Journal on Migration and Human Security

Immigration Governance for the Twenty-First Century

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Executive Summary

The governance of immigration has a checkered past, and policy makers' efforts at reform rarely meet expectations. Critiques have echoed over the years and across the political spectrum. The current system of immigration governance is scattered around the federal government, with no clear chain of command. No single government department or agency captures the breadth of the Immigration and Nationality Act's reach.

At the crux of understanding immigration governance is acknowledging that immigration is not a program to be administered; rather, it is a phenomenon to be managed. The abundance of commissions that have studied the issues and the various administrative structures over time offers some wisdom on ingredients for successful governance. Based upon this research, options for effective immigration governance emerge.

This paper studies the administration of immigration law and policy with an eye trained on immigration governance for the future. It opens with a historical overview that provides the backdrop for the current state of affairs. It then breaks down the missions and functions of the Immigration and Nationality Act by the lead agencies tasked with these responsibilities. The paper concludes with an analysis of options for improving immigration governance. Each of these options poses unique challenges as well as political obstacles.

Introduction

There is a widespread consensus that the US immigration system is not working in the public interest, and it is roundly criticized from a diversity of perspectives. Those who would restrict immigration showcase failures in curbing unauthorized migration, concerns about job competition from foreign workers, and fears of criminal aliens. Those who favor more generous immigration cite backlogs in family reunification, a desire for more foreign workers, and perceived barriers to legal flows. Among those who support immigration, there are differing priorities over employment-based, family-based, and humanitarian-based admissions. Critics of asylum seekers being detained, families being separated by deportations, and the criminalization of illegal presence are met by those who would build walls, broaden the immigration authorities of local law enforcement, and ban certain religious groups. So much attention is given to the pressing challenges of US immigration law and policy that the strained system of immigration governance is usually overlooked.

JMHS Volume 6 Number 1 (2018): 97-120
doi: 10.14240/jmhs.v6i1.114

Immigration governance has vexed policy makers in the United States for decades. A litany of critiques has echoed over the years, including: poorly trained personnel; uneven distribution of resources across functions; wide variations in the application of the law; perceived inability to stymie illegal migration; inadequate preparations for migration emergencies; competing policy priorities; backlogs in processing applications; insufficient recordkeeping and reporting; and no clear chains of command. Today, most of the major immigration functions are housed in three agencies within the Department of Homeland Security (DHS), the federal department that consistently falls at the bottom of employee morale as measured by the global satisfaction index and the employee engagement index (Office of Personnel Management 2016). Two of the three DHS immigration agencies rank 291 and 299 out of 305 federal agencies in terms of "best places to work in the federal government" (Partnership for Public Service 2017).

This paper studies the administration of immigration law and policy with an eye trained on immigration governance for the future. It opens with a historical overview that provides the backdrop for the current state of affairs. It then breaks down the missions and functions of the Immigration and Nationality Act by the lead agencies tasked with these responsibilities. For illustrative purposes, two examples of foreign nationals seeking admission to the United States are featured in sidebars. The paper concludes with an analysis of options for improving immigration governance.

Congress Has the Lead

Among the three branches of government, the US Congress has long been the lead in formulating the laws regarding the admission of foreign nationals and the naturalization of citizens. Congress's role over naturalization and immigration derives from Article 1 of the US Constitution. In 1875, the US Supreme Court clarified Congress' role regulating immigration in *Henderson v. the Mayor of New York City* by stating "We are of opinion that this whole subject has been confided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other body known to our law, state or national; that by providing a system of laws in these matters, applicable to all ports and to all vessels, a serious question, which has long been matter of contest and complaint, may be effectually and satisfactorily settled." Despite this affirmation of Congress' preeminent responsibility, the legislative branch was slow to pick up the task.[1]

It was not until 1889 that Congress formed a joint House-Senate Committee on Immigration, which was charged with formulating policy to handle an unprecedented influx of immigrants from southern and eastern Europe. The Senate Committee on Immigration was established on December 12, 1889, in response to an increasing demand for immigration law at the federal level. In 1893, the House of Representatives followed suit and formed its Committee on Immigration and Naturalization. Even with the committees in place, Congress was unable to enact comprehensive immigration legislation to deal with the numbers and the types of immigrants arriving in the United States as the twentieth century opened.

Rather, Congress formed the US Immigration Commission (commonly known as the Dillingham Commission after its chairman Senator William P. Dillingham) in 1907. The

1 *Henderson v. Mayor of City of New York*, 92 U.S. 259 (1875).

Commission's 1911 report argued that immigration from eastern and southern Europe posed a serious threat to American society and culture. The Dillingham Commission's recommendations provided the impetus as well as the political underpinnings for the immigration restriction and national origin quota laws written by the House and Senate Immigration Committees that Congress enacted in the 1920s.

The House and Senate Immigration Committees remained quite active for many years, and the immigration committee structures lasted until the end of the 79th Congress. By this point in the mid-twentieth century, however, immigration levels were historically low as the national origin quota laws continued to restrict the flow of immigrants.

As part of the sweeping Legislative Reorganization Act of 1946, the House of Representatives folded its Committee on Immigration and Naturalization and the Senate folded its Committee on Immigration into one of the super committees created by the Act — the Committee on the Judiciary. In the post-World War II era, these committees took up the daunting task of consolidating and revising all of the disparate alien registration, citizenship, exclusion, immigration, and visa control laws into the Immigration and Nationality Act (INA) of 1952. The resulting Act was controversial and narrowly survived the veto of President Harry Truman. The INA remains the body of law that governs almost all of what we consider immigration policy today.

The Committees on the Judiciary in both chambers continue to be the principal committees of jurisdiction over the Immigration and Nationality Act. Both Judiciary Committees have subcommittees charged with immigration law and policy. However, the establishment of the House Committee on Homeland Security and the Senate Committee on Homeland Security and Governmental Affairs in the early 2000s has challenged the preeminence of the Judiciary Committees, especially in areas of immigration-related border security and visa security. Regarding refugee law and policy, the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations have long maintained an oversight interest.

A Checkered Past of Immigration Governance

How best to administer immigration and naturalization policy has long challenged lawmakers, and the governance of immigration has a checkered history. Figure 1 presents a timeline highlighting immigration governance in the United States, followed by a brief history of the key moments and decisions.

