



Memorandum

July 28, 2005

TO: House Committee on the Judiciary
Attention: Luke P. Bellocchi & Nolan Rappaport

FROM: Stephen R. Viña
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SUBJECT: Enforcing Immigration Law: Issues of Complexity

Pursuant to your request, this memorandum provides numerous examples that describe some of the reported challenges that officers of the Department of Homeland Security's (DHS) immigration-related bureaus face in furtherance of their missions. In particular, we provide quotes from, and observations made in, case law, testimony, literature, and other sources that seem to illustrate the complexity of the missions of these bureaus and the underlying laws that these officers are charged with enforcing. While there are several immigration-related bureaus at DHS and a number of laws enforced by such bureaus, this memorandum focuses on enforcement operations at the border (i.e., namely those carried out by the Bureau of Customs and Border Protection) and the immigration-related duties that stem from the Immigration and Nationality Act (INA; 8 U.S.C. §§ 1101 *et seq.*).

Background

Enforcing Immigration Law

The responsibility for carrying out our nation's immigration laws lies with the Secretary of Homeland Security. Within the DHS, the Bureau of Customs and Border Protection (CBP) and the Bureau of Immigration and Customs Enforcement (ICE) carry out immigration enforcement functions proximate to the border and within the interior of the country respectively. Although CBP is charged with overall border enforcement, a distinction is made concerning border enforcement *at* and *between* points of entry. Immigration enforcement responsibilities between points of entry fall primarily on the U.S. Border Patrol of CBP, while responsibilities at the points of entry fall on CBP inspectors. DHS's Bureau of Citizenship and Immigration Services (USCIS) is responsible for the granting of citizenship and immigration benefits.

A mission of CBP is to prevent terrorists and terrorist weapons from entering the United States, while also facilitating the flow of legitimate trade and travel. Relatedly, a mission of ICE is to prevent acts of terrorism by targeting the people, money, and materials that support terrorist and criminal activities. USCIS's mission is to provide accurate and useful information to its customers, grant immigration and citizenship benefits, promote an awareness and understanding of citizenship, and ensure the integrity of the immigration system. All of these bureaus help support DHS's overall mission of securing America from terrorist attacks.

Discussion

The following discussion looks into the complexities that the immigration-related bureaus at DHS reportedly face, with a particular focus on immigration-related duties conducted at the border. The first part of this analysis presents some views on the complexities of our immigration laws as expressed in case law, literature, and testimony. Part two delves into some of the complexities of the mission of CBP, as observed by a number of sources.

Complexities of the Law

The Immigration and Nationality Act, as amended, is the primary statute that regulates aliens and the benefits available to them. Before the attacks of September 11, the 9/11 Report indicates that the "immigration system as a whole was widely viewed as increasingly dysfunctional and badly in need of reform."¹ According to testimony by Janice L. Kephart, former Counsel for the National Commission on Terrorist Attacks Upon the United States, before a House Judiciary subcommittee, "inspectors at ports of entry, border patrol agents, immigration agents, immigration benefits adjudicators, and immigration attorneys and judges were all stymied by rules that were fuzzy and time-consuming to implement."² Similarly, courts often recognized the complexities presented by the INA. The following bullets exemplify some of difficulties courts noted before 9/11 when addressing an immigration issue.³

- The Constitution grants Congress the power to "establish an uniform Rule of Naturalization." Drawing upon this power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders. *Pylar v. Doe*, 457 U.S. 202, 225 (1981) (citations omitted).
- Since 1931 the law on deportation has not become simpler. With only a small degree of hyperbole, the immigration laws have been termed "second only to the

¹ The 9/11 Commission Report: Final Report on the National Commission on Terrorist Attacks Upon the United States, at 384 (Official Gov't Ed. 2004) [hereinafter 9/11 Report].

² *New "Dual Missions" of the Immigration Enforcement Agencies*, Hearing before the Subcommittee on Immigration, Border Security, and Claims of the House Committee on the Judiciary, 109th Cong. (May 2005).

³ See also *Guerrero-Perez v. INS*, 242 F.3d 727, 735 (7th Cir. 2001); *Asad v. Reno*, 241 F.3d 702, 704 (6th Cir. 2001); *Leal-Rodriguez v. INS*, 990 F.2d 939, 940 (7th Cir. 1993).

Internal Revenue Code in complexity.” A lawyer is often the only person who could thread the labyrinth. *Castro-O’Ryan v. INS*, 821 F.2d 1415, 1419 (9th Cir. 1987) (citations omitted).

- The statutory scheme defining and delimiting the rights of aliens is exceedingly complex. Courts and commentators have stated that the Immigration and Nationality Act resembles “King Mino’s labyrinth in ancient Crete,” and is “second only to the Internal Revenue Code in complexity.” *Chan v. Reno*, 1997 U.S. Dist. LEXIS 3016, *5 (S.D.N.Y. 1997) (citations omitted).

