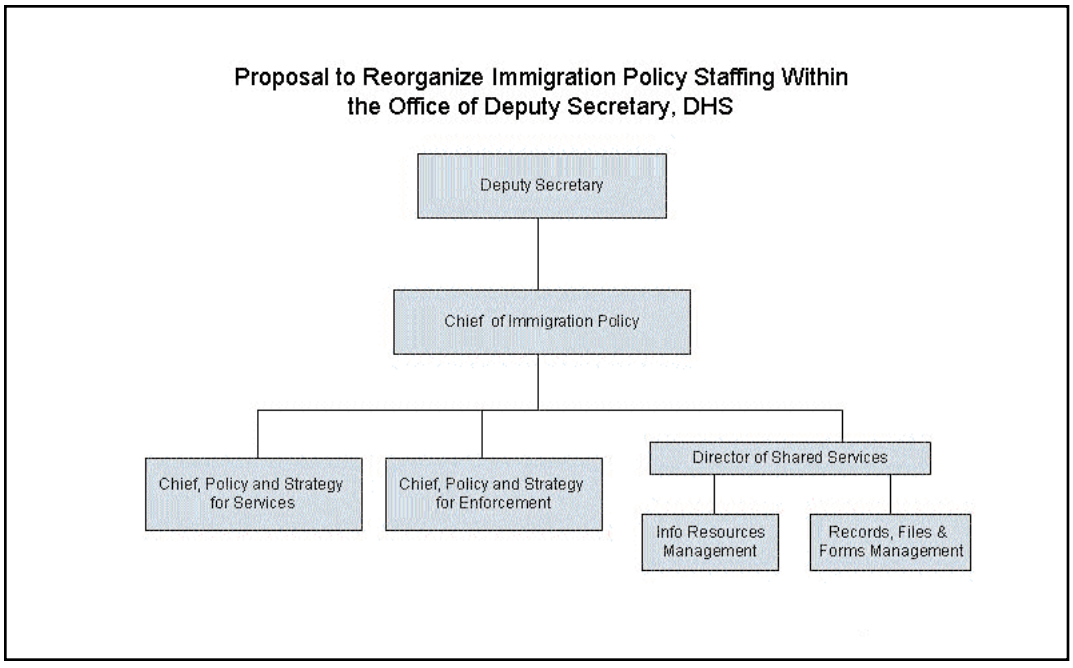


FIGURE 5



ENDNOTES

1) Homeland Security Act of 2002 (HSA), Pub.L. 107-296, 116 Stat. 2135

2) For more of the history and for insightful analysis of structural problems and competing considerations that must be factored into a solution, see Demetrios G. Papademetriou, T. Alexander Aleinikoff, & Deborah Waller Meyers, Reorganizing the U.S. Immigration Function: Toward a New Framework for Accountability (1998).

3) Services - also sometimes called adjudications or benefits - involve the approval of applications and petitions filed by would-be migrants or citizens or their sponsors. Enforcement involves the functions carried out by such units as the Border Patrol, investigations, detention and removal, and intelligence. Inspections could plausibly be placed into both categories.

4) See, e.g., 67 Fed. Reg. 40581 (2002).

5) S. 2444, 107th Cong., 2d Sess. (2002).

6) H.R. 3231, 107th Cong., 2d Sess (2002).

7) See generally Lisa M. Seghetti, Immigration and Naturalization Service: Restructuring Proposals in the 107th Congress (Congressional Research Service, updated Dec. 30, 2002).

8) Two other major components, the Coast Guard and the Secret Service, also became part of DHS. They report directly to the Secretary and do not fall under the jurisdiction of any of the Under Secretaries.

