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SYMPOSIUM: CHANGING THE FACE OF IMMIGRATION: A YEAR IN TRANSITION

THE NEW FACE OF IMMIGRATION IN THE DEPARTMENT OF HOMELAND SECURITY

VICTOR X. CERDA*

Well, first of all, I would like to say thanks for the invitation and for again, hosting this forum, which I think does touch on important topics to many of us in this country, the government, and in the private sector. I would like to also personally thank Peter; I think I have overwhelmed him with e-mails in the last two days, so thanks for assisting in coordinating this event.

Monday does mark the March 1st anniversary for the establishment of the Department of Homeland Security (“DHS”).¹

* These remarks are an actual transcript of the author’s comments at the St. John’s Journal of Legal Commentary Symposium on Feb. 27, 2004.

¹ See Adrien Katherine Wing, *Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA L. REV. 717, 734 (2003) (describing formation of DHS as merger of twenty-two different immigration-oriented federal agencies, including Immigration and Naturalization Services).

I thought Secretary Ridge had a challenging task at that point, but now that I am here with 10 minutes to explain all of DHS, I think I have topped him for at least one day, this morning.

For the Department of Homeland Security, what has happened in the year has been pretty historical. It has been pretty challenging, and frankly for those closely involved, I think it is amazing that it has only been a year given the dramatic changes that have occurred, particularly with respect to immigration, immigration procedures and policy within the United States. I think everyone is looking at DHS, seeing how each mission can be effectively done and looking at what changes are necessary to go forth. Again, this scope of a change in magnitude in government has not been done for quite some time, so I think you are going to keep seeing that in the future.

Next is immigration law and policy. It is very dynamic, from circuit to circuit, district to district, immigration judge to immigration judge; it is a dynamic area of law and one that I think is pretty exciting from the legal perspective just to look at it as lawyers. This term alone in the Supreme Court, we are looking at three cases pertaining to immigration issues coming up, two granted review just last week.² So three cases scheduled for one term, one expedited for the Supreme Court to hear, shows the scope and the impact that immigration policy has in our society.³ If you look at the past dockets of the Supreme Court, you will see that immigration law has been very strongly represented in terms of issues that are dealt with by the highest court in our country.⁴ There, you are looking at dynamics and changes in not just organization, but year-to-year, in terms of law. And again, I just think that lends to the whole idea or the whole view of what immigration policy really means to this

² *Hamdi v. Rumsfeld*, 124 S. Ct. 981, 981–82 (2004) (granting certiorari to defendant Hamdi as to his alleged unlawful detainment); *Rumsfeld v. Padilla*, 124 S. Ct. 1353, 1353 (2004) (granting certiorari to defendant Padilla through his friend Newman regarding possible unlawful detainment).

³ See generally Brian W. Earley, *The War on Terrorism and the Enemy Within: Using Military Commissions to Prosecute U.S. Citizens for Terrorist-Related Violations of the Laws of War*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 75, 77–78 (2004) (noting impact that decisions in *Hamdi* and *Padilla* will have on national foreign policy and immigration).

⁴ See generally Mark Bixler, *Immigration Ruling is Good News for Jonesboro Man*, ATLANTA JOURNAL-CONSTITUTION, June 29, 2001, at 1D (indicating that Supreme Court was faced with multiple cases revolving around specific immigration reform act that had widespread effect on immigrants across nation, even prior to 9/11).

country and the significance it has to U.S. citizens, lawful permanent residents (LPRs), and those wishing to immigrate to the country.

Here is what you had as the last official organizational chart of the Immigration and Naturalization Service (INS), and it does not take much to look at it and get a little frightened at times. This was the chart for years that was out there just before the INS was abolished on March 1st. DHS was created post-9/11, but the discussions on reorganization of INS had been ongoing for at least four years prior to that date.⁵ There was a strong forming consensus that the organizational structure did not permit itself to efficiently and effectively manage the various aspects of immigration, particularly with respect to enforcement and services, the issuance of benefits.⁶ There was this unit called the Office of Programs in INS.⁷ I worked there for seven years and I frankly would still say at the end that I did not understand what it meant or why it was created. But if you look at the INS' organization, you would see that they have units in there including the border patrol, inspections, and adjudications all in one management line. Then, next door to it, you have a field operations office that had several layers of bureaucracy out there, but again underneath those layers you would have border patrol sectors. A service division was not really there, not pronounced. Those were the issues that people were working with pre-9/11. I think 9/11 obviously was strong impetus for review of all our processes and government, definitely a strong impetus in terms of looking at INS and change.