Since 9/11, many still believe there is a need for further simplification of our immigration laws, despite recent revisions. The following bullets demonstrate some of the views expressed by courts and those who believe that our immigration laws are still difficult to understand, apply, interpret, and enforce.⁴

- Every immigration benefit has its own set of rules, regulations, and procedures. Many are complex and time-consuming to adjudicate. Some are so difficult to process that specialists must handle them. 9/11 and Terrorist Travel, Staff Report of the National Commission on Terrorist Attacks Upon the United States, at 98 (Aug. 21, 2004).
- We will not have secure borders until we enforce the laws already in place. Nor will we have full immigration reform ... until we clarify and streamline our complex immigration laws where necessary. Prepared statement of Janice L. Kephart, former Counsel, National Commission on Terrorist Attacks Upon the United States. *New “Dual Missions” of the Immigration Enforcement Agencies*, Hearing before the Subcommittee on Immigration, Border Security, and Claims of the House Committee on the Judiciary, 109th Cong. (May 2005).
- We are saddled with administering what my legal friends tell me is the most complicated set of laws in the nation. I am told it beats the tax code. And as the Immigration and Nationality Act, which you from time to time see fit to modify or add a layer or take one away, each application we receive seems to be slightly or largely different from the other. Six million to seven million applications have to be administered – adjudicated – against a body of law that is very complex and sometimes contradicting each other. Testimony of Eduardo Aguirre, Director, U.S. Citizenship and Immigration Services. *FY2006 Appropriations for Citizenship and Immigration Services*, Hearing before the House Appropriations Subcommittee on Homeland Security, 109th Cong. (March 2006).
- Leticia Cervantes de Hernandez has been in this country for twenty years, and perhaps even longer. On March 22, 2005, she was detained by special agents of Immigrations and Customs Enforcement and now awaits removal. Cervantes de Hernandez filed a petition for a writ of habeas corpus, temporary restraining order, injunction, and declaratory judgment. Her case presents questions that must be answered by the complex, evolving, and sometimes ambiguous, area of immigration law. *Cervantes de Hernandez v. Chertoff*, 368 F. Supp. 2d 896, 898 (E.D. Wis. 2005).

⁴ See also *United States v. Aguirre-Tello*, 324 F.3d 1181, 1187 (10th Cir. 2003); *Renteria-Gonzalez v. INS*, 310 F.3d 825, 830 (5th Cir. 2002); *Tinco v. Ridge*, 359 F. Supp. 2d 1042, 1046 (S.D. Cal. 2005).

- Gonzalez asks this court to reverse the BIA's decision that held him ineligible for a waiver under INA § 212(c), and to remand the case so that the BIA may determine whether the equities favor granting such a waiver, as the BIA itself suggested it might. Determining whether he is entitled to such relief requires me to visit a region of the law that has been described as “infinitely complex,” and has been compared unfavorably to the labyrinth of ancient Crete. *Gonzalez v. INS*, 2002 U.S. Dist. LEXIS 21148, *2 (S.D.N.Y. Oct. 31, 2002).

Like many of the examples provided above, *Immigration Law and Procedure* — one of the primary treatises on immigration law — states that “the immigration laws of the United States are detailed and complex.”⁵ Indeed, immigration officials must be familiar with 24 major nonimmigrant visa categories, and 70 specific types of nonimmigrant visas.⁶ Immigration law, similar to other select bodies of law, also has special administrative courts created solely to review its cases. These courts are housed in the Department of Justice’s, Executive Office of Immigration Review (EOIR). There are three main components to EOIR: the Office of the Chief Immigration Judge; the Board of Immigration Appeals (BIA); and the Office of the Chief Administrative Hearing Officer. The 53 nation-wide Immigration Courts (the first level of review), completed 300,600 cases in FY 2004 — slightly 4,500 more cases than FY 2003.⁷ The BIA (the second stage of review) completed 48,707 cases in FY 04, which constituted a 23% increase from FY 2002.⁸ The increases in completed cases, notwithstanding, the BIA also saw a large backlog of cases, which an American Bar Association report suggests resulted from an increased caseload and the complexity of the legal issues presented to the BIA.⁹

⁵ 1-2 CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, *IMMIGRATION LAW AND PROCEDURE* §2.01 (Matthew Bender & Co., 2005).

⁶ The significant number of travel documents — 240 different types of valid drivers licenses and 50,000 versions of birth certificates — that immigration officials are exposed to also creates challenges, according to former DHS Assistant Secretary, Stuart Verdery. Deborah W. Meyers, *One Face at the Border: Behind the Slogan*, at 43 n. 95, Migration Policy Institute (June 2005) [hereinafter *One Face at the Border*].

