

Legislation Comment

Reorganization as a Substitute for Reform: The Abolition of the INS

September 11th and the events that followed highlighted the shortcomings of our nation's immigration policies and their enforcement. Gaffes, such as the issuance of student visas to two of the hijackers on the six-month anniversary of 9/11, reinforced public perceptions that the Immigration and Naturalization Service (INS) is an agency beyond repair.¹ Critics from both ends of the political spectrum have condemned the INS for its failures. As House Minority Leader Richard A. Gephardt stated, "We saw in the 9/11 incident some of the problems in the INS that many of us had seen before. . . . It became clear, I think, to everybody in the country and in the Congress that we needed reform."²

Consensus on the need for reform may be clear, but the question remains of what shape reform should take. Unfortunately, politicians have taken the path of least resistance by focusing on reorganization plans, rather than tackling the substantive issues that plague the INS.³ The Bush Administration and both houses of Congress have differed about what form a reorganization should assume.⁴ Their proposals share a misguided faith, however, in the efficacy of agency restructurings as a vehicle for reform.

1. See Eric Schmitt, *4 Top Officials on Immigration Are Replaced*, N.Y. TIMES, Mar. 16, 2002, at A1; see also Cheryl W. Thompson, *Justice Dept. To Probe New INS Visa Error*, WASH. POST, Mar. 25, 2002, at A11 (investigating an INS official's decision to grant visas without following screening protocols to four Pakistanis who subsequently disappeared).

2. See Eric Schmitt, *Vote in House Strongly Backs an End to I.N.S.*, N.Y. TIMES, Apr. 26, 2002, at A1.

3. One notable exception is legislation requiring greater information sharing between intelligence agencies and the State Department, which issues visas, and mandating the creation of machine-readable, tamper-resistant visas. See Enhanced Border Security and Visa Reform Act of 2002, Pub. L. No. 107-173, §§ 201-204, 116 Stat. 543, 547-52.

4. See *Details of Homeland Plan Assailed; House Panels Vote To Block Transfers of Some Agencies*, WASH. POST, July 11, 2002, at A1.

These proposals are the latest variation on an old theme.⁵ Reorganizations have long served as politicians' tool of choice for reforming the American administrative state.⁶ Such plans do have the potential to effect widespread change by shaking up agency culture and reallocating management responsibilities and personnel. At the same time, the literature on reorganizations casts doubt on their efficacy as a vehicle for reform.⁷ As Paul Light has highlighted, the pursuit of too many competing goals through agency reorganizations has often served as a formula for failure.⁸ Donald Kettl and John DiIulio have documented how the "overwhelming result" of agency restructurings has been "an intransigent gap between the effort invested and the results produced."⁹ In practice, the main virtue of reorganizations may be their role as politicians' symbolic substitute for tackling the underlying problems that agencies face.

This Comment raises doubts about whether any of the reorganization proposals have the potential to accomplish their intended goals. It assesses the potential and limits of the five main proposals to reorganize the INS. This Comment concludes that the Senate proposal sponsored by Senators Ted Kennedy and Sam Brownback is the strongest in a set of weak options because it seeks to accomplish the least through restructuring and would leave agency leaders with the most flexibility to make future changes. Regardless of which proposal is enacted, the hope for reform lies in politicians' recognition that "restructuring alone is not going to solve all the problems, [but rather] just begins the effort"¹⁰ of reexamining the assumptions, goals, and approaches of immigration policy.

I

This Part considers the limits and potential benefits of each of the five main proposals for reorganizing the INS that have been raised in the wake

5. Donald Kettl and John DiIulio framed this point best when they argued that "[r]eorganizations ye have always with you, a prophet could confidently promise." DONALD F. KETTL & JOHN J. DI IULIO, JR., BROOKINGS INST., CUTTING GOVERNMENT 28 (1995).

6. See, e.g., Jerry Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 408 (1996) (noting that "it is safe to say that none of our Chief Executives, or their COOs, have been immune to the management fraternities' panaceas du jour").