In 1891, Congress established the Bureau of Immigration in the Department of Treasury. Earlier in 1882, Congress had enacted a law providing for an examination of all foreign nationals who arrive in the United States and specifying the grounds for excluding foreign nationals. In the 1882 Act, Congress placed immigration control under the Secretary of the Treasury and authorized the Secretary to appoint officers in each state who were responsible for examining foreign nationals. The Chinese Exclusion laws were also enacted during this period.[2]

2 An amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor, Pub. L. No. 51-551, 26 Stat. 1084 (1891); Immigration Act of 1882, Pub. L. No. 47-376, 22 Stat. 214; and Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882).

Figure 1. Timeline of Immigration Governance in the United States

Source: Author's compilation of laws and executive actions.

In 1903, Congress transferred the various existing immigration functions from the Department of Treasury to what was then the Department of Commerce and Labor. In 1906, Congress established a new agency known as the Naturalization Division

under the Commissioner General of Immigration to handle the citizenship functions.[3] At this point, immigration levels were approaching one million people annually and the importance of naturalization was correspondingly rising.

Congress passed immigration laws in 1918 and 1924 that tasked the Department of State with issuing visas to foreign nationals who sought to come to the United States. As the law required foreign nationals to establish their eligibility in advance of their arrival in the United States, it assigned visa issuances to consular officers abroad.[4] Initially seen in 1918 as a wartime measure to guard national security, the 1924 Act solidified the State Department's role in determining immigrant eligibility and admissibility (President's Commission on Immigration and Naturalization 1953, 128-29).

Meanwhile, Congress established the Departments of Commerce (DOC) and of Labor (DOL) in 1913 as separate entities, and transferred the Bureau of Immigration and the Bureau of Naturalization to the DOL, with each bureau led by a commissioner.[5] DOL took the lead on enforcing the federal labor laws that Congress was enacting during the "Progressive era" from the 1890s to 1920s. Given that so much of immigration law and policy was focused on restricting contract laborers and securing the borders from economic migrants, DOL was the choice to oversee immigration. Two decades later, as immigration levels fell to historic lows, the two bureaus merged again to become the US Immigration and Naturalization Service (INS).[6]

Aware of problems within INS, Labor Secretary Frances Perkins requested an administrative review of the agency in 1938. The report came out in 1940 and concluded that the agency suffered from "defective administrative supervision and control and unfit personnel." The study also found important differences in enforcement within and between localities and lack of a standardized form of examination. Possibilities for abuse were identified in investigations, arrests, and deportation proceedings. The report to Secretary Perkins concluded that opportunities for fair hearings and the requirements of due process were inadequate (The Secretary of Labor's Committee on Administrative Procedure 1940).

Perkins did not follow up on this report because the immigration and naturalization functions were moved to the Department of Justice (DOJ) in 1940. Although the official explanation for the transfer was the growing national security concerns of World War II, the power struggle between Labor Secretary Perkins — who wanted to admit the refugees fleeing Nazi Germany and State Department officials — who opposed issuing visas to the refugees — was apparently a critical determinant for the transfer. After State Department officials reportedly attempted to get the upper hand over the INS, President Roosevelt opted

3 An act to establish the Department of Commerce and Labor, Pub. L. No. 57-552, 32 Stat. 825 (1903); An act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States, Pub. L. No. 59-3592, 34 Stat. 596 (1906).

4 An act to prevent in time of war departure from or entry into the United States contrary to the public safety, Pub. L. No. 65-81, 40 Stat 559 (1918); An act to limit the immigration of aliens into the United States, and for other purposes, Pub. L. No. 65-190, 43 Stat. 153 (1924).

5 An act to create a Department of Labor, Pub. L. No. 62-141, 37 Stat. 736.

6 Organization of Executive Agencies, Exec. Order No. 1066 (June 10, 1933).

not to cede authority to either of the battling departments. Instead, Roosevelt transferred the INS to DOJ, citing national security.[7]

From the 1930s onward, various entities had recommended consolidating the border control functions, including the merger of the INS Border Patrol with the Coast Guard. The consolidation of immigration inspection and customs inspections at port of entry was recommended in 1937, 1940, and 1948. The Senate Committee on the Judiciary's seminal Report No. 1515, which was prepared in anticipation of the consideration of the Immigration and Naturalization Act of 1952, concluded that the merger of INS' immigration and Customs' goods inspections would only be advisable "where such consolidation would not impair enforcement of immigration law." Congress chose not to do so, emphasizing what was then considered tighter immigration enforcement, when codifying the INA in 1952 (US Senate Committee on the Judiciary 1950; US House of Representatives Committee on the Judiciary 1952).

Similarly, the Commission on the Organization of the Executive Branch of Government (more commonly known as the Hoover Commission because it was chaired by former President Herbert Hoover) recommended in 1949 that the Visa Division of the Department of State be transferred to the Department of Justice. Senate Judiciary Committee Report No. 1515 acknowledged the duplication between INS and the Visa Division but concluded that the redundancies provided "additional barriers to the entry of inadmissible aliens." In other words, Congress again opted for what was perceived as stronger enforcement over administrative efficiencies (US Senate Committee on the Judiciary 1950; US House of Representatives Committee on the Judiciary 1952).

In reaction to the override of his veto of the INA, President Truman established a commission (commonly known as the Truman Commission) to provide a thorough review of immigration law and administration. The Truman Commission recommended an independent administrative agency that handled all immigration-related duties, including visa issuances abroad, inspections at ports of entry, patrolling the border, detaining and deporting aliens, citizenship education, and naturalization. The Truman Commission likened their proposed Commission on Immigration and Naturalization to the Interstate Commerce Commission and the Federal Communications Commission. Three entities were proposed to be under the direction of this commission: the Administrator of Immigration and Naturalization to handle all administrative and enforcement duties, i.e., the day-to-day responsibilities of the Immigration and Nationality Act; Hearing Officers to determine exclusions and deportations and hear all quasi-judicial immigration and naturalization matters; and the Board of Immigration and Visa Appeals to adjudicate all appeals of visa cases, exclusions and deportation cases, and other immigration and naturalization matters referred to it (President's Commission on Immigration and Naturalization 1953, chapter 10).[8]

7 In 1940, Frank Murphy and then Robert Jackson were the Attorneys General. Both Murphy and Jackson were noted liberals who supported those fleeing Nazi Germany. However, each was quickly nominated and approved in 1940 and 1941 respectively for openings on the US Supreme Court. The political stalemate over refugees of World War II continued through the debates over the Displaced Persons Act of 1948.

