

The background of the entire page is a large, semi-transparent seal of the Department of Homeland Security. The seal features an eagle with wings spread, perched on a shield. Above the eagle are the words "DEPARTMENT OF" and below it "HOMELAND SECURITY". The eagle is holding an olive branch in its right talon and arrows in its left. The shield on its chest is divided into four quadrants, each containing a different symbol: a scale of justice, a sword, a key, and a laurel wreath. The seal is rendered in a light, semi-transparent style that allows the text to be clearly visible.

SECOND ANNUAL
DHS PROGRESS REPORT

AN ANALYSIS OF IMMIGRATION POLICY IN THE SECOND YEAR
OF THE OBAMA ADMINISTRATION

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ROYCE BERNSTEIN MURRAY, ESQ.
MARY GIOVAGNOLI, ESQ.
TRAVIS PACKER, ESQ.
MICHELE WASLIN, PH.D.

ABOUT SPECIAL REPORTS ON IMMIGRATION

The Immigration Policy Center's Special Reports are our most in-depth publication, providing detailed analyses of special topics in U.S. immigration policy.

ABOUT THE AUTHORS

Royce Bernstein Murray worked for the Department of Homeland Security (DHS) and the former Immigration and Naturalization Service (INS) for eight years: as Associate Counsel in the U.S. Citizenship and Immigration Services (USCIS) Office of the Chief Counsel from 2003-2008, and as a Presidential Management Fellow/Asylum Officer in the INS Office of International Affairs from 2000-2002. At present, Ms. Murray is an adjunct professor of immigration law at the University of the District of Columbia David A. Clarke School of Law and an independent refugee and immigration law consultant. She has a J.D. from the Georgetown University Law Center and holds a B.A. with distinction in political science from the University of Michigan.

Mary Giovagnoli is the Director of the Immigration Policy Center (IPC) at the American Immigration Council. From 1996-2007, she practiced law as an attorney with the Departments of Justice and Homeland Security: serving as a trial attorney and Associate General Counsel with the INS, an Associate Counsel for USCIS, and Senior Advisor to the Director of Congressional Relations of USCIS. She was also awarded a Congressional Fellowship from USCIS to serve for a year in Senator Edward M. Kennedy's office, where she worked on comprehensive immigration reform and refugee issues. Ms. Giovagnoli holds an M.A. in rhetoric and a J.D. from the University of Wisconsin and graduated summa cum laude from Drake University.

Travis Packer is the Research and Policy Assistant at the Immigration Policy Center. He previously worked for the Lutheran Immigration & Refugee Service as well as the University of North Carolina Center for Civil Rights. Mr. Packer holds a J.D. from the University of North Carolina School of Law and graduated Magna Cum Laude from North Carolina State University with a B.A. in Political Science.

Michele Waslin is the Senior Policy Analyst at the Immigration Policy Center. Previously she worked as Director of Immigration Policy Research at the National Council of La Raza (NCLR) and Policy Coordinator at the Illinois Coalition for Immigrant and Refugee Rights. She received her Ph.D. in Government and International Studies from the University of Notre Dame, and holds an M.A. in International Relations from the University of Chicago and a B.A. in Political Science from Creighton University.

ABOUT THE IMMIGRATION POLICY CENTER

The Immigration Policy Center, established in 2003, is the policy arm of the American Immigration Council. IPC's mission is to shape a rational conversation on immigration and immigrant integration. Through its research and analysis, IPC provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy on U.S. society. IPC reports and materials are widely disseminated and relied upon by press and policymakers. IPC staff regularly serves as experts to leaders on Capitol Hill, opinion-makers, and the media. IPC is a non-partisan organization that neither supports nor opposes any political party or candidate for office. Visit our website at www.immigrationpolicy.org and our blog at www.immigrationimpact.com.

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EXECUTIVE SUMMARY

From the beginning of the Obama Administration, there has been a tension between enhanced immigration enforcement and a push for comprehensive immigration reform (CIR). This tension increased significantly in 2010 as the Administration ramped up its immigration-enforcement efforts at the expense, many believe, of the very people most likely to benefit from legalization and CIR. With the 111th Congress essentially immobilized on reform, but for the dramatic lame-duck passage of the DREAM Act in the House and its near miss in the Senate, the public looked to the President and his Department of Homeland Security (DHS) for some measure of immigration relief. For the most part, they didn't find it.

In March 2010, the Immigration Policy Center (IPC) released *DHS Progress Report: The Challenge of Reform*, an analysis of immigration policy in the first year of the Obama Administration. It evaluated DHS's progress against the "Transition Blueprint"—recommendations made to the Obama Transition Team's immigration policy group. The report revealed that DHS had taken concrete steps towards changing the way immigration agencies did business, but was, at the same time, still entrenched in an enforcement mindset.

Now, one year later, the IPC has reviewed DHS's record in 2010 to evaluate whether the promises of 2009 were met, whether new problems or solutions have arisen in immigration enforcement and implementation, and whether DHS has the capacity to follow through on the vision of reform outlined by the President. This year, the report asks the following questions through three critical lenses, suggested by the words and actions of DHS itself:

- 1) **Prioritization.** How did the Department and its immigration agencies articulate its priorities? Were those stated priorities aligned with its mission? How were those priorities implemented in practice?
- 2) **Transparency.** To what extent were stakeholders meaningfully consulted and informed of policy decisions and operational changes? How available to the public did the agencies make information about decision-making processes?
- 3) **Coordination.** How well have the immigration agencies coordinated their actions and policies to promote consistency? What leadership has DHS offered to facilitate this process?

Analyzed against these criteria, the findings are, once again, mixed. The humanitarian effort following the Haitian earthquake evidenced the best of the DHS immigration functions. But, as the year wore on, the emphasis on deportations became so constant that the primary DHS talking point, and the response to every criticism, was that the Department had set a record for the number of removals executed in a year. This was hardly what many expected from the Obama Administration, particularly because the President repeatedly emphasized his commitment to immigration reform that offered a path to citizenship for undocumented immigrants and that created a fair and more just immigration system.

That kind of contradiction was evident throughout the year and occurred, we believe, for three primary reasons. First, DHS put necessary institutional reforms on hold and instead relied on the potential of CIR to solve all existing problems. Second, while the emphasis on CIR was absolutely critical, it should not have come at the expense of deploying more resources and personnel to address the longstanding

institutional shortcomings of DHS and its immigration agencies. Because that level of attention could not be focused on the agencies, the trend towards distinct agency cultures, legal interpretations, and reluctance to coordinate continued. Finally, when the agencies did offer some creative recommendations for administrative reform of the law, DHS failed to support these efforts and refused to make use of its extensive executive branch authority. Time and again, fear of criticism, especially from Congress, stymied good policy and good ideas.

OUR FINDINGS:

Prioritization? *Better on Paper than in Practice*

- As in 2009, ICE continued to issue memos that offered guidance on agency priorities, articulating more specifically than ever before that its first target was criminal aliens who posed a threat to the country. Unfortunately, that priority statement was undermined not only by overly broad definitions of criminal aliens, but by internal and external messages that lauded ICE's record-breaking number of removals in 2010. Many of the approximately 400,000 aliens removed did not fit into the priority categories established by ICE, indicating a double standard and a lack of implementation. One of the primary reasons for this disconnect was the heavy reliance on arrests and deportations produced through the agency's cooperation with state and local law enforcement in the 287(g) and Secure Communities programs. These programs yielded greater numbers of arrests and deportations but include an unacceptably large number of non-priority immigrants. The misuse of immigration detainers at the state and local level, and the slow pace of issuing detainer guidance, added to the problems with prioritization. Similarly, while worksite enforcement priorities shifted to the use of I-9 audits to target critical infrastructure and the prosecution of employers for egregious violations, many of the employers audited did not fit these criteria.
- **USCIS** initiated an extensive policy review that allowed the public to help identify priority issues within the agency. Key highlights of the year were a continued emphasis on supporting and expanding the role of the Office of Citizenship, a highly successful grant program to support citizenship education, and the completion of a standardized fee waiver form. Numerous complaints about the overuse of Requests for Evidence (RFEs) led to the creation of an RFE Working Group and the agency's release of improved RFE templates for comment, but criticisms remained. The application of overly broad terrorism-related inadmissibility grounds (TRIG), typically to refugees (who the immigration system was designed to protect), kept cases on hold and applicants in limbo. The DHS Interagency Working Group should be commended, however, for the progress made on granting several categorical waivers this past year. USCIS took numerous steps to improve the operation of E-Verify, although its continued expansion highlighted ongoing concerns about detecting identity fraud, employer non-compliance, and the effects of erroneous non-confirmations on workers.
- **CBP** quietly began to expand its role of enforcer at the gate. Due to a lack of integrated guidance and training in the field, reports of officers probing travelers beyond admissibility and instead, re-examining their underlying visa eligibility, steadily increased. Asking questions already decided by other agencies (and to which the applicants would not necessarily know the answer) is both inefficient and troublesome for travelers who need to rely on the consistency and finality of agency decision-making. CBP's ongoing efforts to provide immigration law

training to its officers and new plans to place immigration law experts at ports of entry will hopefully address some of these concerns.