9) Another section of the Homeland Security Act undercuts the elevation message, however, by providing that the Director of BCIS shall be paid the same as the Assistant Secretary for Border Security (even though the latter position formally claims a lower ranking in the Executive Schedule listings). HSA § 451(a)(2)(C). Furthermore, an Executive Order issued February 28, 2003, to clarify references and legal authorities affecting DHS, provides for the "order of succession" within the Department - i.e., it designates who will act as Secretary when that officer is unavailable. The Deputy Secretary is listed first, followed by the Under Secretaries in a specified order (BTS comes first), the General Counsel, and then the Assistant Secretaries in order of seniority. The Director of BCIS is not on the list at all. Executive Order No. 13286, § 88, 68 Fed. Reg. 10617 (2003). Because both the statute and the Executive Order were cobbled together under tight time constraints, however, we probably should not read too much into their treatment of the Director.

10) Immigration and Nationality Act (INA) of 1952, Pub.L. 82-414, 66 Stat.163, as amended, codified in Title 8 of the U.S. Code.

11) INA § 292.

12) Department of Homeland Security, Border Reorganization Fact Sheet, found at www.dhs.gov/dhspublic/interapp/press_release/press_release_0073.xml (consulted Feb. 24, 2003).

13) See Papademetriou, Aleinikoff, & Meyers, supra, note 2, at 55-59

14) DHS Budget in Brief, FY 2004, at 6 (Jan. 2003).

15) Id., Border Reorganization Fact Sheet, supra, note 12.

16) The latest acronyms are confusing because they are far too similar to one another - BICE, BCIS, BCBP. Shorthand terms are useful for economical expression, but an alternative and more distinctive set would have worked far better.

17) 68 Fed.Reg. 9824 (2003).

18) The preamble to the regulations states that DOJ retains the functions lodged in EOIR "and other functions that are indigenous to the functions of the Attorney General." The significance of the latter phrase is unexplained.

19) The background discussion published as a preamble to the regulation also clarifies the division of some other responsibilities. Most importantly, it signals that the Secretary of DHS, not the Attorney General, will henceforth be the official who designates the nationals of countries who are to receive temporary protected status under INA § 244. 68 Fed.Reg., at 9827.

20) Different statutory and regulatory schemes apply to the working conditions and benefits that customs inspectors, immigration inspectors, border patrol officers, investigators, detention officers, and other job categories enjoy. For example, some have especially favorable overtime arrangements (in a variety of different flavors, depending on the job category), others generous early retirement possibilities, others a richer range of career advancement possibilities. Each such wrinkle doubtless has a historical explanation and may have made sense when adopted 30 or 50 or 70 years ago. But many lack justification in today's environment, and in any event the variations impede good management. Yet each group of officers holds on tightly to its own special advantages, while finding it possible to look with envy on some particular feature that it lacks but that seems so splendid for another occupational category. To render this disparate system more

uniform and rational will inevitably require a painful fight, and will probably require some grandfathering of benefits for current holders. Perhaps only in the context of an otherwise massive restructuring (as we are now witnessing) can one expect such a change. Even then the odds are not promising.

21) The two chiefs could serve thereafter within Shared Services as heads of suboffices that would focus on policy as it relates respectively to enforcement and services - in order to make it clear that this change complies with the ban on "abolition" of any statutorily created entity or function. HSA § 872(b).

22) As in effect at the time when the HSA was enacted, the regulation, 8 C.F.R. § 2.1 (2002), provided: "Without divesting the Attorney General of any of his powers, privileges, or duties under the immigration and naturalization laws, and except as to [functions delegated to EOIR], there is delegated to the Commissioner the authority of the Attorney General to direct the administration of the Service and to enforce the Act and all other laws relating to the immigration and naturalization of aliens." The picture is clouded somewhat by the existence of a second regulation in a different volume of the Code of Federal Regulations also delegating such powers to the Commissioner, but without express reservation of concurrent authority. 28 C.F.R. § 0.105 (2002).

23) This conclusion gains strength when the provisions transferring immigration functions are contrasted with provisions transferring certain other units to the Secretary of DHS. See, e.g., HSA § 821, which transfers to the Secretary of Homeland Security "the functions, personnel, assets, and obligations of the United States Secret Service, . . . including the functions of the Secretary of the Treasury relating thereto." Nothing comparable to the final clause can be found in the sections of the HSA transferring immigration authorities.