8 The Truman Commission highlighted that transferring visa issuances to the Department of Justice would enable foreign nationals to appeal visa decisions that were not appealable when made by consular officers abroad.

In the 1950s and 1960s the Department of Labor re-emerged as a key player in immigration governance. The 1952 Act had established employment-based preference categories and charged the Department of Labor with certifying that US workers were not sufficiently available "in the locality of the aliens' destination who are able, willing, and qualified to perform such skilled or unskilled labor and that the employment of such aliens will adversely affect the wages and working conditions of workers in the United States similarly employed." As Congress was debating what would ultimately become the Immigration Act of 1965, which repealed the national origin quota law, a major point of debate was the preference categories for employment-based immigration. The congressional sponsors worked with then-Secretary of Labor Willard Wirtz to ensure that the Department of Labor would administer strong labor market protections (i.e., labor certification) to guard against any adverse effects that foreign workers might have on the wages and working conditions of US workers.[9]

By the 1970s, INS was under fire because it appeared unable to stop the flow of unauthorized migrants across the southern border. The agency also had what was then considered burgeoning backlogs of adjudications. During this period, the US Government Accountability Office (GAO, then known as the General Accounting Office) published a series of evaluations identifying INS failures in the administration of adjudications, the enforcement of immigration laws, and the management of case records overall (US GAO 1973, 1976, 1980, 1986).

The Select Commission on Immigration and Refugee Policy (commonly known as the Hesburgh Commission after its chairman Father Theodore Hesburgh) offered a comprehensive package of recommendations in 1981 to reform and modernize immigration law and policy. In terms of the INS, the Hesburgh Commission referred to it as "beleaguered" and included options aimed at strengthening and streamlining the agency. The Hesburgh Commission specifically recommended that INS be elevated as an agency within DOJ, with the Commissioner upgraded to a Director reporting directly to the Attorney General (Select Commission on Immigration and Refugee Policy 1981).

Passage of the Refugee Act of 1980 led to the INS' Office of Refugees, Asylum, and Parole, the Department of State's Bureau of Population, Refugees, and Migration (PRM), and the Office of Refugee Resettlement in the Department of Health and Human Services (HHS).[10] Within months of its passage, however, the INS faced a crisis of mass asylum seekers known as the Mariel boatlift from Cuba. The INS struggled to cope with over 100,000 asylum seekers who arrived in South Florida, lacking the resources and personnel to handle the crisis. The Mariel boatlift dramatized the INS's competing priorities of providing humanitarian adjudications with enforcing border control (Wasem 1993).

The Immigration Reform and Control Act of 1986 (IRCA) expanded and tightened immigration enforcement and legalized the status of several million foreign nationals

9 Senator Philip Hart of Michigan was the cosponsor of the legislation that initially would have substantially increased the number of work-related visas. Hart and other important backers of the legislation were also closely aligned with organized labor unions.

10 Most importantly overall, the Refugee Act of 1980 amended the INA to repeal the ideological and geographic limitations which had previously favored refugees fleeing communism or from countries in the Middle East and to redefine "refugee" to conform with the definition used in the United Nations Protocol and Convention relating to the Status of Refugees.

living in the United States without legal immigration status. Although this major revision of immigration law featured many of the recommendations of the Hesburgh Commission, it did not address the organizational issues raised by that Commission. Some who have studied the 1986 Act concluded that IRCA exacerbated INS's management failures by burdening it with additional mandates, including the legalization of 2.7 million unauthorized migrants, substantially increased border controls, and the expansion of work site enforcement and employer sanctions (Juffras 1991).

When the Commission for the Study of International Migration and Cooperative Economic Development (which IRCA established) issued its final report in 1990, it called for the creation of an Agency for Migration Affairs that reported directly to the President. It recommended placing all immigration, naturalization, and refugee functions from the INS (except the expressly law enforcement functions of the Border Patrol and interior enforcement agents) and from the Department of State into this independent agency. It maintained that consolidating and elevating these functions would address the immigration governance problems resulting from fragmentation across federal departments and inadequate prioritization within the administration (Commission for the Study of International Migration and Cooperative Economic Development 1990, 27-32).

Implementing two major legislative revisions to the INA — the Immigration Act of 1990 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 — created new challenges for the INS. The 1990 Act increased legal immigration and created new legal pathways for both permanent and temporary admissions. It also rewrote the grounds of inadmissibility and deportability. The 1996 Act significantly revised immigration enforcement provisions, consolidating the exclusion and deportation provisions into a unified removal process. Among other things, it ratcheted up the consequences of illegal presence in the United States and broadened the circumstances under which legal permanent residents could be deported. During this period, INS became more dependent on the fees charged for immigration and naturalization adjudications, rather than direct appropriations. The shift in the sources of funding for the agency added to the administrative problems, as the various functional units within INS competed for resources.[11]

In September 1997, the US Commission on Immigration Reform (commonly known as the Jordan Commission after its first Chair, the Honorable Barbara Jordan) became yet another congressionally mandated study group to point out the administrative and management problems that plagued the implementation of immigration policy. It described INS as an agency suffering from conflicting priorities and mission overload, whose enforcement and service missions were incompatible. The Jordan Commission considered a proposal to establish a cabinet-level Department of Immigration Affairs, but in the end it did not follow earlier commissions' recommendations to elevate the federal immigration system. Rather, the Jordan Commission recommended "a restructuring of the immigration system's four principal operations" as follows:

1. immigration enforcement at the border and in the interior of the United States in a Bureau for Immigration Enforcement at the Department of Justice;

11 In the FY 1989 Department of Justice Appropriations Act, Congress established the Immigration Examination Fees Account and made the portion the INS budget collected from user fees a mandatory appropriation.