Transparency? *High Marks for Greater Openness, but Results Vary from Program to Program*

- **USCIS** continues to maintain high levels of stakeholder engagement on a wide range of issues, particularly on its comprehensive review of agency policy memoranda. The solicitation of comments on draft memos marked a new openness in DHS's public engagement and offers the potential for far more meaningful input as the agency shapes policies going forward. The Administrative Appeals Office (AAO) began to meet with stakeholders and issued its first precedent decisions in years, but advocates are concerned about the overall procedures used to adjudicate administrative appeals. While many were anxious to encourage USCIS in its attempts to engage the public more directly, some complained that the extra steps increased delays in releasing memos. The agency was both commended and criticized for considering administrative reform options but then shying away from them due to Congressional criticism.
- **ICE** also strengthened its stakeholder engagement in 2010, at least at the national level. In particular, the DHS-NGO Enforcement Working Group met and communicated frequently on the range of enforcement issues, and ICE's two detention subgroups continued to address the numerous criticisms of its detention efforts. The creation of a Risk Assessment Tool to determine eligibility for release from detention was a positive step, but its implementation has been delayed until January 2012, and the latest version has not been shown to advocates. Similarly, the Alternatives to Detention (ATD) program suffers from delayed implementation; advocates worry that it will fail to accurately assess whether an individual should be placed in the program or released on recognizance or bond. The draft of the new 2010 Performance Based National Detention Standards was a welcome step toward improved transparency in the treatment of detainees, but implementation has not yet begun and, ultimately, the standards are not judicially enforceable. Finally, Secure Communities appears to intentionally operate behind a veil of bureaucracy and secrecy, generating serious questions about who will *really* be targeted and whether and how localities can decline to participate in the program.
- **CBP** has begun to meet with immigrant advocates but maintains its reputation as being largely closed to public input. The agency has a long way to go to demonstrate that it considers dialogue with stakeholders genuinely constructive. CBP remains reluctant to share information, such as its Inspectors Field Manual or agency directives ("musters"), and does so in limited fashion only following a FOIA fight.

Coordination? *The Lack of a Strong Authority and Sufficient Resources at the Department Level Impedes Opportunities to Make Change Stick*

In a number of ways throughout the year, DHS and its immigration agencies worked at cross-purposes, leaving the public confused about the integration and coordination of its priorities. Although CBP, ICE, and USCIS have distinct missions, DHS has failed to provide the critical leadership and reporting structure needed to bridge the gaps and move forward with a coherent and unified agenda. Haiti provided the most recent example of conflicting goals and objectives within the Department, where the humanitarian efforts within USCIS and the Department were overshadowed by ICE's resumption of deportations to the still-devastated, cholera-plagued island nation. DHS coordination is also desperately needed to avoid conflicting interpretations of law within and between agencies. Other conflicts occur

when DHS does not provide the support to the agencies to withstand Congressional attacks on matters within the discretion of the executive branch, such as administrative reform of certain immigration practices. The DHS immigration-regulation process has come to a virtual standstill, delaying needed regulations across all immigration agencies. The lack of coordination also has led to uneven and inconsistent application of information-sharing practices, defying many of the Obama Administration's directives to cut red tape and provide the public easy access to information.

RECOMMENDATIONS

While our immigration system desperately needs to be overhauled and reformed, DHS, as an executive branch agency, has wide discretion to enforce, implement, and interpret existing laws.¹ DHS cannot wait for the passage of comprehensive immigration reform to begin to tackle the many injustices created by the current system. Based on the findings of this review, DHS should strive in 2011 to improve the integrity and fairness of its operations within all three immigration agencies.

Bring practice in line with priorities: Particularly in enforcement programs such as Secure Communities and I-9 audits, DHS has repeatedly emphasized that it has put in place priorities that instruct officers to focus on the most egregious offenders and most dangerous criminals. In reality, however, current practices generally fail to distinguish between those who pose a genuine threat to society and those who are non-criminal immigrants, between employers with paperwork violations and employers with criminal violations of labor and employment laws. There is little evidence that equities such as length of residence in the United States, community ties, or membership in a mixed status family have any bearing on charging decisions. Once an immigrant in the country illegally is placed into immigration court proceedings, the likelihood of deportation is almost inevitable, regardless of priority status. Consequently, DHS should take steps that limit the chances that non-priority individuals are caught in enforcement actions:

- **DHS should ensure that priorities for immigration enforcement established in 2009 and 2010 are followed by ICE officials and by state and local partners where applicable.** At the federal level, this requires more rigorous application of the priorities, ensuring that those who truly seek to do our country harm are the target of enforcement actions. The number of removals must become less important than the threat level associated with the persons removed.
- **State and local law-enforcement partnerships must be carefully monitored and supervised to ensure that individuals who are not ICE priorities are not caught up in the net of Secure Communities or 287(g) programs.** Implementing clear detainer standards, including advice regarding local jurisdiction's discretion to release individuals, is essential.
- **ICE must acknowledge its own guidelines for prosecutorial discretion,** which clearly show that officers are not obligated to place in removal proceedings every undocumented person with whom ICE comes into contact.

Detention reform cannot be allowed to stall. Continuing to engage with non-governmental organizations (NGOs) to improve the process is critical, as is working through internal conflicts. The public critique of ICE tools such as the national detention standards, the risk assessment tool, and alternatives to detention should be taken seriously and incorporated into the final programs. Ensuring the health and safety of detainees must remain an ICE priority and is most likely to occur with consistent

and meaningful dialogue between all stakeholders, including government officials, ICE rank and file, and NGOs .

Extensive public engagement and public comment on policies was an important development in 2010 and should continue. For USCIS and ICE, the challenge will be to continue to engage the public in a way that demonstrates results. For CBP, the challenge will be to use new tools, such as district liaisons, to begin opening up the conversation. CBP, in particular, must become more transparent in sharing its practices and procedures with the public.

Promoting better funding for immigration services, particularly immigrant integration, must be treated as an investment in the future. The Obama Administration has demonstrated a genuine commitment to reforming the USCIS fee structure, shifting a higher percentage of services to appropriated funds in each subsequent budget request. While the House has stripped funding for the Office of Citizenship from the most recent Continuing Resolution, DHS should push for the restoration of funds and should push even harder for the support provided in the Fiscal Year (FY) 2012 budget.

DHS must assert its executive branch authority, even in the face of Congressional challenges. There has been much evidence that DHS has been reluctant to move forward on administrative measures that could provide relief to individuals because it feared that such actions could lead to backlash in Congress or jeopardize comprehensive immigration reform efforts. Even if that strategy had merit in the early years of the Obama Administration, the likely deadlock over immigration matters in Congress demands a new direction for reforms that can be accomplished administratively. Such reforms are not end runs around Congress, but are instead critical exercises in interpreting, implementing, and enforcing existing law within the context of changed circumstances. Numerous groups, including Members of Congress, have asked for administrative action. These requests range from formalizing a process for deferring removal of students who would qualify for lawful permanent resident status under the DREAM Act, redesignation of Temporary Protected Status (TPS) for Haitians to cover a broader period of first entry into the country, and revisiting current policies affecting waivers for the spouses of U.S. citizens who entered the country unlawfully long ago.² DHS should also continue to push forward on broadening its exercise of exemption authority to ensure that protection for legitimate refugees and asylum seekers is neither delayed nor denied based on the application of overly broad terrorism-related inadmissibility grounds.

DHS must also expand its coordination functions to prevent conflicts in the interpretation of law and policy. Despite efforts to coordinate through DHS policy and the Office of General Counsel, there remains a lack of mutual agreement and coordination among the three immigration agencies. This criticism has been levied against DHS since its inception, but as the cultures of ICE, USCIS, and CBP become ever more distinct, the lack of a final arbiter to ensure that the immigration laws are enforced and implemented with consistency and fairness is detrimental to DHS and to the citizens and immigrants it serves. The Secretary of DHS must empower political appointees at the headquarters level with the necessary operational control over the agencies. Whether that authority is vested in the Office of Policy or elsewhere, there must be DHS officials who can ensure that the immigration agencies are both coordinating and in compliance with the policies and expectations of the Department. Immigration reporting and command functions within the Department should be reorganized to ensure that the key point person on immigration is empowered to block operational decisions that are inconsistent with Department policy.

DHS must also improve and streamline its regulatory process, which is widely acknowledged to be virtually impossible to navigate. Without a working regulatory review process, implementing laws and holding the agencies accountable for their actions becomes ever more difficult.

While these recommendations address DHS actions, it is clear that the Obama Administration must be more engaged in the implementation of day-to-day immigration policy. Leadership is needed from both the White House and the front office of DHS to make immigration reform any kind of a reality. The Administration must acknowledge its executive branch authority to revisit prior policies and reinterpret existing laws, particularly in light of Congress's unwillingness or inability to reform the immigration system. Numerous recommendations exist for changes to the interpretation of existing immigration law that would streamline and improve immigration procedures and extend greater opportunities for benefits. The mantra that the Administration's hands are tied by existing law is not only misleading, but effectively cedes executive branch authority to Congress that it vigorously protects in other contexts.

INTRODUCTION

In 2010, the Immigration Policy Center released its first DHS Progress Report, [*The Challenge of Reform: An Analysis of Immigration Policy in the First Year of the Obama Administration*](#),³ in which we found that the Obama Administration had initiated many promising changes to immigration policy, but that the political and practical realities of reform had thus far yielded few results. With the publication of our second DHS Progress Report, we find that the Administration continues to struggle with many of the same challenges, making isolated improvements, but lacking the tools necessary to fulfill many of its initial objectives. The failure of Congress to pass comprehensive immigration reform (CIR), or even the Development, Relief and Education for Alien Minors (“DREAM”) Act, has been a significant setback for the President, but it has also highlighted the limitations of the Administration’s current immigration reform strategy, which plays up immigration enforcement even as it argues for broad reform. This not only leads to a series of mixed messages, but may very well undermine the possibility of both administrative and legislative reform by putting policies and practices in place that reinforce a deportation-driven culture. After only eight years under DHS, the immigration agencies have become institutionally separate, often acting at cross-purposes with the goal of creating a more effective immigration system.