7. See, e.g., KETTL & DI IULIO, *supra* note 5; PAUL C. LIGHT, THE TIDES OF REFORM: MAKING GOVERNMENT WORK, 1945-1995 (1997); Mashaw, *supra* note 6.

8. See LIGHT, *supra* note 7, at 1.

9. See KETTL & DI IULIO, *supra* note 5, at 28.

10. *Hearing To Examine Restructuring Issues Within the Immigration and Naturalization Service Before the Senate Judiciary Comm.*, 107th Cong., 2002 WL 853468 (2002) (statement of Rom Mazzoli, former Chair of the House Subcomm. on Immigration, Refugees, and International Law).

of 9/11.¹¹ The five proposals are: (1) the INS's internal reorganization plan,¹² (2) and (3) the main House (Sensenbrenner-Gekas)¹³ and Senate (Brownback-Kennedy)¹⁴ proposals to create a new immigration agency with a sharper separation between service and enforcement bureaus; (4) the Bush Administration's plan to subsume an unchanged INS into the proposed Department of Homeland Security,¹⁵ and (5) the likely legislative compromise to shift the INS's enforcement functions to the Department of Homeland Security and to leave the service functions in the Department of Justice (DOJ).¹⁶

Each proposal, except for the Administration's original Homeland Security plan, seeks to reorganize the INS along functional lines. The INS's internal reorganization plan would create separate enforcement and service bureaus at the national and field office levels.¹⁷ This plan would attempt to strengthen coordination and oversight by consolidating agency-wide responsibilities for information management, budget, legal matters, and policy and planning in executive positions within the Office of the Commissioner.¹⁸ The INS would remain within the DOJ.¹⁹

In contrast, the Sensenbrenner-Gekas and Brownback-Kennedy proposals go further in calling for a more comprehensive division of immigration functions into service and enforcement bureaus.²⁰ Both of these proposals call for the formal abolition of the INS and the creation of a new immigration agency within the DOJ.²¹ These proposals appear

11. A myriad of other reorganization proposals have been raised, such as the Immigration and Naturalization Service Reorganization Act of 2002, H.R. 4108, 107th Cong. This bill, which was introduced on April 9, 2002, proposed the creation of a Bureau for Immigration Enforcement within the Department of Justice and the delegation of the INS's service functions to the State Department. However, H.R. 4108 has been overshadowed by the proposals discussed in this Comment, which have been the focal points of the ongoing debate.

12. The Bush Administration approved and designed the INS's internal restructuring plan. This plan focuses on changes within the INS that could be effected without statutory changes. See generally DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE RESTRUCTURING PROPOSAL (2001), at <http://www.ins.gov/graphics/aboutins/restruct/proposal.pdf>.

13. Barbara Jordan Immigration Reform and Accountability Act of 2002, H.R. 3231, 107th Cong. The bill was approved by the House on April 25, 2002.

14. Immigration Reform, Accountability, and Security Enhancement Act of 2002, S. 2444, 107th Cong. This bill was introduced on May 2, 2002.

15. The original version of the Administration's proposal was introduced in the House on June 24, 2002. See Homeland Security Act of 2002, H.R. 5005, 107th Cong. §§ 401-403 (original version).

16. The amended version of the Administration's proposal was approved by the House on July 26, 2002. See Homeland Security Act of 2002, H.R. 5005, 107th Cong. §§ 411-428, 441-446 (approved version).

17. See DEP'T OF JUSTICE, *supra* note 12, at 22.

18. See *id.* at 24-26.

19. See *id.* at 3.

20. See Barbara Jordan Immigration Reform and Accountability Act of 2002, H.R. 3231, 107th Cong. §§ 2-6; Immigration Reform, Accountability, and Security Enhancement Act of 2002, S. 2444, 107th Cong. §§ 101-105.