2. adjudication of eligibility for immigration-related applications (immigrant, limited duration admission, asylum, refugee, and naturalization) in the Department of State under the jurisdiction of an Undersecretary for Citizenship, Immigration, and Refugee Admissions;

3. enforcement of immigration-related employment standards in the Department of Labor; and

4. appeals of administrative decisions including hearings on removal, in an independent body, the Agency for Immigration Review (US Commission on Immigration Reform 1997).

As the twentieth century drew to a close, there was widespread concern with immigration governance. These issues were primarily defined in terms of the INS's competing priorities of adjudicating immigration benefits (service) and enforcing violations of immigration law (enforcement), though arguably this dichotomy oversimplified the problems facing the INS. The last two commissioners of INS, Doris Meissner (1993-2000) and James Ziglar (2001-2003), each proposed more modest reforms to immigration governance that would have kept INS intact. They advocated restructuring the INS into two distinct branches — enforcement and service. Ziglar's restructuring was in progress as the September 11, 2001 (hereafter "9/11") terrorist attacks occurred.[12]

The last legislative reorganization of federal immigration functions occurred in 2003 as part of the enactment of the Homeland Security Act of 2002, which was a direct policy reaction to the 9/11 terrorist attacks. This Act abolished the INS and assigned its immigration functions to two bureaus with the newly created Department of Homeland Security (DHS) — the Bureau of Citizenship and Immigration Services and the Bureau of Border Security. It is worth noting that annual funding for the INS was the largest single agency budget prior to September 11 that went into the new DHS.[13] After weighing the request of the administration of President George W. Bush to move visa processing to DHS, Congress decided once again not to move the visa issuance function out of the Department of State. As DHS stood up, the Bush administration merged the Bureau of Border Security with the US Customs Service and established a border agency known as Customs and Border Protection (CBP) and an interior enforcement agency known as Immigration and Customs Enforcement (ICE). The Bureau of Citizenship and Immigration Services was renamed US Citizenship and Immigration Services (USCIS). These three agencies are responsible for most of the functions that the former INS handled (Wasem 2006).

Currently, five federal departments have important immigration responsibilities, with the Department of Homeland Security (DHS) as the lead. Although the Departments of Justice and State do not have a wide range of immigration duties, those that they do have are quite important and extensive. The Department of Labor's authority to protect US workers from

12 There was a public perception that the INS should have recognized and apprehended the foreign terrorists involved in the 9/11 attacks, even though the comprehensive reviews of the 9/11 terrorist attacks identified other agencies' intelligence, communications, and oversight failures to be much most consequential than those of the INS (US National Commission on Terrorist Attacks upon the United States 2004).

13 In years where there were major natural disasters, the Federal Emergency Management Administration might have had larger appropriations as the result of supplemental disaster funding.

adverse effects of foreign workers has diminished over the years as employers have found new avenues for recruiting foreign workers (Wasem 2016).

A Fragmented System of Governance

Today the US system of immigration governance is scattered across the federal government, with no clear chain of command and no entity that has a lens to capture the breadth of the INA's reach. Figure 2 offers a view of the major immigration functions and how a variety of federal agencies are tasked with elements of these functions. Each of these agencies house databases that contain administrative, demographic, and workload statistics, including personal records. The penetration of national security screenings is evidenced by interagency data sharing, or in some instances data interoperability, among these numerous databases. The figure below is in no way a comprehensive listing of the functions and elements, but it does convey the main responsibilities. A brief elaboration of the elements follows.

Figure 2. Major Federal Immigration Responsibilities: Selected Functions and Lead Agencies

Note: This chart does not depict all immigration functions nor does it list all agencies with immigration responsibilities.

Selection

The INA spells out the law governing the selection criteria and procedures and assigns specific duties to USCIS, the State Department's Bureau of Consular Affairs, and the Department of Labor.

USCIS officers determine the eligibility of the immediate relatives and other family members of US citizens, the spouses and children of legal permanent residents (LPRs), employees that US businesses have demonstrated that they need, and other foreign nationals who meet specified criteria. They also determine whether a foreign national can adjust to LPR status within the United States.

Consideration of these various immigration petitions, however, is not a routine matter of processing paperwork. USCIS also makes determinations on a range of immigration-related benefits and services. The agency decides whether a foreign national in the United States on a temporary visa (i.e., a nonimmigrant) is eligible to change to another nonimmigrant visa.

USCIS considers the cases of asylum seekers who are in the United States and not involved in any removal proceedings. The USCIS asylum officers make their determinations regarding the affirmative applications. The asylum officer does not technically deny asylum claims; rather, if foreign nationals are out of status, their asylum applications are referred to immigration judges in the Justice Department's Executive Office of Immigration Review (EOIR) for formal proceedings, as discussed below.

The Division of Foreign Labor Certification in the US Department of Labor (DOL), specifically the Employment and Training Administration, is responsible for ensuring that foreign workers do not displace or adversely affect working conditions of US workers. DOL handles the labor certifications for permanent employment-based immigrants, temporary agricultural workers, and temporary nonagricultural workers as well as the simpler process of labor attestations for temporary professional workers. The US employer, rather than the prospective worker who is foreign, is responsible for completing the foreign labor certification process.

The State Department's Bureau of Consular Affairs is the agency responsible for issuing visas. DHS is responsible for formulating regulations on visa issuances and may assign staff to consular posts abroad to advise, review, and conduct investigations. As discussed above, USCIS is charged with approving immigrant petitions, a prerequisite for obtaining a visa to become a legal permanent resident. The Bureau of Consular Affairs issues visas to all foreign nationals approved for travel to the United States. A Visa and Passport Security Program within the Bureau of Diplomatic Security at DOS targets those involved in the fraudulent production, distribution, or use of visas, passports, and other documents used to gain entry to the United States.

The visas that the Bureau of Consular Affairs issues have biometric identifiers, e.g., finger scans and digitized photographs. Similarly, the permanent resident card, commonly called a "green card" because it originally had been printed on green stock, that USCIS issues to all foreign nationals who become legal permanent residents is also biometric. It has digital photograph and fingerprint images that are an integral part of the card.

Foreign nationals who are temporarily in the United States and eligible to work file a request with USCIS for an employment authorization document (EAD). Other foreign nationals who are authorized to work freely in the United States without restrictions also apply to USCIS for an EAD. Examples of foreign nationals who need EADs are refugees, asylum applicants and asylees with cases pending, foreign nationals who are covered under Temporary Protected Status (TPS), and foreign nationals for whom an immigration judge or the Attorney General has granted relief from removal.