24) See The Jewels of the Princess of Orange, 2 Op. A.G. 482 (1831) (the President may not assume authority given to a district attorney, but may only act through that officer and remove him if he fails to follow the President's direction).

25) 8 C.F.R. § 2.1, as amended by 68 Fed.Reg. 10921, 10923 (March 6, 2003). The regulation then goes on to state that the Secretary may, in his discretion, delegate any such function to any officer he chooses - but it does not specify to whom specific powers are given, simply noting that delegation can occur by regulation, directive, memorandum, or other means. It is understandable that the Department would reserve this latter prerogative, with its attendant flexibility, at a time of transition, when a series of new delegations may have to be implemented quickly as the full organizational outlines for immigration functions are worked out. Nonetheless, it would be far batter for DHS to publish future delegations in the Federal Register to the maximum extent possible, in order to help the interested public in understanding how immigration powers will be distributed.

26) One of the few sections of the INA that was amended by the HSA, INA § 103, also probably bolsters the assertion that the key immigration authorities are vested in the Secretary, rather than the Under Secretary or the Director of BCIS. HSA § 1102. But before that section could play that role, Congress first had to repair it. As enacted in November 2002, § 1102 was a remarkable hash of mangled wording. The caption was inconsistent with the text, the text added oddly duplicative wording that could not be sensibly parsed, and the text established an effective date linked to an Act that Congress never enacted. On February 20, 2003, Congress used the FY 2003 omnibus budget reconciliation bill, Pub.L. 108-7, Div. L, § 105, 117 Stat. 11, 531, to amend HSA § 1102. The newly revised provision still contains some drafting peculiarities, but it plainly substitutes the Secretary for the AG as the principal official "charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens."

27) The amended INA § 103, even as further repaired in February 2003 (see note 26 supra), does not solve this problem. The statute now charges the Secretary of DHS with the administration and enforcement of all immigration laws, but it excepts the powers, functions, and duties conferred upon, among others, the AG. Most of the rest of the INA is still worded so as to confer powers on the AG. Only a careful section-by-section revision of the remainder of the INA, excising references to the AG whenever the power is now effectively held by the Secretary, will wholly clarify the allocation of authorities.

28) As noted above, EOIR also includes administrative law judges with a highly specialized range of jurisdiction. For ease of discussion, they will not receive further express consideration here, but most of the suggestions presented apply with equal force to that component of EOIR.

29) See, e.g., Maurice Roberts, Proposed: A Specialized Statutory Immigration Court, 18 San Diego L.Rev. 1 (1980); Commission on Immigration Reform, Becoming an American: Immigration and Immigrant Policy 54-56 (1997).

30) See United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1954).

31) Further, immigration judges and BIA members historically have occupied career attorney positions within DOJ, with strong expectations of retention and exemption from performance evaluation based on viewpoints expressed in their judgments. I am unaware of any instance before

2002 wherein a BIA member was involuntarily removed from the Board by the Attorney General, although Attorneys General have always had that removal power. This history or custom doubtless bolstered a truly independent outlook; many immigration judges and BIA members have ruled frequently and vehemently against the INS. Nonetheless, reforms implemented by Attorney General Ashcroft in 2002, 67 Fed.Reg. 54878 (2002), eventually shrunk the Board from 23 members to 11, resulting in resignations and apparently in the involuntary termination of five members. These steps have cast a shadow over the tradition of decisional independence, a shadow that may be hard to dispel.

32) The classic affirmation of agency discretion in choosing between rulemaking and adjudication for developing regulatory policy may be found in Securities and Exchange Commission v. Chenery.Corp. (Chenery II), 332 U.S. 194, 201-03 (1947).

33) See, e.g., Marcello v. Bonds, 349 U.S. 302, 311 (1955); Richardson v. Perales, 402 U.S. 389, 409-10 (1971).