Homeland Security came out of 9/11 and covers 180,000 employees as opposed to the 40,000 employees that existed under INS.⁸ The key aspect with respect to immigration that existed

⁵ See Ryan Alessi, *Battle Brewing in Congress Over What Made-Over INS Will Look Like*, VENTURA COUNTY STAR (California), November 26, 2001, at A01 (highlighting that House Judiciary Committee was confronted with and arranged meetings with Congress regarding reorganization of INS back in 2001).

⁶ See Kevin R. Johnson, *Beyond Belonging: Challenging the Boundaries of Nationality: September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 859-60 (2003) (discussing INS' inability to operate efficiently due to overwhelming emphasis on its enforcement duties rather than its services function).

⁷ See Margaret A. Catillaz, *Who's on First - Understanding Agencies' Authority and Jurisdiction*, A.L.I.-A.B.A. COURSE OF STUDY MATERIALS SF82 (2001) (discussing function of Office of Programs within INS).

⁸ See Lt. Col. Pamela M. Stahl, *Article for the Legal Assistance Practitioner: The Legal Assistance Attorney's Guide to Immigration and Naturalization*, 177 MIL. L. REV. 1, 4

under the Homeland Security model is a separation of the enforcement and services components in immigration.⁹ That is one of the dramatic changes that we are seeing right now and we are figuring out as we go forward, there is separation, but immigration still “reports” to a cabinet level official.

I think there will be some benefits that we have seen already and that we will continue to see in the future. That is where we are standing right now, in terms of the process of restructuring. What do we see? One of the criticisms internally as well as externally of the legacy INS was the schizophrenic mission.¹⁰ What are we doing, what are the immigration priorities? I could recall sitting down with some of the former INS Commissioners and one minute we were talking about the naturalization backlogs and the next minute we were talking about a national security case. As much as you wished to say yes, they are all immigration related, they are at the same time distinct issues. You do have at times conflicting priorities in there and it does put the person in charge facing the challenge of having to decide which issues we are going to focus on. Particularly, it impacted the most on budget and resource issues, because you did have two very compelling missions competing against each other for resources.

What you have here right now is in the right direction, the split between the services and enforcement. What are you going to get with the split of services and enforcement? The enforcement units are split under BTS, the Border and Transportation Security Office.¹¹ There is an immigration split between the Bureau of Customs and Border Protection under Judge Bonner, which controls the Border Patrol and

(2003) (stating that DHS has combined several federal agencies, including now-abolished INS, to reach considerable number of employees).

⁹ See Immigration Reform and Accountability Act of 2001, H.R. 3231, 107th Cong. (1st Sess. 2001) (specifying proposed partitioning of then-current INS into separate bureaus to respectively handle immigration enforcement or immigration services).

¹⁰ See Kevin R. Johnson, *Responding to the “Litigation Explosion”: The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413, 446–47 n.150 (1993) (noting how two areas of focus within INS create conflicting missions for agency, leaving it vulnerable to criticism).

¹¹ Department of Homeland Security, *Border and Transportation Security: Securing Our Borders*, available at <http://www.dhs.gov/dhspublic/display?theme=50&content=875> (last visited Mar. 21, 2004) (explaining the purpose of BTS and the incorporation of various agencies, including enforcement division of INS to carry out border security mission).

Inspections,¹² and the Immigration and Customs Enforcement under Assistant Secretary Garcia, which is focused on the interior investigations aspects of immigration as well as the detention and removal aspects of immigration,¹³ two key components.

But what do you get out of Homeland Security in the split? Again, clear missions, focus, and goals. Eduardo Aguirre is in charge now of the services side,¹⁴ his day to day job and his day to day focus is on how do we improve the benefit side, how do we eliminate the backlog, and what resources and priorities, do we establish within this area to meet those goals? That alone is a full-time job, was a full-time job in the past, but now you have an advocate in the Department whose sole focus is that. I think that is going to the benefit of the services side.

On the enforcement side is the same thing. You have Asa Hutchinson overseeing the two immigration enforcement components, and in the border side you have focus in the Border Patrol and Inspections.¹⁵ People who identify who is entering the country. There is clear expertise and authorities right there that are managed and focused on the border on a day-to-day basis. On the Immigration and Customs Enforcement (“ICE”) side, you have clear focus on the detention policies, the detention procedures, the detention processes, as well as on the immigration investigations, the interior investigative angle of immigration enforcement.¹⁶

You will see equal benefits I believe, on the focus of enforcement too. Those results have occurred now and will occur

¹² U.S. Customs and Border Protection, *Mission Statement*, available at <http://cbp.gov/xp/cgov/toolbox/about/mission/cbp.xml> (last visited Mar. 21, 2004) (explaining priority mission of agency as preventing terrorists and terrorist weapons from entering the United States).