The Case of the H-1B Worker

Three federal departments are involved in the H-1B process: Homeland Security, Labor, and State. Prospective employers of H-1B professional specialty workers must submit a labor attestation to the Employment and Training Administration at the Department of Labor. In the labor attestation for an H-1B worker, the employer must attest that the firm will pay the nonimmigrant the greater of the actual wages paid to other employees in the same job or the prevailing wages for that occupation, that the firm will provide working conditions for the nonimmigrant that do not cause the working conditions of the other employees to be adversely affected, and that there is no applicable strike or lockout. After DOL has approved the labor attestation, USCIS processes the petition for the H-1B nonimmigrant (assuming other immigration requirements are satisfied). The H-1B nonimmigrant must demonstrate to USCIS that he or she has the requisite education and work experience for the posted position. If a visa is available, the prospective H-1B nonimmigrant then proceeds to the Bureau of Consular Affairs to apply for the visa and to be screened for admissibility. With the H-1B visa in hand, the H-1B worker seeks admission to the United States at a port of entry where a CBP officer inspects him or her. Typically, a foreign national can stay a maximum of six years on an H-1B visa.

Naturalization

USCIS is responsible for naturalization, the process through which LPRs may become US citizens if they meet the requirements of the law. USCIS adjudicators determine whether LPRs have continuously resided in the United States for a specified period of time, have good moral character, have the ability to read, write, speak, and understand English, and have passed an examination on US government and history. Prospective citizens can opt for an official from USCIS or a federal judge to perform the ceremony swearing them in as US citizens.

Border Control

Consular officers must perform admissibility reviews for all foreign nationals seeking visas to ensure that they are not ineligible for visas or admission under the grounds for inadmissibility. These grounds include criminal, national security, health, and indigence grounds as well as past violations of immigration law. Consular officers use the Consular Consolidated Database (CCD) to screen visa applicants. In addition, USCIS officers must confirm not only that the foreign nationals are eligible for the particular immigration status

they are seeking, but also whether they should be rejected because of other requirements of the law. As a result, they also make admissibility determinations prior to approving a petition.

CBP inspectors examine and verify US citizens and foreign nationals who seek admission to the United States at ports of entry. In addition to inspecting individuals seeking entry into the United States, immigration inspectors, like their border patrol counterparts, are the first line of contact for all foreign nationals seeking entry into the country, including asylum seekers who may not have proper documents.

CBP inspectors and consular officials partner with the National Counterterrorism Center (NCTC) to utilize the Terrorist Identities Datamart Environment on known and suspected terrorists and terrorist groups. They also check the background of all foreign nationals in biometric and biographic databases such as the Department of Homeland Security's Automated Biometric Identification System (IDENT) and the Federal Bureau of Investigation's Integrated Automated Fingerprint Identification System.

The Centers for Disease Control (CDC) in the US Department of Health and Human Services take the lead in protecting the United States from foreign nationals arriving with communicable diseases. A medical examination is required of all foreign nationals seeking to come as LPRs and refugees, and may be required of any foreign national seeking a nonimmigrant visa or admission at the port of entry. The diseases that trigger inadmissibility in the INA are those communicable diseases of public health significance as determined by the Secretary of HHS.

CBP border patrol activity includes enforcing US immigration law, as well as some aspects of the criminal law (e.g., drug interdiction) along the border and between ports of entry. The border patrol coordinates its border security and management activities with other federal agencies, such as the Drug Enforcement Administration and the US Coast Guard.

Enforcement

ICE is the lead agency for immigration interior enforcement activity, which includes investigating foreign nationals who violate the INA and other related laws. The main categories of crimes they investigate are: suspected terrorism; criminal acts; suspected fraudulent activities (i.e., possessing or manufacturing fraudulent immigration documents); and suspected smuggling and trafficking of foreign nationals. ICE investigators are considered law enforcement agents. Typically, ICE investigators identify the foreign nationals subject to removal on grounds specified in INA and turn these foreign nationals over to the Enforcement and Removal Operations part of ICE.

Often considered a subset of investigations, a key activity is the investigation of suspected violations of immigration law pertaining to foreign nationals working illegally in the United States. This function most frequently involves foreign nationals who work without proper employment authorization as well as employers who knowingly hire unauthorized foreign nationals.

DOL's Wage and Hour Division is responsible for administering and enforcing worker protections provided in several temporary foreign worker visa categories. The Wage and

Hour Division's primary duties include the minimum wage, overtime, and child labor provisions of the Fair Labor Standards Act; the Family and Medical Leave Act; the Migrant and Seasonal Agricultural Worker Protection Act; and the prevailing wage requirements of the Davis-Bacon Act and the Service Contract Act.

DOJ's Immigrant and Employee Rights Section investigates and prosecutes charges of immigration-related employment discrimination. In 1986, Congress prohibited discrimination on the basis of legal alien status or national origin in hiring, firing, and recruitment or referral for a fee. The Immigrant and Employee Rights Section also offers grants for public education programs on the rights afforded potential victims of employment discrimination and the responsibilities of employers under the anti-discrimination provisions of the INA.

ICE is responsible for overseeing the custody of foreign nationals who are detained by DHS and facilitating their release or deportation. The INA requires DHS to detain several classes of foreign nationals, including those who are inadmissible or deportable on criminal, terrorist, or national security grounds; those who arrived in the United States without proper documents and requested asylum (pending a preliminary determination of their asylum claims); and those who have final orders of deportation.

In terms of fraud detection, USCIS must confirm not only that the foreign nationals are eligible for the particular immigration status they are seeking, but also whether they should be rejected because of other requirements of the law. USCIS established the Office of Fraud Detection and National Security to work with appropriate law enforcement entities to handle national security and criminal "hits" on foreign nationals and to identify systemic fraud in the application process.

Refugees

Within the Department of State, the Bureau of Population, Refugees, and Migration has primary responsibility for formulating policies on population, refugees, and migration, and for administering the US international refugee assistance and admissions programs. PRM monitors US contributions to international and nongovernmental organizations that assist and protect refugees abroad. It oversees admissions of refugees to the United States for permanent resettlement in coordination with DHS and HHS.