Despite this sober observation, progress has been made in some areas examined in our last report, including: detention practices; more extensive public engagement; improvements in handling certain “material support” asylum and refugee cases; expanded support for immigrant integration; and clearer articulations of administrative priorities. These positive developments, however, were frequently dwarfed by the Department’s overemphasis on deportation-driven programs, such as the expansion of Secure Communities, the decision to resume Haitian deportations without adequate safeguards, and the failure to seriously consider proposals to use deferred action or other administrative relief to assist people with strong equities who face deportation or the denial of benefits because of out-dated and ineffective laws.

What is perhaps most troubling is the apparent disconnect between the President’s vision of immigration as a contributor to “winning the future” and the practical realities of administering the current immigration system. As the Immigration Policy Center has repeatedly documented, there are numerous institutional and structural barriers to immigration reform, but it has never been the case that all reform requires legislative action. A deep disappointment of the past year has been the failure of the Administration to embrace administrative relief and policy reforms with the same gusto that it has invested in touting its removal record. Although the Administration was apparently considering revising policies that unnecessarily limited eligibility for benefits, as well as proposals to defer action on the removal of certain sympathetic cases, any real prospects for administrative reform seemed to evaporate after a series of leaked policy memos were released by critics of the Administration. By labeling such proposals “backdoor amnesty,” critics such as Senator Charles Grassley and Congressman Lamar Smith got the rhetorical upper hand, seemingly stopping these proposals before they had been fully vetted or discussed. Without a reconsideration of those proposals, it is hard to see how the Administration’s more visionary approach to immigration can begin to take hold.

This disconnect between broad vision and current implementation plays itself out in many ways, but can be seen at its sharpest in themes suggested by DHS itself. This year, rather than attempt to catalog all the actions of DHS in numerous categories, this report traces the success or failure of broader concepts outlined in DHS's own objectives:

1. The concept of “**prioritization**” has been the lynchpin of many DHS immigration initiatives, particularly within ICE. How have such efforts played out in practice?
2. Directly related to the question of priorities are the often intersecting issues of **transparency** and process. The Obama Administration's directive to ensure accessibility and transparency in government has led to many changes in how DHS interacts with the public, but how well have the agencies fared?
3. While that is a matter of external relations, internal relations—**coordination** within each agency and across the Department—needs to be examined to determine whether individual objectives are reinforced department-wide.

While the report itself provides numerous illustrations of these themes, we also determined that several topics provided important case studies in how prioritization, transparency, and coordination—or the lack thereof—shape the Department's reaction to critical issues. Consequently, special sections of the report address developments in refugee and asylee processing, and the continued struggle to fairly deal with the complications and needs of Haitians who cannot return home one year after an earthquake devastated their country. The treatment of Haitians, in fact, illustrates the best and worst of DHS practices, and moreover highlights the many shortcomings of our current immigration laws, which are ill-equipped to deal with the myriad legal problems arising after the earthquake.

Taken as a whole, we find that DHS continues to merit mixed reviews—succeeding in isolated instances, but generally failing to deliver a coherent and coordinated vision of immigration policy for the 21st century. The reasons for this are many, but we have identified three primary factors contributing to this lack of progress:

- **DHS may have put necessary reforms on hold in order to pursue comprehensive immigration reform.** For many within DHS and the larger immigration advocacy community, the prospect of comprehensive immigration reform—and the opportunity it would have provided to reshape many of the basic processes within the Department—was a necessary condition of changing the way DHS operated. This is understandable, but in hindsight, the greatest reforms came in areas where independent analysts were brought in to deal with problems immediately facing the agencies. For instance, Dr. Dora Schriro's report on detention reform has continued to shape ICE policy long after her departure—and without any corresponding legislative action by Congress. As much as legislation is required to revamp our broken immigration system, the challenge for DHS must be to pursue administrative reform as much as, if not more than, it has pursued legislative reform. In many instances, pursuit of an enforcement-driven strategy was privately justified as a necessary pre-condition for legislative action. To the degree that decisions were made based on an attempt to create a favorable climate for legislative reform, however, DHS has instituted policies and adopted public messaging that ultimately will undermine many of its stated goals. The example of Secure Communities, laid out in detail below, is illustrative of this conclusion.

- **ICE, CBP, and USCIS have developed distinct cultures that frequently put interpretation and policy in conflict.** The DHS treatment of Haitians over the last year represents some of the best of the Department and its people, and yet it also evidences the lack of coordination and vision endemic to the institution. For example, at virtually the same time that USCIS was poised to implement the Help Haiti Act of 2010 (which grants permanent residence to orphans paroled into the U.S. after the earthquake), ICE announced that it would resume deportations to Haiti, despite the abysmal conditions that continue to exist one year after the earthquake. This lack of a disciplined and coordinated approach to issues seems to routinely undermine the good work that does happen within the agencies.
- **DHS applies its executive branch authority unevenly, taking far bolder action on removals than in other areas of immigration law.** This is best illustrated by the failure to own the ideas and proposals on administrative reform that leaked out over the last year. Rather than defend the idea that the Administration was free to revisit past policies and legal interpretations to support its objectives, officials essentially backed away from all such proposals, retreating to arguments that they were there to enforce the current law, without any attempt to explain how much of “enforcement” is a matter of interpretation and discretion. This attitude has solidified in the first few months of 2011. Both Secretary Napolitano and President Obama have insisted that their hands are tied to make any changes to existing practice until Congress changes the law.

In many ways, DHS is its own worst enemy. Reluctant to appear weak, officials have often promoted a vision of immigration policy that is decidedly one-sided and enforcement-minded. Many times, however, depending on the audience and the moment, political appointees exhibit a clear understanding of the broader role of immigration in society. Without additional guidance and leadership at the highest levels of DHS and the White House, however, this more nuanced understanding does not make its way into the daily life of the agencies. Without a clearer vision, the three immigration agencies will continue to squabble and contradict each other, limiting the potential for genuine reform.

In the pages that follow, we offer an analysis of DHS actions, looking first at the political context of the last year, and followed by analysis of the agencies’ major actions through the lenses of prioritization, transparency, and coordination. It is virtually impossible to track every action and thus we have selected those programs and events that best reflect the general direction of DHS initiatives over the last year. This analysis is intended to spur debate within the agencies, the media, the halls of Congress, and among the public. Only by squarely addressing both the successes and the failures of the current system can we hope to improve it for the generations to come.

I. DHS and Immigration Reform in 2010

Politics, catastrophes, and personalities all contributed to a very bad year for immigration reform legislation in 2010. Key factors in 2010 included the weak but recovering economy, the ongoing healthcare debate, the midterm elections, and the passage of SB 1070. From the beginning, it seemed, Congress would have little time for issues other than healthcare, financial reform, and propping up the economy, but most people believed that immigration reform still had a chance if a bill could be quickly passed, if several Republican Senators would support it, and if no major catastrophes occurred to distract the Administration, where a full show of support for reform would be critical. Unfortunately, the country seemed to lurch from crisis to crisis. Congress dragged its heels on healthcare and financial reform legislation, and Republicans and Democrats could not get past a very basic set of comprehensive immigration reform principles issued by Senators Schumer and Graham in April.

Things went from bad to worse as SB 1070, the most openly anti-immigrant piece of state legislation to date, passed in Arizona, igniting a bitter controversy over federalism, immigration, racial profiling, and equal rights. Supporters of the bill justified its necessity based on the rise of border violence and crime allegedly caused by illegal immigration, which only re-invigorated the old debate about whether immigration reform could be accomplished until our borders were “secure.” Although the Obama Administration and advocates ultimately (and successfully) sued the state of Arizona, arguing that federal immigration law pre-empted SB 1070, both the Administration and Congress fed the border-first mentality with an infusion of National Guardsmen and millions of dollars in supplemental funding for border security. While some of these funds may have gone to needed programs, the message to the public was relatively clear: Congress could gather the votes to throw money at the immigration problem, but couldn’t find the courage to fix it.

The remainder of the year was little better. Almost immediately after SB 1070 was enjoined, political heavyweights such as Senator Lindsey Graham began attacking birthright citizenship—starting a national attack on the Fourteenth Amendment, which many believed was motivated by the impending elections. Ugly and insulting anti-immigrant ads were featured in many political races, although they appeared to backfire and led to significant Latino turnout in key states. The House changed hands after midterm elections, which made the prospects for immigration reform less likely in the 112th Congress, and paved the way for a lame-duck showdown over the DREAM Act. In a dramatic finish to a roller-coaster year, the DREAM Act passed the House on a bipartisan vote but died in the Senate.

For DHS, the catastrophe in Haiti became the defining issue of the first few months of 2010 and marked a high-water point in its performance for the year. But even as the Department showed the ability to respond quickly and compassionately to the crisis, it was also refining a political strategy begun in 2009—win CIR by proving how good we are already at enforcing the law. Agency officials repeatedly boasted of their record-breaking removal numbers, but seemed to shy away from any efforts to promote administrative changes that might expand eligibility for benefits. By the fall of 2010, Secretary Napolitano seemed to use the removal numbers as a shield against further inquiry on administrative relief. For instance, when questioned on reports and complaints that DHS was planning an amnesty for millions of undocumented immigrants, she went beyond disavowing such claims, noting instead that it had been a record-breaking year for removals. The Secretary further distanced the Department from administrative relief, arguing that Congress needed to change the laws. As long they were on the books, however, “this Department is about enforcing the laws that we have.”