¹³ See U.S. Immigration and Customs Enforcement, *Enforcement*, available at <http://www.ice.gov/graphics/enforce/index.htm> (last visited March 21, 2004) (discussing investigations and immigration aspects of ICE and array of responsibilities of each).

¹⁴ See U.S. Citizenship and Immigration Services, *Welcome*, available at <http://uscis.gov/graphics/welcome.htm> (last visited Mar. 21, 2004) (outlining functions of USCIS and leadership of Eduardo Aguirre).

¹⁵ U.S. Customs and Border Protection, *Overview of the Immigration Inspections Program*, at http://www.cbp.gov/xp/cgov/enforcement/port_activities/overview.xml (last visited Mar. 21, 2004) (explaining authority of inspection agents at border checkpoints, and overall mission of agency).

¹⁶ See generally U.S. Immigration and Customs Enforcement, *Immigration Detention and Removal*, at http://www.ice.gov/graphics/enforce/imm/imm_dro.htm (last visited Mar. 21, 2004) (discussing the specifics of detaining aliens in custody).

in the future. Secretary Ridge still does have the difficult challenge, because it ultimately will all go up to him to establish the overall department priorities, including immigration priorities for the country.¹⁷

What has been going on in the past year? I would say that it is like a Fortune 100 company that is merging with another one, 180,000 employees, 22 agencies being merged. I add that congressional oversight is well over 20 committees that have some touch on the Department of Homeland Security, which demonstrates the scope of the authorities under DHS.¹⁸ At the same time that we are doing this merger, we are also responsible for trying to get rid of the backlog in issuing citizenship, Green Cards, permits to come into the country. We are responsible for the border patrol, apprehensions at the border that average over 1,000,000 a year easily.¹⁹ We are responsible for the inspection process to make sure that people are properly admitted, that they do not pose a risk to the country.²⁰ Then on top of that, we are responsible at the same time for the investigations, national security investigations, and also the detention and removal to effectuate orders of removal, with an estimated population of eight million illegal aliens here in the country.²¹

All of that has to be done on a day-to-day basis, and given the backdrop of 9/11, the leeway for mistakes has dramatically

¹⁷ See Department of Homeland Security, *DHS Organization: Leadership*, available at <http://www.dhs.gov/dhspublic/display?theme=11&content=13> (last visited Mar. 21, 2004) (outlining Secretary Ridge's responsibilities as coordinating and developing a national strategy to strengthen the United States against terrorist attacks and threats).

¹⁸ *FY 2005 Border And Transportation Security Appropriations: Hearing before the U.S. Committee on Appropriations*, at 2 (Mar. 2004) reprinted in FDCH Political Transcripts (statement of U.S. Senator Thad Cochran). One such committee is the Homeland Security Subcommittee of the U.S. Senate Committee on Appropriations. *Id.* at 2. At a recent hearing of the committee, it specifically stated its objective as providing the resources the Border and Transportation Directorate requires to function successfully. For fiscal year 2005, the President requested 14.4 billion dollars in discretionary funding for the directorate. *Id.* at 2.

¹⁹ See generally *Kobach Briefing on NSEERS*, 8 BENDER'S IMMIGRATION BULL. 277 (Feb. 1, 2003) (discussing National Security Entry-Exit Registration System and how it monitors persons deemed to be national security concerns).

²⁰ See generally *A Tribe Caught in the Middle; Arizona Indians Believe Their Safety and Sovereignty Are Being Threatened by Hordes of Illegal Immigrants and Federal Agents*, L. A. TIMES, Mar. 21, 2004, at A1 (discussing the vast number of illegal entries into United States through southern border, and recently announced 10 million dollar plan to fund new agents, surveillance and officers to that border).

²¹ See generally Department of Homeland Security, *Securing Our Homeland: US Department of Homeland Security Strategic Plan*, available at http://www.dhs.gov/interweb/assetlibrary/DHS_StratPlan_FINAL_spread.pdf (last visited Mar. 21, 2004) (discussing principles, objectives and responsibilities of Homeland Security).

decreased. This is what has been going on for the past year and that is the challenge. One failure may not mean that the profits go down, but a failure would mean that X number of thousand of people are not getting their citizenship, which allows them to petition for other people to enter, for family relatives to come into the country, or it means that an individual who may pose a risk to our country has been admitted, has snuck across the border or is in the country planning something that we need to catch up to, that we need to keep an eye on.

This is what is at stake within DHS, those are pretty much the missions and mandates that Congress has given us and again everybody wants it done immediately. It has been pretty dynamic, pretty exciting. You are going to continue seeing improvements in immigration on the services and enforcement sides.