21. See H.R. 3231 § 2; S. 2444 §§ 101-102.

designed to elevate the prominence of a new immigration agency and its potential influence on DOJ policy and to give the agency a fresh start.²²

The Sensenbrenner-Gekas and Brownback-Kennedy proposals differ in some significant respects. The Sensenbrenner-Gekas proposal goes further in attempting to micromanage reforms through the reorganization plan. This plan mandates the creation of specific officers, defines their substantive roles, and even imposes an annual rotation system for managerial staff.²³ In contrast, the Brownback-Kennedy plan grants agency leaders a greater degree of discretion to determine the substantive roles for newly created officers and agency divisions.²⁴ The plan would empower the agency director to mold the composition of personnel by providing compensation flexibility to allow for recruitment, retainment, and early retirement incentives for staff.²⁵ The Brownback-Kennedy proposal also establishes a new institutional framework and substantive protections for unaccompanied illegal immigrant children.²⁶

The original version of the Homeland Security Act proposed by the Administration seeks to merge the INS into the new Office of Homeland Security. This proposal would vest control of the INS in the Undersecretary for Border and Transportation Security and combine the INS with the Coast Guard, the Customs Service of the Treasury Department, and the Transport Security Administration of the Department of Transportation, as well as parts of other agencies.²⁷ The Administration's proposal is silent as to what internal changes in the INS may be necessary to effect this merger.²⁸ This proposal also does not address whether this plan is designed to redress the problems facing the INS or only to address broader national security challenges.

The Senate is currently considering the amended version of the Homeland Security Act that has been approved by the House.²⁹ This proposal would shift the enforcement functions of the INS to the Office of Homeland Security by creating a Bureau of Border Security led by the Undersecretary for Border and Transportation Security.³⁰ The amended bill would keep immigration service functions within the DOJ under a Bureau

22. The House proposal emphasizes this point by calling for the elevation of the formal status of the agency director to that of an associate attorney general. *See* H.R. 3231 § 2(b).

23. *See id.* § 6(a)(4).

24. *See* S. 2444 §§ 102-105.

25. *Compare id.* §§ 201-205 (providing flexibility for hiring and retainment compensation), with H.R. 3231 § 11 (granting funds for early retirement incentives only during the restructuring).

26. *See* S. 2444 §§ 301-361.

27. *See* Homeland Security Act of 2002, H.R. 5005, 107th Cong. §§ 401-403 (original version).

28. *See id.* § 402.

29. *See* Homeland Security Act of 2002, H.R. 5005, 107th Cong. (approved version).

30. *See id.* § 412.

of Citizenship and Immigration Services.³¹ In the bill's current form the two new bureaus incorporate many features of the Sensenbrenner-Gekas proposal, such as detailed provisions concerning new managerial roles.³² The final legislative compromise will likely contain elements of the Sensenbrenner-Gekas and Brownback-Kennedy proposals concerning internal changes in the new bureaus.

II

The enactment of a reorganization bill affecting the INS appears to be only a matter of time. On the eve of an election, both Congress and the Administration are eager to demonstrate that they have addressed the failures of the INS and strengthened our national security. Disputes over labor issues in the Homeland Security Act and the Administration's heavy-handedness may stall legislation in the short term.³³ Given the pressure for a reorganization plan, however, the question is which proposal has the most potential to reform the INS or, alternatively, poses the least risk for harm.

With the exception of the Administration's Homeland Security plan, the proposals share the premise that a functional division along service and enforcement lines constitutes "a big step towards enabling the Federal Government to effectively manage our Nation's immigration policy."³⁴ The creation of new chains of command along functional lines may enhance communication, accountability, and coordination. Shaking up the INS's staid agency culture may help to promote greater flexibility and openness to new ideas. Given the relentless criticism the INS has faced, proposals to create successor agencies may be valuable for the sole reason that they give a beleaguered leadership and staff the appearance of a fresh start.