The Office of Refugee Resettlement is within the Administration for Children and Families in HHS. Since its establishment by the 1980 Refugee Act, this HHS refugee resettlement program administers an initial transitional assistance program for temporarily dependent refugees, Cuban/Haitian entrants, and asylees. The Trafficking Victims Protection Act of 2000 makes victims of a severe form of trafficking in persons eligible for federally funded or administered benefits and services to the same extent as refugees. The Homeland Security Act of 2002 also transferred the responsibility for the care and custody of unaccompanied alien children to the HHS Office of Refugee Resettlement.

Courts

The Executive Office of Immigration Review in the Department of Justice administers and interprets federal immigration laws and regulations through immigration court proceedings, appellate reviews, and administrative hearings in individual cases. There are three main components to EOIR: the Board of Immigration Appeals (BIA), the Office of the Chief Immigration Judge, and the Office of the Chief Administrative Hearing Officer. There are 58 immigration courts across the country. The approximately 330 immigration judges decide cases of eligibility, inadmissibility, and deportation or removal. Complaints are brought by the DHS, the Office of Special Counsel for Immigration-Related Unfair Employment Practices, or private individuals in certain instances.

Defensive applications for asylum are raised when a foreign national is in removal proceedings and asserts a claim for asylum as a defense to his/her removal. EOIR's immigration judges and the BIA have exclusive control over such claims and are under the authority of the Attorney General. Generally, the foreign national raises the issue of asylum during the beginning of the removal process.

Convoluted Chains of Command

The federal departments tasked with immigration responsibilities are so dispersed that it foments balkanization. Within the Department of Homeland Security, the Commissioner of CBP, the Director of ICE, and the Director of USCIS currently are among two dozen DHS officials — including the leadership of Federal Emergency Management Agency, the Secret Service, the Transportation Security Administration, and the US Coast Guard — that report to the DHS Deputy Secretary. At the State Department, the Assistant Secretary for Consular Affairs reports to the Under Secretary for Management, and the Assistant Secretary for Population, Refugees, and Migration reports to the Under Secretary for Civilian Security, Democracy, and Human Rights. EOIR reports to the Deputy Attorney General, and the Immigrant and Employee Rights Section is part of the Civil Rights Division that reports to the Associate Attorney General at the Justice Department. At the Labor Department, the Office of Foreign Labor Certification is housed in the Employment and Training Administration, which is one of 21 agencies that report to the Deputy Secretary. Similarly, the Wage and Hour Division, which is organized by geographic region, reports to the Deputy Secretary of Labor.[14]

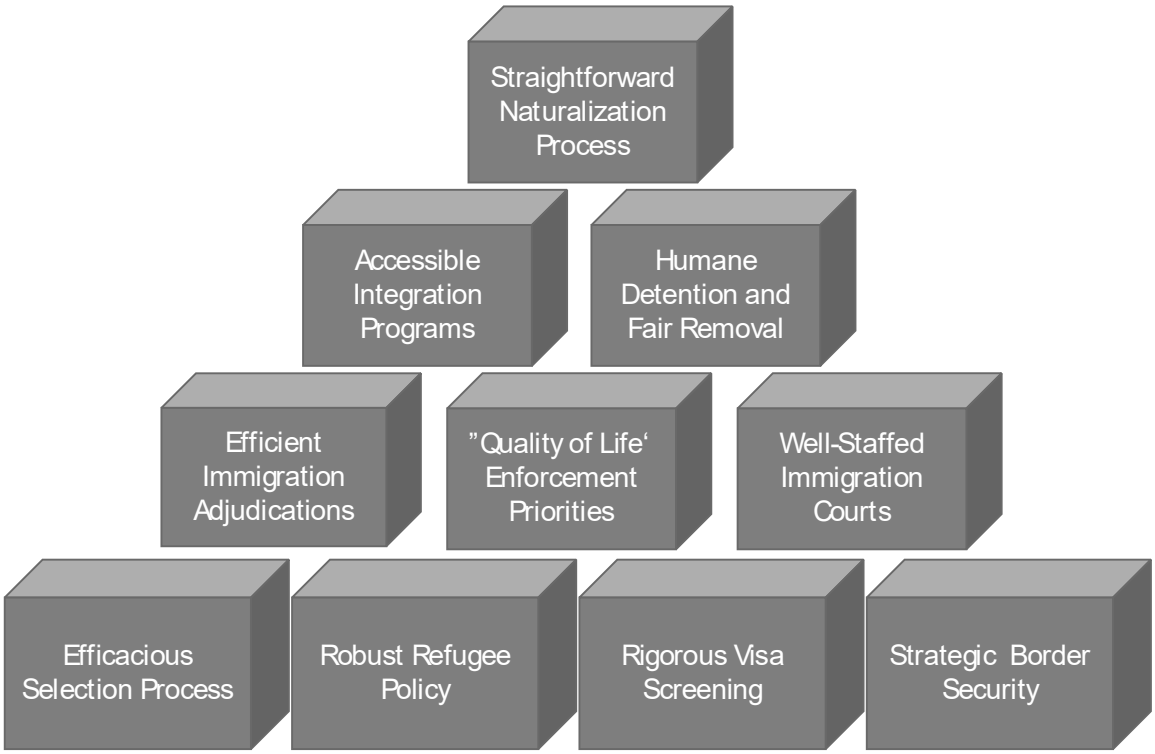
As a consequence, immigration leadership responsibilities are nested at the third tier down within these federal departments and are dispersed across eight agency heads. These agency heads report to deputy secretaries that have many other important departmental responsibilities. In other words, there is no clear chain of command for immigration governance.

14 The organizational charts for these departments are available at: https://www.dhs.gov/sites/default/files/publications/Public%20Org%20Charts%202017.08.15.pdf, https://www.state.gov/documents/organization/263637.pdf, https://www.justice.gov/agencies/chart, and https://www.dol.gov/general/aboutdol/orgchart.

Options for Improved Governance

There are several options for improving immigration governance, in terms of both policies and administration. The abundance of commissions that have studied the issues and the various administrative structures over time offers some wisdom on ingredients for successful governance. Based upon this research, policies for effective immigration governance emerge. As in Maslow's hierarchy of needs and the US Department of Agriculture's food pyramid, these elements are presented as building blocks in Figure 3.