As the year ended without any major immigration reform, pressure began to increase for an administrative solution to assist DREAM Act students, families with children who are U.S. citizens, Haitians, and other vulnerable groups. In the first months of 2011, think tanks and grassroots groups urged the President to revisit administrative remedies. Increasingly, the thousands and thousands of people who marched for immigration reform in 2010 were and are rightly asking, “what’s next?”

It appears that DHS and the Obama Administration run the risk of repeating last year’s performance by reverting to the convenient excuse that they can do nothing more than enforce the law. But enforcing the law is never cut and dried. As our report demonstrates, there are multiple opportunities within immigration enforcement and adjudication of benefits to exercise discretion, decline to prosecute, or interpret the law differently to reflect changing realities. If these moments are not seized, the government risks weakening, rather than enhancing, the chance for meaningful immigration reform.

II. PRIORITIZATION: Listing Priorities v. Acting on Them

DHS’s own list of its 2010 accomplishments on immigration demonstrates that the agency’s priorities remain firmly grounded in immigration enforcement and removal. Virtually all immigration-related successes touted by DHS were enforcement-focused.⁴ DHS repeatedly reported that ICE executed a record number of removals in 2010 and that border arrests by CBP had notably dropped, in large part due to its increased enforcement and manpower at the border.⁵ DHS made no mention of USCIS successes related to immigration benefits to signal a balanced benefit/enforcement agenda; instead the Department highlighted the re-design of the permanent resident card (“green card”) and naturalization certificate in an effort to hamper fraud.⁶ So, even as DHS officials promoted the idea of immigration reform, the signal within the Department and to the public remained deportation-driven. What changed were tactics and emphasis, but as an analysis of DHS’s own attempts at prioritization show, the end result—massive deportations—remained the same. Even as ICE, in particular, struggled publicly to create a more systematic and possibly humane approach to removals, other competing actions and priorities undermined that attempt.

A. ICE Priorities: Identifying the Right Targets

1. Putting Priorities on Paper: ICE Memoranda

During 2010, ICE solidified its public commitment to focus on criminal aliens who posed a threat to society. ICE issued a series of memos that directed officers to prioritize the arrest and detention of persons who posed a risk to national security, recent illegal entrants, and persons with final orders of removal.⁷ In addition to spelling out ICE’s priorities for civil immigration enforcement, a June 30, 2010 memo, issued by ICE Director John Morton, directed officers to exercise prosecutorial discretion when proceeding with cases, particularly those involving lawful permanent residents, juveniles, and immediate relatives of U.S. citizens, all of whom may possess greater equities. While advocates welcomed greater guidance on “prioritization,” numerous critiques of these policies found that the memos offer little clarity for handling the hundreds of thousands of decisions made annually by ICE agents regarding the arrest, detention, and removal of individual immigrants.⁸ For example, it is unclear whether ICE officers tasked with implementing the “Morton Memo” have been adequately trained not only about the language and interpretation of the newly stated priorities, but also on the various prosecutorial discretion directives referenced in the memo and how to resolve potential conflicts and contradictions.⁹ ICE’s own statements on its priorities leave plenty of space for

them to deport immigrants charged with crimes but not convicted, immigrants convicted of minor crimes, and immigrants with no criminal history. Moreover, the nature of current immigration law and the expansive list of aggravated felonies and deportable offenses mean that immigrants convicted of relatively minor and nonviolent crimes will be detained and deported, regardless of how many years they have lived in the United States or whether they have U.S.-citizen dependents.¹⁰

In addition, the guidance itself was issued after a series of embarrassing leaked memos that suggested ICE's internal priorities were not quite so clear. In March 2010, the *Washington Post* reported on a memo from James Chaparro, head of ICE Detention and Removal Operations (DRO), which commended enforcement officers on their efforts to reach a record-setting target goal of 150,000 criminal alien removals in Fiscal Year 2010. The memo went further, admonishing officers for failing to track toward the total agency goal of 400,000 removals, including non-criminal removals.¹¹ To reach its overall quota, Chaparro elaborated a strategy of increasing bed space in detention centers and sweeping prisons and jails to identify deportable criminals and non-criminals alike.¹² A separate January 2010 memo was simultaneously leaked and showed how performance appraisals for immigration enforcement agents are also based on the sheer number of removals accomplished in a month's time.¹³

ICE attempted to distance itself and the agency from the Chaparro memo by quickly announcing that significant portions of the controversial document were inconsistent with the Administration's point of view, had been sent without authorization from ICE Director Morton, and were subsequently withdrawn and corrected.¹⁴ Seeking to reassure the American public and Congress, Morton said, "We are strongly committed to carrying out our priorities to remove serious criminal offenders first and we definitively do not set quotas."¹⁵ But many remained unconvinced that ICE is serious about prioritizing serious criminals, given the high leadership position James Chaparro holds and the reality on the ground, which indicates that low-level offenders and non-criminals are being deported in large numbers.¹⁶

2. Worksite Enforcement Priorities

In 2010, DHS continued to shift emphasis from mass worksite raids to verification and compliance through the use of E-Verify, administered by USCIS, and the expansion of I-9 audits in the workplace, conducted by ICE. Both programs have come under criticism as producing unintended consequences, particularly I-9 audits. In both cases, however, DHS has argued that it is attempting to use the tools available to enforce worksite compliance without resorting to the greater disruptions caused by worksite raids.

I-9 Audits

Two years into the Obama Administration's efforts to reshape worksite enforcement, there have been no large-scale worksite raids. Instead, ICE has expanded its use of I-9 audits to monitor the employment of undocumented workers. These audits of employers' records and paperwork are meant to determine whether or not the employer is in compliance with employment eligibility verification laws and regulations. Penalties are sometimes imposed when employers are found to have violated the law. This approach, consistent with the goals of the 1986 laws which first imposed documentation requirements for workers, nonetheless is fraught with concerns.

In FY 2010, ICE audited more than 2,740 companies and levied \$7 million in civil fines on businesses that employed unauthorized workers.¹⁷ In January 2011, ICE announced the creation of a new Employment Compliance Inspection Center with the sole purpose of conducting large audits.¹⁸ ICE plans to expand its ICE Mutual Agreement between Government and Employers (IMAGE) program, but since the program's inception in 2006, only 115 employers have reportedly registered.¹⁹ While the program is intended to build better relationships between ICE and private-sector employers, the program offers no safe haven from ICE enforcement actions or fines, and requires companies to submit to a complete audit of their I-9 files.

ICE claims that worksite enforcement investigations prioritize critical infrastructure and cases in which there are "egregious violations of criminal statutes by employers and widespread abuses."²⁰ ICE looks for evidence of "mistreatment of workers, along with evidence of trafficking, smuggling, harboring, visa fraud, identification document fraud, money laundering and other such criminal conduct."²¹ Furthermore, ICE has stated that it prioritizes criminal employers over any unauthorized workers they encounter in the course of the audits.

Recent ICE audits suggest that there is a disconnect between stated priorities and practice. Among the concerns are ICE criteria for selecting employers for audits, and how well ICE field offices comply with policy directives from headquarters. The extent to which ICE communicates with the Department of Labor (DOL) about potential labor and employment law violations has also been sharply criticized. However, DHS and DOL recently issued an updated Memorandum of Understanding (MOU) regarding coordination of worksite and labor law enforcement. As part of the agreement, DHS agrees to refrain from engaging in civil immigration enforcement activities if DOL is investigating a labor dispute, with some significant exceptions.²² This memo marks an important step forward toward ensuring that labor laws are enforced and workers' rights are protected. Advocates will continue to monitor the implementation of the MOU by both the national headquarters and ICE field offices.

In several high-profile cases, it appears that employers with no egregious violations have been targeted. For example, in July 2009, ICE audited American Apparel, a Los Angeles-based company, although no allegations of wage, hour, or working condition violations were made. The company is reportedly the largest clothing manufacturer in the U.S., employing some 4,000 workers at average pay of thirteen dollars per hour.²³ The company dismissed 1,600 workers after it was unable to document their status or correct problems with their employment records.²⁴ The company subsequently suffered significant financial losses that it attributed to lost productivity, and its stock dropped 41% after reporting losses in the second quarter of 2010.²⁵

There is also a lack of uniform and consistent enforcement standards. The agency has not delineated clear standards for technical versus substantive I-9 violations, and different ICE auditors may view the same evidence differently. The fine structure for technical and substantive paperwork violations, as well as for the knowing employment of unauthorized workers, are set according to a fine schedule established by statute.²⁶ However, much discretion exists with ICE agents and auditors in determining which violations are fined, if any. This leads to uneven, and occasionally disproportionate, penalties on employers.²⁷

Finally, while ICE's focus is on employers, workers are still placed in removal proceedings if the worker is prioritized as a "criminal alien" based on his or her criminal record—raising the same

issues discussed below on the over-reach of the term “criminal alien.” ICE has not shared data about the number of immigrants encountered in the course of I-9 audits who have been detained or deported, or for what crimes they have been convicted. Evidence has shown that ICE’s definition of a criminal alien is broad, and immigrants with misdemeanors or other low-level criminal records—not serious or violent criminals—can be deported.²⁸