⁷ Immigration Courts completed 295,964 cases in FY 2003. Completions include Immigration Judge decisions on proceedings (i.e., deportation, exclusion, removal, credible fear, reasonable fear, claimed status, asylum only, rescission, continued detention review and withholding only) bond redeterminations, motions, and other completions such as administrative closings and changes of venue. U.S. Department of Justice, Executive Office of Immigration Review, FY 2004 Statistical Yearbook, at B2 (March 2005) available at [<http://www.usdoj.gov/eoir/statspub/fy04syb.pdf>].

⁸ *Id.* at S1-S2.

⁹ According to the Report, massive changes in immigration law between 1996 and 2002, which required review of many questions of first impression and development of case law to resolve complex statutory interpretation questions, helped create a 55,000 case backlog. American Bar Association, ABA Commission on Immigration Policy, Practice & Pro Bono, *Seeking Meaningful Review: Findings and Recommendations in Response to Dorsey & Whitney Study of Board of Immigration Appeals Procedural Reforms* (Oct. 2003).

Complexities of the Mission

As a sovereign state, the United States has the right to “protect itself by stopping and examining persons and property crossing into this country.”¹⁰ Indeed, courts have recognized that the “government’s interest in preventing entry of unwanted persons and effects is at its zenith at the international border.”¹¹ Since September 11, many courts have emphasized a heightened need for more thorough security inspections along our borders and at our ports of entry.¹² For example, in acknowledging the events of September 11, the Seventh Circuit in *United States v. Teng Yang*, stated that “we now know the serious threats that our border agents need to guard against and we must be mindful of the special needs of the agents in responding to those threats.”¹³ Courts have responded, in part, to the special law enforcement needs of border officials by allowing the *border search* exception (to the Fourth Amendment’s probable cause and warrant requirements) to be applied farther away from the border.¹⁴ Under the *extended border search* doctrine, courts are providing a geographically flexible reading to the term *border* to address “the many difficulties that attend the attempt to intercept contraband and to apprehend increasingly mobile and sophisticated smugglers at the very borders of the country.”¹⁵ As the previous examples seem to demonstrate, the courts have given some latitude to those enforcing our immigration laws, particularly those U.S. border inspectors and Border Patrol agents that, as the Terrorist Travel Staff Report indicates, are the “last physical barrier between terrorists and their entry into the United States.”¹⁶

In fiscal year 2004, approximately 433 million people were inspected upon entry in the United States, of which 628,290 were denied entry.¹⁷ Interdicting the flow of illegal entrants and contraband from Mexico and other countries, according to the Supreme Court, “poses formidable law enforcement problems” for border officials.¹⁸ Some problems might arguably arise from the sheer magnitude of the mission and number of applicants when coupled with the merger of enforcement responsibilities into DHS and the dual nature of CBP’s mission. For example, the mission of CBP officers must be accomplished at 312 air, sea, and land ports-of-entry and along the 5,525-mile U.S.–Canadian border and the 1,989-mile U.S.–Mexican border. With so many different entry points and so much land to oversee,

¹⁰ *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

¹¹ *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004); *United States v. Cortez-Rocha*, 394 F.3d 1115, 1120 (9th Cir. 2004).

¹² *Flores-Montano*, 541 U.S. at 152; *United States v. Teng Yang*, 286 F.3d 940, 944 n.1 (7th Cir. 2002); *Bradley v. United States*, 299 F.3d 197, 202 (3^d Cir. 2002); *Chen Yun Gao v. Ashcroft*, 299 F.3d 266, 281 (2002) (Greenberg, J., dissenting).

¹³ 286 F.3d 940, 944 n.1 (7th Cir. 2002).

¹⁴ For more information on border searches and extended border searches see RL31826, *Protecting Our Perimeter: “Border Searches” under the Fourth Amendment*, by Stephen R. Viña.

¹⁵ *United States v. Bilir*, 592 F.2d 735,740 (4th Cir. 1979). *See also Teng Yang*, 286 F.3d at 946.

¹⁶ 9/11 and Terrorist Travel, Staff Report of the National Commission on Terrorist Attacks Upon the United States, at 85 (Aug. 21, 2004) [hereinafter Terrorist Travel Staff Report].

¹⁷ Rey Koslowski, *Real Challenges For Virtual Borders: The Implementation of US-VISIT*, at 5, Migration Policy Institute (June 2005).