However, as Congressman Melvin Watt has opined, it is equally possible that moving "the most inefficient government agency in America . . . down the hall and making it a two-headed monster will not make the agency more efficient."³⁵ Glenn A. Fine, the DOJ Inspector General, has gone further in arguing that separating the INS into two parts "might merely compound the deficiencies in the agency's management controls, systems and accountability."³⁶ A reorganization along functional lines or the relocation of the INS's functions may allow elected leaders to

31. *See id.* § 421.

32. *See id.* §§ 412-413, 421-423.

33. *See* Steven Greenhouse, *Labor Issue May Stall Security Bill*, N.Y. TIMES, July 28, 2002, at A22.

34. *See* 148 CONG. REC. H1626 (daily ed. Apr. 25, 2002) (statement of Rep. John Linder).

35. *See* 148 CONG. REC. H1632-33 (daily ed. Apr. 25, 2002) (statement of Rep. Melvin Watt).

36. *See* Eric Schmitt, *Agency Finds Itself Under Siege, with Many Responsibilities and Many Critics*, N.Y. TIMES, Mar. 15, 2002, at A11.

campaign as individuals who have addressed the problems facing the INS. There is no reason, however, to believe that such changes will necessarily enhance the effectiveness of a successor to the INS.

The INS's internal reorganization plan highlights these shortcomings. The plan proclaims that its implementation would accomplish a "fundamental reform" of the agency.³⁷ This proposal, however, appears notable for how little it is likely to accomplish beyond creating the appearance of action by dividing the agency along functional lines. This approach is a poor substitute for reform, since it fails to address the substantive problems facing the agency or to give the agency director new tools to effect internal changes.

The Sensenbrenner-Gekas and Brownback-Kennedy proposals and the amended Homeland Security Bill also overstate the potential of a functional reorganization of the agency to effect needed reforms. In each of these bills politicians emphasize the formal abolition of the INS. While the name change may be intended to emphasize hopes for a dramatic transformation of the agency, it is unclear that this name change amounts to more than an attempt to score political points.

The Sensenbrenner-Gekas and Brownback-Kennedy plans and the amended Homeland Security Bill do give the directors of the successor agencies new tools to effect ongoing reforms. Each bill also creates an independent ombudsman to hear complaints concerning the INS's service functions in an effort to foster greater accountability to the public.³⁸ All three bills provide additional funding flexibility, so that agency directors may provide incentives for early retirement. The Brownback-Kennedy proposal has the additional virtue of providing greater flexibility for the hiring and retainment of workers, so that the director may more actively shape the composition of agency personnel.

The shortcoming of the Sensenbrenner-Gekas Bill and the amended Homeland Security Bill is that they err on the side of micromanagement by attempting to define the substantive roles of officers. Both bills attempt to impose a managerial rotation system for administrators of the agency and to dictate in part the way in which the agency should be run.³⁹ In contrast, the Brownback-Kennedy proposal appears to grant agency leaders a greater degree of discretion on how to implement the reorganization and manage the agency on an ongoing basis. For these reasons, the Brownback-Kennedy

37. See DEP'T OF JUSTICE, *supra* note 12, at 4.

38. See Barbara Jordan Immigration Reform and Accountability Bill of 2002, H.R. 3231, 107th Cong. § 5; Homeland Security Act of 2002, H.R. 5005, 107th Cong. § 422 (approved version); Immigration Reform, Accountability, and Security Enhancement Act of 2002, S. 2444, 107th Cong. § 106.

39. See H.R. 3231 § 6; H.R. 5005 §§ 412, 423 (approved version).

proposal offers advantages over the Sensenbrenner-Gekas proposal and the amended Homeland Security Bill.