Figure 3. Building Blocks of Immigration Governance



The foundational elements are an efficacious selection process, a robust refugee policy, rigorous visa screening procedures, and strategic border security practices. Congress sets the terms of the selection process, and legislators continue to debate ways to reform the system to make it more efficacious in the eyes of the American people generally, as well as for immigrant communities and businesses that recruit foreign workers specifically. The policy research community has offered an array of reform strategies to move the debate forward (Gelatt 2017; Kerwin and Warren 2017).

A robust refugee process would be generous in its priorities, thorough in its review, and expeditious in its processing. Refugee policy is experiencing upheaval since the election of President Donald Trump, suggesting that robust humanitarian policies are not likely in the near term. The Trump administration's proposed level of 45,000 refugees for fiscal year (FY) 2018 is the lowest proposed level since the passage of the Refugee Act of 1980, though actual admissions of refugees fell below the proposed levels in the aftermath of the

September 11, 2001 terrorist attacks (Bruno and Bush 2002, 2006, 2012; Scribner 2017; Wasem 2017a).

Years of generous funding for border security are one indication of the importance policymakers place on this element, and the US-Mexico border is considered to be one of the most surveilled borders between friendly nations in the world (Roberts, Alden, and Whitley 2013; Hassner and Wittenberg 2015; Seghetti 2015; Office of Inspector General 2017). A recent DHS report on border security between ports of entry made two important findings: "available data indicate that the southwest land border is more difficult to illegally cross today than ever before"; and "available data also indicate the lowest number of illegal entries at least since 2000, and likely since the early 1970s" (Office of Immigration Statistics 2017). Policymakers, however, are not paying sufficient attention to the infrastructure weaknesses at US ports of entry, revealing that a more strategic and risk-based approach to border security is necessary for this foundational element (US House of Representatives Committee on Homeland Security, Subcommittee on Border and Maritime Security 2014).

Improvements in intelligence gathering and sharing, along with advances in technologies, have greatly enhanced the rigor of visa screening, placing it perhaps in one of the strongest positions of the foundational elements. Consular officers use biometric and biographic databases to screen all foreign nationals seeking visas. They also use facial recognition technology to screen applicants against photographs of known and suspected terrorists obtained from the Terrorist Screening Center. Consular officials partner with the National Counterterrorism Center (NCTC) to utilize the Terrorist Identities Datamart Environment on known and suspected terrorists and terrorist groups (Wasem 2017b).

Core blocks depicted in the second tier of Figure 3 are key administrative priorities that build on the foundational policies. These core blocks are efficient immigration adjudications, well-staffed immigration courts, and "quality of life" enforcement priorities. The need for improved efficiencies in immigration adjudications is documented regularly by reports of the USCIS Ombudsmen and the DHS Inspector General (Office of Inspector General 2016). The USCIS Ombudsmen cited in 2016 "lengthening processing times as a serious and pervasive issue" and concluded in 2017 that the "agency's current fee structure — including recent increases — barely cover its operating costs and are unlikely to lead to a meaningful reduction in processing times" (USCIS 2016, 2017).

Similarly, a considerable literature exists on the overburdened and unevenly trained immigration court system. Recently the US Government Accountability Office reported that the number of pending cases in immigration courts grew by 58 percent from FY 2012 through FY 2016 resulting in a backlog of more than 500,000 cases pending at the start of FY 2017. "EOIR officials have identified increases in immigration court caseloads and legal complexity, as well as resource shortages as contributing to the backlog" (US Government Accountability Office 2017). According to the latest data, the immigration court's backlog of pending cases has surpassed 600,000 cases (TRAC 2017).

In this paper, "quality of life" enforcement is offered as a targeted, risk-based approach to interior enforcement. Foremost, it includes policies aimed at protecting US residents from the deleterious and criminal aspects of immigration. It involves the investigation and removal of foreign nationals who have been convicted of crimes and who are deportable under the

Immigration and Nationality Act. "Quality of life" enforcement furthermore prioritizes investigations of specific worksites for wage, hour and safety violations, sweatshop conditions, and trafficking in persons — all illegal activities to which unauthorized workers are vulnerable and enforcement is scant (Fine and Lyon 2017). "Quality of life" enforcement also encompasses stringent labor market tests (e.g., labor certifications and attestations) to ensure that US workers are not adversely affected by the recruitment of foreign workers, as well as reliable employment verification systems. Prioritizing these functions is likely to go a long way in curbing the pull-factors of unauthorized migration.

The third tier of successful immigration governance in Figure 3 presents two quite different functions: fostering foreign nationals who are in the United States legally; and removing foreign nationals who violate the law. A key element is an accessible set of programs that foster the integration of legal immigrants into the fiber of American life. Achievement of this building block is possible through adequate resources committed to existing educational and human service programs with assurances that these programs are open to all legal residents of the United States. New targeted integration programs are another possibility. In terms of those foreign nationals determined to be deportable, detention facilities should be maintained at humane standards and alternatives to detention should be used as appropriate. The removal practices should be fair and afford due process, a feature that depends on the building block of well-staffed immigration courts.

The pinnacle of successful immigration governance features straightforward naturalization procedures for those immigrants who choose to become US citizens. Since its founding, the United States has held to the principle that legal permanent residents have the opportunity to become US citizens. Naturalization is an inclusive — not coercive — policy. Barriers to the process and backlogs in naturalization petitions serve neither the immigrant nor the nation.

The possibilities for achieving improved governance are far from bleak. Indeed, several alternative approaches would greatly enhance governance, and a few may not be that difficult to accomplish. The three broad sets of options proposed in this paper are: 1) expanding governance; 2) consolidating governance; or 3) increasing resources for the status quo. Each of these options poses unique challenges as well as political obstacles.

Expanding Governance

Given that the current system of governance is already widely dispersed, expanding governance to engage the expertise of other federal agencies in critical areas makes a certain amount of sense. For example, many agricultural business interests have argued that the Department of Agriculture should play a lead role in administering the agricultural guest worker program, commonly referred to as H-2A nonimmigrants. The case can also be made to give the Department of Commerce a lead role in overseeing foreign investor visas, because the Department of Commerce is likely to have greater in-house expertise in business and entrepreneurship than DHS.