3. Enforcement Priorities: State and Local Partnerships

287(g) and Secure Communities

At an October 6, 2010, press conference, Secretary Napolitano announced that DHS had removed more than 392,000 individuals in FY 2010, including “unprecedented numbers of convicted criminal alien removals.” Of the 392,000 removals in FY 2010, more than 195,000 were classified as “convicted criminal aliens,” which was 81,000 more criminal removals than in FY 2008.²⁹ Much of this shift has been credited to ICE’s continued partnerships with state and local law-enforcement agencies through the Criminal Alien Program (CAP), 287(g) program, and the Secure Communities program, which merge the federal immigration enforcement system with state criminal justice systems. Named for the authorizing provision of the Immigration and Nationality Act (INA), the 287(g) program trains local and state law enforcement to perform immigration law enforcement functions pursuant to a Memorandum of Agreement (MOA). ICE’s Secure Communities automatically runs fingerprints collected by local law-enforcement agencies at time of booking through DHS immigration records, in addition to FBI criminal databases. The stated objective of both of these programs is to target dangerous criminals and persons who pose a threat to the community. In reality, however, they cast a wide net, resulting in the identification and deportation of persons charged with or convicted of low-level crimes, or who have no criminal history at all. These collaborations generate continuing concerns about prioritization within ICE’s partnerships with state and local law-enforcement agencies.³⁰

Many reports from government and non-governmental sources point to the fact that the 287(g) program is not achieving its objectives.³¹ A January 2009 U.S. Government Accountability Office (GAO) report found that ICE had failed to articulate the 287(g) program’s objectives and had not consistently articulated how local partners use their 287(g) authority.³² A March 2010 report by the DHS Office of Inspector General (OIG) found that ICE and its local law-enforcement partners had not complied with the terms of their 287(g) MOAs.³³ In September 2010, the DHS OIG released an updated report on the Performance of 287(g) Agreements, which largely echoes the findings of the first report.³⁴ The new report contains additional recommendations to ensure that ICE establishes a comprehensive approach for determining whether 287(g) program goals for removing criminal aliens who pose a threat to public safety are being achieved.

The Migration Policy Institute (MPI) has found that, nationally, the 287(g) program is not targeted toward serious offenders. Only about half of the program activity involves people who have committed felonies or other serious crimes, while the other half is people who have committed misdemeanors or traffic offenses. In Cobb County, GA, for example, traffic offenders now account for nearly 70% of 287(g) detainees.³⁵

Similarly, Secure Communities has come under increasing criticism because its use seems to undermine stated ICE priorities. Pursuant to ICE guidance, Secure Communities prioritizes the

immigrants it identifies using a three-level prioritization system: Level 1 being the most serious criminal offenses, and Levels 2 and 3 being less-serious offenses.³⁶ According to ICE data, between October 2008 and February 2011, Secure Communities resulted in 94,218 removals, of which 26% were for Level 1 crimes, 14% were for Level 2 crimes, and 32% were for Level 3 crimes. Twenty-nine percent of removals were of non-criminals.³⁷ Examinations of ICE's Secure Communities statistics reveals that those identified by Secure Communities include large numbers of individuals with no criminal history, individuals convicted of low-level crimes, and legal immigrants with prior convictions that make them deportable.³⁸

By partnering with state and local police agencies, ICE has put non-ICE personnel at the front lines of immigration enforcement, and because law-enforcement agencies (LEAs) have their own local interests and priorities, it is very likely that non-priority immigrants will continue to be funneled to ICE and subjected to immigration enforcement actions.

Immigration Detainers

ICE's use of immigration detainers has become the entry-point for rapidly expanding the pool of removable immigrants identified through programs such as 287(g) and Secure Communities. An immigration detainer is an official request from ICE to another LEA—such as a state or local jail—that the LEA notify ICE prior to releasing an individual from local custody so that ICE can arrange to take over custody within a designated 48-hour time period, during which the LEA can continue to detain the individual.³⁹ Once an LEA has a person in custody and ICE determines that the person may be deportable, the detainer is the method for holding the person until ICE takes custody.

As the use of detainers has increased with the expansion of the 287(g) and Secure Communities programs, advocates have become increasingly concerned about the detainer issuance process. Specifically, 1) there has been a lack of clarity regarding ICE's detainer issuance process; 2) detainers are issued to persons charged with crimes, but not convicted of crimes, without regard to the severity of the person's criminal history; 3) local law-enforcement agencies are unaware of their responsibilities regarding the 48-hour rule and their option to not comply with detainers; 4) there is no guidance for lifting a wrongfully issued detainer; and 5) there is no standard of proof of removability articulated before a detainer can be issued. To its credit, the agency engaged its critics on this issue and in December 2009 agreed to issue detainer guidance that addressed these concerns.

Eight months later, on August 1, 2010, ICE released a draft detainer policy and granted the public 60 days to comment on the draft.⁴⁰ The following day, ICE issued Interim Guidance on Detainers that closely parallels the draft.⁴¹ While the draft policy shows an effort to clarify ICE's detainer policies, and the opportunity for public comment is a key step forward, the draft guidance did not adequately address the concerns voiced by advocates. The American Immigration Council, as part of a coalition of concerned groups and experts on immigration, submitted comments critiquing the detainer guidance.⁴² With regard to prioritization, the draft policy also does not mention nor reflect the June 30, 2010, memo on ICE's civil enforcement priorities.⁴³ It allows for placing detainers on individuals following arrest, rather than conviction, in direct contradiction to the "Morton Memo" (discussed above), and fails to include instruction regarding exercising discretion consistent with enforcement priorities.

The American Immigration Council and other advocates were hardly alone in their critique, as ICE received over 20,000 comments.⁴⁴ Given that volume, it is somewhat understandable that the agency has yet to release finalized policy, but it is critical that ICE engage and respond to the very serious critique laid out by critics. The detainer issuance process is a concrete way in which ICE can enforce its own enforcement priorities. By limiting the universe of individuals to whom ICE issues detainers, the agency could take a serious step toward its stated goal of targeting serious criminals. However, if ICE fails to advance its own enforcement priorities through its detainer policy, it will signal a lack of conviction on the issue and will further undermine the agency's credibility concerning enforcement priorities.

For these reasons, the universe of individuals identified and removed through 287(g) and the Secure Communities program is much larger than those convicted of serious criminal offenses. As long as local police have the ability to arrest—on minor charges—large numbers of persons they suspect may be deportable immigrants, and as long as ICE continues to respond to low-level “hits,” the number of deportations of low-level and non-criminal immigrants will greatly exceed the number of serious Level 1 criminals removed.

Generally, there has been a lack of demonstrated will on the part of ICE to enforce its own priorities. In fact, priorities appear to come into play only when there is a lack of resources to detain everyone subject to removal, tying prioritization to funding, rather than an underlying belief that certain types of enforcement are not in the public interest. ICE's prioritization memos include disclaimers stating that “nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of other aliens unlawfully in the United States.” In other words, while ICE's priorities are clearly articulated in memos, the reality in practice is that ICE can and will continue to identify, detain, and remove as many persons as funding allows.

B. USCIS: Balancing Benefits and Enforcement

From the inception of DHS, USCIS has occupied an uncomfortable position, adjudicating immigration benefits within a DHS culture that is highly slanted towards removal and national security enforcement. During the early years of DHS, backlogs and delays caused by prolonged FBI background checks created significant hardship for applicants, many of whom waited for years to complete naturalization cases. Although streamlined processing and better risk management reduced many of those backlogs in recent years, there is a continuing concern that USCIS may once again be facing a self-made conflict between customer service achievements and fraud and national security enforcement.

With respect to immigration priorities, USCIS has made some significant strides in its humanitarian mission. In several ways, 2010 was a banner year for the agency. For example, USCIS granted refugee status to nearly 75,000 applicants admitted to the U.S. in FY 2010, the highest number in over a decade.⁴⁵ Likewise, the 10,000 visa cap for U victims of crime was reached for the first time.⁴⁶ And the agency contributed tremendous support toward citizenship education and preparation programs by offering over \$8 million to 56 organizations nationwide through the Citizenship and Integration Grant Program.⁴⁷ The program aims to provide services to approximately 25,000 lawful permanent residents from over 70 countries living in new and traditional immigrant destinations. The Office of Citizenship also launched the first phase of the Citizenship Resource Center, a free online resource for citizenship information, study materials, and

lesson plans for the naturalization test. These tools are being made available in advance of the planned Citizenship Public Education and Awareness Initiative, a media campaign due to run from April to September 2011, that will target permanent residents eligible to naturalize and promote the importance of U.S. citizenship. Finally, the Office of Citizenship is playing a prominent role in the White House Domestic Policy Council's inter-agency effort to support immigrant integration.