While all of the proposals have shortcomings, the Administration's Homeland Security Bill is noteworthy for the fact that it ignores the thorny problems of reforming the INS in favor of focusing on a macro "solution" to America's homeland security challenges.⁴⁰ A one-stop shop for point-of-entry controls that consists of more than 169,000 federal workers and a \$37.4 billion budget looks impressive on paper.⁴¹ Combining the Coast Guard, the Customs Service, the INS, and many other agencies signifies the Administration's commitment to homeland security concerns and may be a first step toward enhancing interagency communication and coordination. The creation of this superagency may result in little more, however, than forcing a host of agencies to order new letterhead and change their seals. Worse still, the Department of Homeland Security may become a bureaucratic juggernaut, whose unmanageability may magnify the shortcomings of each component agency.

As importantly, the danger exists that the relocation of the INS into the Department of Homeland Security will subordinate all other goals and functions of the INS to national security concerns. This outcome may appease the popular desire for the appearance of action on homeland security. In the long term, however, this focus may create many more problems for immigration policy than it solves, if only by obscuring the importance of other pressing concerns facing the INS.

The amended Homeland Security Bill attempts to avert this danger by retaining the service functions of the INS in a new bureau within the DOJ.⁴² By "solving" one problem, this approach may create a more significant one by allowing inconsistencies to arise between the service and enforcement bureaus. Relocating only enforcement functions to the Department of Homeland Security may accentuate the shift of the enforcement focus toward national security issues by reducing internal policymakers' awareness of service concerns. September 11th helped to highlight the importance of immigration issues. In the long term, however, one ironic legacy of this tragedy may be a lower profile for immigration issues, if separate immigration bureaus are subsumed under larger agencies.

40. Then-INS Commissioner James Ziglar indicated that "[t]he President's plan will pre-empt all other restructuring proposals," which suggests that the INS's internal restructuring plan will be on hold indefinitely. Press Release, Message to INS Employees from Commissioner Ziglar on the President's Announcement of the Formation of the Department of Homeland Security (June 7, 2002), at <http://www.ins.gov/graphics/publicaffairs/statements/securityformation.htm>.

41. See GEORGE W. BUSH, THE DEPARTMENT OF HOMELAND SECURITY REPORT (2002), at <http://www.whitehouse.gov/deptofhomeland/book.pdf>.

42. See H.R. 5005 § 421 (approved version).

The virtue of the Sensenbrenner-Gekas and Brownback-Kennedy proposals is that they avoid this danger by keeping a single successor agency within the DOJ. There are risks that location within the DOJ will continue to bias the INS toward a predominantly enforcement function. At the same time, the Sensenbrenner-Gekas and Brownback-Kennedy proposals are designed to elevate the profile of the immigration agency and immigration issues. Their focus on functional reorganization may not lead to the desired reforms, yet they pose fewer dangers than either the original or amended versions of the Homeland Security Bill. Among these two proposals, the Brownback-Kennedy proposal appears preferable because it seeks to accomplish less through reorganization, and gives the agency director more tools and flexibility to effect future changes.

III

While the Brownback-Kennedy proposal appears preferable to the other plans on the table, politicians have little reason to place faith in reorganizations. September 11th opened many eyes to the problems that plague the INS. A quick fix through restructuring alone cannot, however, address the unclear and often conflicting priorities of our immigration policies and the ineffective tools that the agency has at its disposal.

Crafting an effective immigration policy requires reconsidering the extent to which economic, foreign policy, cultural, or national security interests should be the national priority. An immigration policy designed to stop potential terror threats will look very different from one designed to halt rising levels of illegal immigration. A visa policy that favors tourism and respects the need for skilled and unskilled laborers will be far different from one focused on national security or foreign policy concerns. Clarifying the priorities of our immigration policy in the wake of 9/11 will do more to enhance U.S. immigration policy than any restructuring plan.

In the short term, a reorganization plan for the INS may be a necessary evil to assuage the popular desire for action. Nonetheless, politicians should do more than make hollow promises of reform through reorganization. They should also be leading a national debate to redefine the priorities for immigration policy. September 11th provided an occasion to consider far-reaching reforms to immigration policy, and neither politicians nor the American people should be content to let reorganization substitute for reform.

—*Jeffrey Manns*