In addition to these narrow examples, the Department of Labor's longstanding role in protecting US workers and certifying the hiring of foreign workers could be strengthened.

Additional resources for the "quality of life" enforcement building block discussed above would be consistent with the Jordan Commission recommendations of the mid-1990s, though the business community would likely resist increased worksite enforcement now as it did then. Employers generally view more vigorous enforcement of labor standards as government intrusion (Marshall 2007, 2011).

The case for returning USCIS to the Department of Justice is a plausible one. Much of the work of USCIS involves adjudicating immigration status and benefits, which aligns with the judicial role of EOIR. Rather than assigning the citizenship and immigration responsibilities to DHS, the House-passed Homeland Security Act of 2002 would have established an Assistant Attorney General for Citizenship and Immigration Services in DOJ. Since 2010, USCIS and the DOJ's Civil Rights Division have had a Memorandum of Agreement to facilitate shared responsibilities under the INA.

The dispersed system of immigration governance already begs for reorganization. An expanded governance would best be led by an Interagency Council on Immigration, staffed by top officials from each department. A strong council could coordinate the administration of laws and could recommend policies to ensure more coherent governance. It could even establish a clear chain of command, especially in times of migrant emergencies (such as the 2014 influx of Central American children). That said, a strong council is unlikely due to bureaucratic turf battles. A more feasible option would be comparable to the US Interagency Council on Homelessness of cabinet-designated officials who meet quarterly to identify "high-impact strategies" and align efforts (US Interagency Council on Homelessness 2014). An Interagency Council on Immigration operating as a working group or coordinating body is a more viable, albeit less effective, option.

Consolidating Governance

As the brief history highlighted, the push for an independent immigration agency that would consolidate and elevate the many functions scattered across the federal government emerges every few decades. In 1952, the Truman Commission recommended an independent administrative agency to handle all immigration related duties. In 1990, a congressionally-mandated commission called for the creation of an Agency for Migration Affairs that would have reported directly to the president. There have been few, if any, calls for the return of the INS, however, implying that a partial consolidation of immigration functions is not a viable option. A sweeping merger of the component parts would be the more logical consolidation option, providing a coherent organization with a clear chain of command.

Figure 2 above offers a worksheet for structuring an independent immigration agency, as it outlines the major responsibilities and identifies where overlap currently exists. The questions of which — if not all — of the current federal functions would be absorbed by this new agency would be fraught with turf battles and thorny questions. Should border security stay in DHS? Should the Bureau of Consular Affairs continue to issue visas? Should DOL or the new agency be the lead on employment-related immigration law?

The US public today considers immigration one of the top issues facing the nation (Gallup 2017). This heightened public interest would lend support to the argument that immigration

merits an independent agency reporting directly to the president. Moving the enabling legislation through the US Congress, however, would be daunting even with public support. Even if a consensus were reached to consolidate and elevate immigration governance, there would be tough negotiations on the details, comparable to the debate when the DHS was created in 2002.

Tweaking Current Governance

Considerable improvement to immigration governance might be achieved through a few critical tweaks to the current system. The most essential reform would be the creation of an Assistant Secretary of Immigration in DHS who would oversee CBP, ICE, and USCIS. This position would address one of the biggest governance problems — no clear chain of command. CBP, ICE, and USCIS currently are among a variety of DHS agencies, including the Federal Emergency Management Agency, the Transportation Security Administration, and the US Coast Guard, that report directly to the DHS Deputy Secretary. The Assistant Secretary would coordinate across the three DHS immigration agencies and report directly to the Secretary. Under the Assistant Secretary, the USCIS Ombudsman could grow into the role envisioned in the earliest versions of the Homeland Security Act to encompass ICE and CBP, too. If the office of the Assistant Secretary would coordinate or absorb the policy, statistical, and evaluation functions within each of the three DHS agencies, immigration governance would become more coherent and streamlined.

The other essential reform would be the infusion of additional resources across the various immigration functions. USCIS is almost exclusively a fee-based operation, as is the Bureau of Consular Affairs' visa processing. Regular funding for upgrades and maintenance of the all-important immigration databases and for administrative overhead would ensure that the fees paid are being used to pay for the adjudications. Ports of entry need ample resources to upgrade their infrastructure so CBP can better balance public safety and national security screenings with expeditious processing of people and commerce entering the country. Modernized ports of entry would better thwart illicit monies, drugs, arms and other contraband exiting and entering the country. It would certainly be prudent to reestablish and revise the authorization of a reserve fund for immigration emergencies, so that the involved agencies could respond quickly and ongoing operations would not falter during these pressure periods.

Concluding Comments

Even with fragmented governance and strained resources, the US immigration system has enjoyed successes. Each year, approximately one million foreign nationals legally become permanent residents in the United States. In FY 2015 and FY 2016, the Bureau of Consular Affairs issued over 10 million visas each year to foreign nationals coming to the United States as nonimmigrants (i.e., for a temporary purpose and a temporary period of time) and over half a million visas to LPRs (Bureau of Consular Affairs 2017). CBP admitted almost 77 million foreign nationals as nonimmigrant admissions to the United States in FY 2015 (Office of Immigration Statistics 2016). That year, DOL processed 711,820 employer applications for 1,580,778 positions for temporary and permanent labor certifications

(Office of Foreign Labor Certification 2016). In FY 2015, there were 730,259 LPRs who became US citizens. That same year, the United States admitted 69,920 refugees, and USCIS approved 26,124 asylees. DHS apprehended 462,388 foreign nationals and deported 444,431 foreign nationals in FY 2015. Another 253,509 foreign nationals were denied entry, and 129,122 foreign nationals returned home without a formal order of removal (Office of Immigration Statistics 2016). In FY 2016, EOIR judges received 328,122 cases and completed 273,390, including those of 8,726 foreign nationals who were granted asylum (EOIR 2017). Considerable credit is due to the people carrying out immigration-related responsibilities across the federal government.

Immigration is not a program to be administered; rather, it is a phenomenon to be managed. While there are limits to how much one government can control migration, the building blocks in Figure 3 offer a reasonable set of priorities. Effective immigration governance, coupled with laws and policies that incorporate the national interests, is key to maintaining a robust sovereign nation.

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