1. Expanding Enforcement Priorities

Despite the many successes that USCIS accomplished in terms of benefits adjudication and outreach, one of the chief critiques of USCIS in 2010 was a growing sense that the agency continued to be caught between its customer service goals and an overemphasis on national security interests. For instance, USCIS listed strengthening national security safeguards within the immigration system and combating fraud as its top priority.⁴⁸ These objectives in themselves are not surprising, but rather than emphasize these factors as separate objectives, they should be part of the basic expectation for conducting a thorough adjudication. The USCIS Office of Fraud Detection and National Security (FDNS) plays an ever-more prominent role in the agency, raising questions about whether fraud and national security detection has become an end in itself. Created in 2004 with 100 positions, it now has 627 positions across all USCIS offices in the U.S. and overseas.⁴⁹ In 2010, FDNS was promoted to the level of Directorate, which, in its own words, "elevated the profile of this work within USCIS."⁵⁰ Advocates and insiders alike continue to report that this emphasis on fraud detection without clear guidance sends the message that a criminal standard of "beyond a reasonable doubt" is sometimes the norm for benefits adjudications, rather than taking all factors into account for deciding eligibility.⁵¹ FDNS reported that 29,559 cases and leads were referred based on fraud concerns to its office in FY 2010, and while 56% were found to involve fraud (although fraud itself was not defined), fewer than 7% of the total referrals were sent to ICE for further action.⁵² The number of national security referrals has reportedly remained constant since 2008, when reliable data collection began, but FDNS declined to provide further data for this report.⁵³

Advocates have questioned whether the disproportionate focus on fraud could be resolved with further training, despite the fact that FDNS Immigration Officers receive extensive and ongoing instruction already.⁵⁴ The new Chief of the USCIS Training and Career Development Division, however, will reportedly be prioritizing trainings on interpretation and application of the "preponderance of the evidence standard," and defining "fraud." Although it remains unclear whether the overemphasis on enforcement is an outgrowth of culture or training, these additional training efforts are at least one indicator of the agency's interest in tackling the problem.

2. Requests for Evidence

One of the primary criticisms of USCIS in 2010 was the proliferation of Requests for Evidence (RFEs). USCIS is authorized under 8 CFR §103.2(b)(8) to issue an RFE to an applicant or petitioner seeking immigration benefits when the agency needs initial or additional evidence to determine an individual's eligibility. Advocates and immigration attorneys have witnessed an increasing number of RFEs being issued, many of which contain unclear or excessive demands for additional supporting documentation, resulting in less predictability and greater confusion in the application and petition process. Complaints about RFEs also garnered the attention of the USCIS Ombudsman, who reported that RFEs had problems with redundancy, boilerplate

language, burdensome and intrusive requests, incorrect references to regulations, inappropriate questions regarding the petitioner's business determinations, mischaracterization of the nature of a business, unfounded assumptions, lack of explanation regarding why additional corroboration was sought, and unnecessary requests of petitioners to prove alternative bases for eligibility.⁵⁵

As part of an effort to improve the clarity and consistency of RFEs, USCIS announced at a stakeholder meeting on April 4, 2010, the creation of the "RFE Project."⁵⁶ This task force considered RFE-improvement recommendations made by the Ombudsman in June, including that USCIS should: 1) implement new and expanded training for adjudicators on applying the "preponderance of evidence" standard in adjudications; 2) require adjudicators to specify the facts, circumstances, and derogatory information prompting an RFE; 3) establish clear adjudicatory L-1B visa (Intracompany Transferees—specialized knowledge) guidelines through the notice and comment process of the Administrative Procedures Act; and 4) implement a pilot program requiring 100% RFE review, as well as completion of an adjudicative checklist prior to issuance of an RFE on one or more product lines.⁵⁷

In response to these recommendations, USCIS has reiterated that the purpose of the RFE Project is to ensure that RFEs are consistent across Service Centers, relevant to the adjudication, flexible to the needs of each case, and clear and concise.⁵⁸ The RFE Project plans to develop a library of RFE templates for adjudicators to use, accompanied by training on evidentiary standards.⁵⁹ The first five draft templates, pertaining to petitions for nonimmigrant P visa classification, were posted online for public comment in late February 2011.⁶⁰ In addition, the Task Force is working on a Standard Operating Procedure to direct adjudicators as to when issuance of a Notice Of Intent to Deny (NOID) or an RFE is most appropriate.⁶¹

USCIS disagreed with some of the Ombudsman's recommendations and articulated its reasons in a formal response in November.⁶² First, it argued that 100% supervisory review of RFEs would be too time consuming and resource intensive. The agency prefers to utilize supervisory review for a limited time during a training period.⁶³ Second, it finds a uniform checklist to be impracticable given the many classifications that can be sought on a single petition, but asserts that its planned trainings will provide the consistency sought through the checklist.⁶⁴ Finally, it elaborately discussed why its current L-1B decision-making is consistent with agency policy, and that formal notice and comment to change its guidance is unnecessary. Instead, USCIS anticipates that its plan to issue one or more L-1B precedent decisions through the AAO, a new "specialized knowledge" memorandum, and changes to the Adjudicator's Field Manual (AFM) should suffice.⁶⁵

In the meantime, however, Service Centers continue to issue RFEs that probe ever deeper into one's eligibility for an immigration benefit or classification. For example, Service Centers have issued RFEs on I-140 petitions in which they pick apart legitimate employer requirements on a labor certification that has already been vetted and approved by the Department of Labor.⁶⁶ It also remains unclear which long-standing policy guidance will be adhered to by USCIS officers when considering issuance of an RFE. For instance, immigration attorneys report that Service Centers are regularly issuing RFEs on extensions of stay despite agency guidance that explicitly advises officers not to readjudicate cases unless there is a material change that would impact the application or petition.⁶⁷ USCIS was also extremely reluctant to release adjudicator guidance related to RFEs issued on H-1B petitions that were related to a Benefits Fraud

Assessment Report, despite concerns that the guidance contravened established law, regulations, and policies.⁶⁸

In the end, advocates are cautiously optimistic that the work of the RFE Project will improve the adjudicative process, but it is too soon to assess any real change. The proposed templates are promising, but public feedback on them must be taken into account, and—above all—training and a Standard Operating Procedure are essential to ensuring that the right RFE is issued to the right person at the right time.

3. E-Verify

DHS continues to promote the expansion of E-Verify, even as its critics argue that E-Verify without a legalization program will not end unauthorized immigration and is likely to cost U.S. citizens their jobs and drive undocumented workers further into the shadows. While many grudgingly recognize that DHS has worked diligently to improve the program and minimize errors, advocates are concerned that DHS has prioritized the expansion of the program over ensuring that employers use it correctly.

The E-Verify system allows employers to electronically verify the work authorization status of their employees. The program has grown dramatically in recent years, and is now utilized by over 230,000 employers at more than 800,000 worksites. Between October 2009 and August 2010, E-Verify processed roughly 14.9 million queries from nearly 222,000 participating employers.⁶⁹ E-Verify is a largely voluntary program. However, as of September 2009, all federal contractors are required to enroll in and use the E-Verify system, and several states have also made the program mandatory for some state and private employers.⁷⁰

In 2010, DHS unveiled a series of initiatives to “strengthen the efficiency and accuracy of the E-Verify system.”⁷¹ First, DHS’s Office for Civil Rights and Civil Liberties produced two informational training videos in Spanish and English. Second, DHS expanded E-Verify’s photo matching tool, which allows employers to check the documents employees present against the photos in government databases, to include U.S. passport and passport card photos. The photo matching tool also includes employment authorization documents and permanent resident cards. In addition, the E-Verify web interface was redesigned to provide employers with “more streamlined access” and to offer “an expanded customer service section.”⁷²

DHS created an informational telephone hotline for workers with questions about E-Verify or complaints about possible discrimination or employer misuse of the system. The hotline is available in English and Spanish and is expected to expand to additional languages, and operates from 8 a.m. to 5 p.m. weekdays. DHS signed a Memorandum of Agreement with the DOJ’s Office of Special Counsel for Unfair Immigration-Related Employment Practices which establishes a streamlined process for referring potential cases of discrimination and employer misuse.⁷³ Finally, DHS implemented a “self-check” pilot program in 2011, which allows workers to self-verify work authorization status and be made aware of any errors contained in their personal records.⁷⁴

In January 2011, USCIS reported the results of a customer satisfaction survey which surveyed more than 4,500 employers, chosen at random, who use E-Verify, and evaluated key aspects of the E-Verify program including registration, tutorial, ease of use, and customer service.⁷⁵ USCIS

found that “The E-Verify Program works exceptionally well, according to employers, and is a very promising tool for ensuring a legal workforce in the U.S.”⁷⁶ However, this is inconsistent with other reports that employers have found the system expensive and difficult.⁷⁷

While USCIS has taken positive steps forward, concerns over E-Verify remain. The GAO also expressed concerns in its January 2011 report, entitled, “Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain.”⁷⁸ The GAO study highlighted the fact that E-Verify remains unable to detect identity fraud. A December 2009 study found that approximately 54% of unauthorized workers screened through E-Verify were erroneously confirmed as work authorized, usually because they used borrowed or stolen documents that were undetected by the system.⁷⁹ Workers may still receive erroneous nonconfirmations,⁸⁰ some of them due to inconsistencies in how personal information, such as surnames, are recorded. Workers who naturalize, marry, or divorce, or who have multiple or hyphenated surnames, may receive erroneous results from E-Verify. Furthermore, GAO found that workers are limited in their ability to correct errors in their personal information maintained by DHS. In some cases, workers must file a Privacy Act or Freedom of Information Act request to gain access to their personal records—a daunting process that could take more than 104 days.⁸¹ Due to a lack of coordination among the various components of DHS, it is even more difficult for employees to locate the error and resolve it with the proper agency. The GAO has recommended that the Secretary direct the heads of DHS components to coordinate with one another to develop procedures to correct inaccurate or inconsistent information in their records and systems that may lead to erroneous E-Verify results.