¹⁸ *United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976).

inconsistencies and variations in inspectors' understanding and application of immigration law were reportedly common before the attacks of September 11.¹⁹ According to the observations of some, the merger of enforcement responsibilities into CBP has — in some instances — exacerbated the inconsistencies.²⁰

The consolidation of immigration, customs, and agriculture inspections in CBP did not necessarily change the underlying authority that governs inspections in each area. Accordingly, some suggest that many of the difficulties that border officials may have had in applying their respective laws before the creation of DHS still exist.²¹ To address such complexities, for example, CBP still employs separate and specialized CBP-agriculture inspectors due to the complicated laws that agriculture inspectors must enforce and the scientific and technical expertise required to enforce such laws. The same type of specialization does not exist for the enforcement of immigration or customs laws (though there is some specialization at secondary inspection) — laws that some conclude are just as, if not more, complex than other bodies of law.²² The following bullets represent some views by those who have expressed concern about the consolidation of enforcement responsibilities within CBP.

- I think you are asking an awful lot for one human being to be expert in all of these three very complex and arcane areas. I mean, if you stack the laws and the regulations and all of the other information up, each of them is over 6 inches tall, and we are talking a lot of on-the-job training. Testimony of Mr. T.J. Bonner, President of the National Border Patrol Council (in response to questions about overcoming the need for specialization with more training). *CBP and ICE: Does the Current Organization Structures Best Serve U.S. Homeland Security Interests*, Hearing before the Subcommittee on Management, Integration, and Oversight of the House Committee on Homeland Security, 109th Cong. p. 65 (March 2005).²³
- In its eagerness to unify the agencies and gain efficiencies, CBP may have inadvertently minimized the complexity of the various bodies of law and regulation and the value of specialized expertise. Deborah W. Meyers, *One Face at the Border: Behind the Slogan*, at 53, Migration Policy Institute (June 2005).

In addition to the various bodies of law that must be understood, there is an inherent tension between the need to conduct thorough inspections and the need to process passengers and cargo efficiently so as not to impede cross-border traffic. Officers examining applicants for admission apparently strike a balance between the competing mandates in usually less

¹⁹ *Terrorist Travel Staff Report*, at 133.

²⁰ *One Face at the Border*, at 19 (reporting that differences in location, facilities, practices, knowledge, and expertise all contribute to inconsistent and unpredictable policies, application, and adjudications at the border).

²¹ *Id.* at 43.

²² *Id.* (disagreeing with CBP's assumption that additional specialized subject matter "is not more difficult or more complex to apply"). CBP's position can be found at "*One Face at the Border*" — *Questions and Answers*, reprinted at [http://afge.org/documents/cbp_faq.doc].

²³ In Mr. Bonner's prepared statement, he stated, "the complexities of the three major types of laws and regulations that are enforced at the border virtually guarantee that no individual can become an expert in all of these areas. Efforts to homogenize the inspectors at our Nation's ports of entry will ultimately result in a workforce composed of 'jacks of all trades, but masters of none.'"

than a minute.²⁴ The decisions made in this time and in secondary inspection, according to Michael Cutler, former Senior Special Agent of the U.S. Immigration and Naturalization Service, are “conceivably life and death decisions.”²⁵ For example, Mr. Cutler observed that “mistakes that err on the side of permitting aliens into the United States who are involved with crime and terrorism ... inadvertently facilitated the actions of the terrorists of September 11.”²⁶ The *Terrorist Travel Staff Report* suggests that a “culture of facilitation,” in which inspectors were graded on how fast airline passengers were processed played some part in officer error.²⁷ It also states, that “immigration law was, and remains, so intricate and confusing that some inspectors lacked a clear understanding of issues of admissibility, and therefore mistakenly admitted some hijackers into the country.”²⁸

Conclusion

The debate on comprehensive immigration reform continues in the 109th Congress. The extent to which our immigration laws are hindering rather than helping the missions of DHS and its immigration-related bureaus is not clear, though some would suggest, as quoted herein, that the complexity of our immigration laws should be an area of concern. The balance that CBP and other DHS officers must strike in their day-to-day duties in preventing terrorists from entering the United States, while also facilitating the flow of legitimate trade and travel will undoubtedly continue to be an issue.

²⁴ *Terrorist Travel Staff Report*, at 87.

²⁵ *CBP and ICE: Does the Current Organization Structures Best Serve U.S. Homeland Security Interests*, Hearing Before the Subcommittee on Management, Integration, and Oversight of the House Committee on Homeland Security, 109th Cong. at 65 (May 2005).

²⁶ *Id.* For example, the *Terrorist Travel Staff Report* observed that at least two and as many as eleven of the hijackers presented to immigration inspectors at ports of entry passports manipulated in a fraudulent manner. *Terrorist Travel Staff Report*, at 138.

²⁷ *Terrorist Travel Staff Report*, at 136 and 144.

²⁸ *Id.* at 144.