34) See INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (emphasizing judicial deference to the Attorney General because immigration decisions involve "especially sensitive political functions that implicate questions of foreign relations").

35) 68 Fed.Reg. 9832-33 (2003) (new 8 C.F.R. §§ 103.37(h)(1)(iii), 1003.1(h)(1)(iii)).

36) 68 Fed.Reg. 9825.

37) Compare 8 C.F.R. § 1239.1(a), as amended by 68 Fed.Reg. 9838 (Feb. 28, 2003), with 8 C.F.R. § 239.1(a), as amended by 68 C.F.R. 10924 (March 6, 2003).

38) Two days after DHS assumed immigration functions, the Washington Post quoted an unnamed official who described the sharing of authority over asylum regulations (and presumably over all other duplicated regulations): "As for regulations, the official said that they would have to be approved by [Attorney General John] Ashcroft and Homeland Security Secretary Tom Ridge. 'Both departments have equity in determining what 'asylum' means,' the official said. 'When it comes to rulemaking, it will be a shared authority. Neither department will promulgate a rule without the assent of the other'," George Lardner, Jr., Ashcroft Reconsiders Asylum Granted to Abused Guatemalan, Wash. Post, March 3, 2003, at A2.

39) See George Robert Johnson, Jr., The Split Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences, 39 Admin. L.Rev. 315 (1987).

40) Martin v. Occupational Safety and Health Review Commission, 499 U.S. 144, 154 (1991). In most such unitary agencies, the Administrative Procedure Act (APA) requires that separate personnel carry out enforcement and adjudication roles. Since 1952 Congress has exempted immigration proceedings from the APA's more modest separation-of-functions requirements. But even so, administrative practice soon evolved so that immigration proceedings came to observe a strict separation of personnel carrying out these distinct functions. See T.Alexander Aleinikoff, David A. Martin, & Hiroshi Motomura, Immigration and Citizenship: Process and Policy 254-55 (4th ed. 1998).

41) Martin v. OSHRC, 499 U.S. at 154.

42) Secretary of Labor on behalf of Wamsley v. Mutual Min. Inc., 80 F.3d 110, 114 (4th Cir. 1996) (citations omitted, quotation taken from the Supreme Court's Martin decision, supra, 499 U.S. at 153). Presumably, for these same functional reasons, a reviewing court would also owe primary deference, under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), to the principal enforcement agency. See generally Thomas W. Merrill & Kristin E. Hickman, Chevron's Domain, 89 Geo. L.J. 833, 893-96 (2001). The drafters of the HSA seemed at least aware of a risk that the division of functions between DOJ and DHS might pose a problem with regard to judicial deference, but the provision enacted on this topic is of no real help if the two departments are at odds. HSA § 1103 simply provides: "Nothing in this Act [or related provisions] shall be construed to limit judicial deference to regulations, adjudications, interpretations, orders, decisions, judgments, or any other actions of the Secretary of Homeland Security or the Attorney General."

43) An argument against such deference might be thought to derive from the proviso to INA § 103(a)(1), which makes the AG's rulings on questions of law "controlling." Certainly EOIR's February 28 regulations take every opportunity to read that proviso for all it is worth, even to the potentially insulting length of insisting on DOJ review of the "lawfulness" of DHS adjudicatory decisions (within DHS's exclusive jurisdiction) before they can be published as precedents in the official reporter. 68 Fed.Reg. 9832 (new 8 C.F.R. §§ 103.3(c), 1003.1(i)). But the INA § 103 proviso merely states the effect of an AG ruling after it has been issued; it does not dictate what stance the AG and his delegates in EOIR must take in initially interpreting a statute or regulation. They could defer to the interpretations of DHS without violating this proviso. What "controlling" must mean under the new organizational structures also remains to be tested. I would argue that the proviso should not disable DHS from adopting regulations within its domain essentially overruling an earlier EOIR interpretation of an ambiguous statutory provision, provided that the new regulation itself sets forth a reasonable interpretation.

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