GAO also found that USCIS remains unable to ensure employer compliance with the program. Yet employer misuse of the program still appears to be a problem. The Monitoring and Compliance Unit, which electronically monitors employer behavior, has been expanded, and more staff will be hired in 2011. However, there is some behavior that cannot be detected electronically, such as a failure to inform employees of a tentative nonconfirmation (“TNC”) (which deprives the employee of the opportunity to resolve an error) or terminating employees who receive a tentative nonconfirmation. According to a 2009 DHS-commissioned study, 42% of workers report that they were not informed by their employer of a TNC, and over 66% of employers took adverse actions against workers receiving a TNC.⁸² While DHS is conducting some on-site audits of employers using E-Verify, the resources devoted to this are not growing rapidly enough to match the program’s expansion. Furthermore, USCIS does not have any authority to penalize employers for intentional misuse of E-Verify other than to terminate their participation in the program. Because additional penalties can only be created through legislative action, DHS must do more to educate employers as they use the program and keep pace with employer enrollment.

4. Administrative Reforms

Despite the Department’s emphasis on comprehensive immigration reform, a series of leaked memos suggested that the Department had been considering some modest changes through revisiting policies and legal interpretations that many considered overly restrictive, inaccurate, or impractical. In July, an 11-page draft memo detailing these options was leaked to Senator Charles Grassley, who released it publicly in an effort to embarrass and chastise the Administration for considering “backdoor amnesty.”⁸³ Prior to Senator Grassley’s release of the memo, he and six other senators had written to President Obama warning against the executive

branch using its authority, such as deferred action and parole, to benefit large numbers of unlawful immigrants.⁸⁴

The draft memo gave immigration reform advocates hope that USCIS was open to revisiting past interpretations of the law, applying it more generously, and expanding the use of discretionary authority to benefit people with substantial ties to and equities in the United States. All of the recommendations in the memo had been made previously, either within the agency or by advocates; none of them were a surprise to immigration attorneys. A more politically savvy analysis of possible administrative reforms, written by DHS headquarters and also leaked to Senator Grassley, discussed many of the same options, but with a greater eye to the impact administrative relief efforts could have on CIR. Despite allegations to the contrary, the memos noted that deferred action for the full undocumented population would be highly impractical and unfeasible. The vast majority of the ideas—changing how waivers for family members eligible to apply for adjustment of status are handled (allowing the waiver to be processed before the family member leaves the U.S.), or creating more efficient processes for adjudicating employment visas—had the potential to help numerous people and were well within existing law.

In both instances, critics such as Senator Grassley and Congressman Lamar Smith, accused the Administration of hypocrisy, charging that that USCIS appeared to have a “backdoor runaround” “non-legislative version of amnesty.”⁸⁵ Regrettably, USCIS retreated under pressure rather than defending its initiatives. USCIS Director Alejandro Mayorkas deflected questions on these initiatives, stating in response to an American Immigration Lawyers Association (AILA) inquiry about the memo, “We continue to maintain that comprehensive bipartisan legislation, coupled with smart effective enforcement, is the only solution to our nation’s immigration challenges.”⁸⁶ By the time news of these memos broke, DHS was well on its way to exceeding its deportation removal record of the prior year, and queries about the memo were often quickly rebuffed by Secretary Napolitano and others by invoking the number of removals DHS had achieved.

Rather than shy away from these proposals, both USCIS and DHS should vigorously stand up for the authority of the executive branch to implement the law consistent with its own policies and priorities. The example of the past Administration should not be lost here. After the failure of the Senate’s comprehensive immigration reform bill in 2007, DHS Secretary Chertoff and Commerce Secretary Gutierrez launched a 26-point administrative plan—utilizing regulations and policies—to implement some of their key objectives, such as mandating E-Verify for federal contractors. Advocates and Congress balked, fought, and sometimes defeated those proposals, but Secretary Chertoff stood firm in his conviction that he was empowered to interpret the laws and execute them as the head of an executive branch agency. The Obama Administration and DHS leadership should take a page from their predecessor’s book by implementing the law consistent with their policy objectives. As long as their interpretation of existing law is credible, the tremendous deference given to agency interpretation by the courts provides ample legal cover. And as long as their interpretations of the law are made with the best interests of the country in mind, they should not be afraid to defend those actions in front of Congress.

C. CBP: A Quiet Expansion of Its Enforcement Mandate

In contrast to ICE, which spent much of 2010 laying out its enforcement priorities publicly, CBP spent 2010 quietly expanding its enforcement mandate at certain ports of entry. Even more than USCIS,

CBP faces a challenge of balancing its pro-active mission, which CBP Commissioner Alan Bersin has characterized as facilitating the movement of people and commerce, with its dual immigration functions of granting the “benefit” of admission while enforcing immigration and customs laws at and near the border. Advocates report that CBP has been going beyond its traditional role of assessing admissibility and, instead, re-evaluating the merits of an underlying visa petition. Although CBP has *de novo* review authority, regularly revisiting an individual’s visa eligibility at a Port of Entry (POE) is an inefficient use of CBP resources, generates inconsistent adjudications between government agencies, and makes it extremely difficult for employers and travelers to rely on the finality of agency decision-making. For example, CBP is reassessing foreign business travelers’ visa eligibility, rather than reviewing admissibility alone, and turning people around at the airport.⁸⁷

There are also reported instances of CBP asking a business traveler questions about his/her employer—knowledge that he/she does not likely possess.⁸⁸ CBP often does not have the knowledge of complex visa requirements and/or the traveler does not possess that knowledge, because they are not required to do so (i.e., corporate papers). Neither CBP nor the traveler has the documents in their possession required to make determinations on such complex applications. Although AILA raised this issue with CBP recently, it is unclear whether new guidance will be issued and, if so, by what means it will be disseminated and implemented in the field. At least some CBP officers have shifted to a more enforcement-focused approach in light of the poor U.S. economy; they perceive themselves as not only the protectors of America’s borders, but of its workforce as well. Many business travelers facing refusals—and, worse, expedited removals—report that CBP told them that there are “enough workers in the U.S.”

Further questions are raised about whether the increasing amount of money spent on the Border Patrol is a wise prioritization of resources. Since 2005, the average yearly budget for the Border Patrol has increased by \$300 million, despite the fact that the number of apprehensions of people crossing the border illegally has dropped.⁸⁹ During that same time period, government expenses on apprehensions at the border have risen 500%; from roughly \$1,400/migrant in 2005 to over \$7,500/migrant in 2011.⁹⁰ In these tough economic times, when illegal border crossings are in a downward trend, CBP should re-evaluate its need for and allocation of ever-increasing expenditures.

III. TRANSPARENCY

As DHS priorities are being formulated, challenged, and reevaluated, the Department’s decision-making processes become increasingly critical. Do stakeholders understand how policies are being made? Is there ample inter-agency coordination to ensure implementation of a cohesive department-wide agenda? Are agencies arriving at consistent interpretations of the law, and are headquarters decisions uniformly operationalized in the field? Does the Department seek and incorporate meaningful input from field officers and immigrant advocates who engage with DHS policies on a day-to-day basis? Do stakeholders know how to access these processes for voicing their concerns? The answers to these questions guide this report’s assessment of DHS’s and its component agencies’ policy-making procedures. Overall, DHS does an adequate job of engaging communities, but with varying outcomes. While USCIS and ICE have made some strides in their efforts to increase transparency, CBP largely continues to keep itself inaccessible and its decision-making behind closed doors.

A. USCIS

1. Stakeholder Engagement

As last year's DHS Progress Report noted, of all the DHS immigration agencies, USCIS has taken the lead in soliciting meaningful public input on a wide range of issues. The USCIS Office of Public Engagement (OPE) coordinates numerous public stakeholder meetings, including quarterly meetings with Director Mayorkas, plus collaboration sessions to gather technical advice on more specific topics.⁹¹ It also hosted listening sessions and webinars in English and Spanish throughout the year. This stakeholder engagement was particularly important during the aftermath of the Haitian earthquake. USCIS quickly used its network to disseminate information by national teleconference about Haiti, including the registration process for TPS, and provided much-needed clarity about how deferred action and prosecutorial discretion would be employed for Haitians, as well as the process for paroling Haitian orphans into the country. The utility of strong public engagement was also evidenced in USCIS's outreach to engaged stakeholders regarding the Office of Citizenship's plans to launch a public-education campaign on the rights, responsibilities, and importance of U.S. citizenship.⁹²

It can be easy to take for granted the significance of public outreach, as in many ways the public should expect the government to listen and respond to concerns, but the level of commitment to gathering stakeholder input at USCIS marks a new stage in public engagement. Although Washington-based organizations generally have some access to the agencies, USCIS has expanded outreach and access to stakeholders around the country, bringing Washington and regional NGOs to the table at the same time. Moreover, it has provided a broader platform for input from all stakeholders—including internal stakeholders—in two complementary ways.

First, in April 2010, USCIS launched a Policy Review Survey to re-examine its adjudication and customer-service policies. The USCIS workforce and external stakeholders were invited to participate to determine priorities for this review.⁹³ By July, nearly 5,600 stakeholders had responded and helped dictate the first ten areas under review.⁹⁴ Internal working groups were formed to begin a comprehensive review of all related policy memoranda. USCIS sees this Policy Review as part of its obligation to effectively administer the immigration system with "fair, consistent, and prompt decisions for the public it serves."⁹⁵

Second, USCIS commenced an innovative memo review process that invites the public to comment on draft and interim memos before they go permanently into effect.⁹⁶ Both the draft memoranda and the final versions are catalogued online; a total of 15 final memoranda were issued in 2010.⁹⁷ The Office of Public Engagement, which manages the program for the agency, is currently evaluating its impact. Informally, however, it appears that the process has the potential to not only provide more meaningful contributions from the public, but also to give rank-and-file agency employees a chance to comment on national policy decisions. This process offers an opportunity to institutionalize more give and take within the agency, serving as a reminder that policymakers must be mindful of a wider audience than the Department in making decisions. Putting these procedures in place now also paves the way for meaningful engagement when comprehensive immigration reform finally passes, potentially avoiding some of the hasty interpretations and bad policy that arose following both the 1986 legalization program and the 1996 immigration overhaul.

These initiatives help demonstrate USCIS's commitment to reviewing the consistency and fairness of current agency policies. Among USCIS Director Mayorkas' top strategic goals for 2011

is to “promote quality and consistency in the administration of our immigration laws.”⁹⁸ He acknowledged that “[USCIS has] a considerable amount of work to perform to achieve the consistency the public deserves. In fact, there are areas in which our policies are not necessarily consistent or consistently applied.... [C]onsistency is a critical attribute.”⁹⁹ Stakeholder input in this process is extremely valuable, but it is worth little if memoranda subsequently get mired in internal bureaucracy and therefore cannot be issued in a timely way. Recognizing that memo drafting and issuance is a deliberative process, USCIS must be sure to strike the appropriate balance between proceeding with caution and not proceeding at all.

An additional challenge going forward is finding the best way to ensure continued public engagement. As the initial review of the public comment process occurs, USCIS should continue to examine making comments public, weighing what issues are more appropriately matters for regulation rather than memorandum, and ensuring that USCIS staff are fully engaged in vetting and thinking through relevant comments.

2. Administrative Appeals Office Precedent Decisions

In another departure from the status quo, the AAO conducted its first listening session with stakeholders in October, at which time the AAO issued its first two precedent decisions in 12 years¹⁰⁰ and expressed its intention to issue many more.¹⁰¹ Precedent decisions are issued with the concurrence of the Attorney General and, once published by the Department of Justice, establish a binding rule for DHS employees. For the most part, the issuance of more precedent decisions is a welcome development since they should provide clear guidance and promote more consistent adjudications. Director Mayorkas himself said, in regard to the issuance of precedent decisions, that there is a “need for guideposts that not only achieve consistency but predictability when coming before the agency.”¹⁰²

Additional engagement from the AAO is an important goal and bears watching, given that its precedent decisions can be another vehicle for policy-making that is less regulated. Critics have noted that the AAO engages in a *de novo* review of facts and law, but rarely provides parties an opportunity to brief the issues not considered below.¹⁰³ In addition, the AAO does not operate according to detailed regulations, as does the Board of Immigration Appeals.¹⁰⁴ It does, however, offer a 16-page document online that provides an overview of the precedent-decision process.¹⁰⁵ The AAO also consults regularly with the USCIS Office of the Chief Counsel on interpretations of law, thereby placing the agency and arbiter in inappropriate *ex parte* contact. Finally, and perhaps most importantly, the development of law and policy via AAO precedent decision can be disproportionately determined by the skill of the attorney (or applicant *pro se*) filing the appeal.¹⁰⁶

3. Freedom of Information Act (FOIA) Disclosure Concerns

The general impetus towards revising and creating policy with the public in mind is worth applauding. In terms of numbers, USCIS should be commended for the resources it has dedicated towards reducing the FOIA backlog, from over 88,000 cases in 2006 to approximately 8,000 cases by the end of FY 2010—despite an increase in the number of FOIA requests.¹⁰⁷ While these figures demonstrate an improvement in the quantity of FOIA requests more timely processed, advocates have been disappointed with the quality of the resulting disclosure. Despite USCIS assurances that it has adopted a presumption in favor of disclosure—“When in

doubt, openness prevails,”¹⁰⁸—it continues to be difficult to obtain substantive information about current practices or policy, leading unnecessarily to litigation. Advocates charge that there is a lack of consistency over whether and how information is disclosed and point out that costly and unnecessary litigation is sometimes required.

For example, USCIS released incomplete and heavily redacted documents in response to an AILA FOIA request for documents concerning the adjudication of H-1B temporary-worker petitions, including guidance issued to field adjudicators about processing H-1B petitions, issuance of RFEs, its H-1B Fraud Referral Sheet, and its Compliance Review Worksheet for on-site inspections of businesses.¹⁰⁹ Because of USCIS’s inadequate response, the Legal Action Center (LAC) of the American Immigration Council filed a complaint on behalf of AILA in district court in July 2010 to seek to compel release of the requested information. This case currently remains pending, although following suit, a limited number of additional documents were released by USCIS.¹¹⁰ Meanwhile, H-1B adjudications remain governed by the undisclosed guidance. The FOIA problems presented in this case do not stand alone. TechServe Alliance, a company that recruits information technology (IT) workers, filed suit against DHS and USCIS to compel disclosure of H-1B-related policies, after they refused to respond to a FOIA request.¹¹¹ More than three months later, USCIS released 286 documents in full, 71 in part, and 695 blank pages without adequate explanation of the limited disclosure.¹¹²

USCIS’s commitment to transparency must be a two-way street. Stakeholder engagement is a means for the public to share information with the agency and for the agency to illuminate its procedures and policies. But this commitment must penetrate all offices, most especially FOIA. As LAC aptly stated in its court complaint, the “reliability and fairness of an adjudication process...can only be evaluated if the procedures and actions of the government agency are transparent.”¹¹³

Overall, USCIS’s transparency initiatives are to be commended. The ultimate success of these initiatives will turn on how well the process is incorporated into actual decision-making at the agency. The process has met with some frustration from USCIS employees who find it unnecessarily time consuming and inefficient. Balancing the demands of the internal and external stakeholders and creating a system that gives the public ample room to comment, while maintaining the government’s deliberative process protections, will be an important challenge in the coming year, but one worth pursuing. The value of the exercise has not been lost on other agencies; for instance, ICE recently posted its draft removal policy for Haitians for public comment.¹¹⁴ As with the USCIS critique, the sincerity of the engagement will only be evident as it becomes clear how much the comments are actually taken into account.

4. Waivers, Fees, and Funding

USCIS also advanced transparency through improvements to several key waiver procedures that were previously shrouded in mystery. For instance, the USCIS Ombudsman found that Form I-601, Waivers of Inadmissibility, required major revisions, because the waiver process was so challenging that many applicants were discouraged from applying and immigration attorneys counseled clients against filing for waivers.¹¹⁵ Limited information was available about one’s case status or where to file, and no standard process existed for expediting waiver processing.¹¹⁶ The Ombudsman also observed that there was inconsistent interpretation of the “extreme hardship” standard when adjudicating the inadmissibility waivers.¹¹⁷

USCIS has taken many positive steps towards improving the I-601 waiver process, in advance of and in response to the Ombudsman's report. USCIS revised Form I-601, developed a quality-assurance pilot program and an adjudicative checklist to better standardize adjudications.¹¹⁸ Its overseas case management system, "CAMINO," became operable for International Operations staff as of August 2010, making case processing times more accessible abroad.¹¹⁹ As of October, the agency was evaluating different organizational models and the prospect of concurrently filing the I-130 petition and I-601 waiver to determine the most efficient way to process waivers submitted around the world.¹²⁰ Interim guidance on criteria to consider for requests to expedite was issued to overseas field offices and that guidance was made available for public comment.¹²¹ USCIS routed many Forms I-601 filed overseas to domestic offices for adjudication, thereby reducing the total number of pending waivers by 42% in FY 2010.¹²² In conjunction with the issuance of more specific RFEs and caseload management improvements at the Ciudad Juarez Field Office (where the majority of Forms I-601 are filed), the Ombudsman expected that applicants would begin to see significant improvements.¹²³

In late November 2010, USCIS introduced the first-ever standardized fee-waiver request form, Form I-912.¹²⁴ The proposed form was vetted in the *Federal Register* in July and received significant stakeholder input.¹²⁵ It was issued with corresponding guidance on how to consistently process these new requests, and web-based training sessions followed.¹²⁶ As of February 2011, the approval rate of fee-waiver requests over the previous six months averaged 84%.¹²⁷

In addition to the fee-waiver request form, USCIS made other efforts to institutionalize its existing processes, including formalizing longstanding policies to expedite naturalization applications for members of the military.¹²⁸ These streamlined procedures facilitated USCIS's ability to naturalize the highest number of service members since 1955—a total of 11,146 members of the U.S. armed forces were naturalized in FY 2010.¹²⁹ The agency also conducted extensive outreach to members of the military and their families through seminars at military installations.¹³⁰ USCIS should be commended for its commitment to those who serve in the U.S. armed forces and for clarifying the naturalization processes that apply to them.

The new fee-waiver form was implemented in conjunction with a new fee schedule that took effect November 23, 2010.¹³¹ Fees increased by a weighted average of 10%. The N-400 naturalization application fee did not change. Immigration advocates were dismayed by the fee increase on several counts.¹³² First, there continues to be debate over whether some of the expenses included in the cost analysis, such as fraud and security costs, are fairly attributable to the application being adjudicated and should instead be funded through the appropriations process.¹³³ Second, the 10% fee increase comes only three years after fees were increased by an average of 66%, putting many benefits increasingly out of the reach of indigent applicants.¹³⁴ Third, although the USCIS Ombudsman claims that the reduction in new receipts has enabled the agency to cut processing times on certain petitions and applications, many advocates maintain that since fees were raised in 2007, the corresponding level of improvement in the quality or efficiency of adjudicative services has not kept pace.¹³⁵

As a fee-funded agency, the struggle to ensure that USCIS has the funds it needs to operate remains a point of controversy. The Obama Administration has recognized the need for greater appropriations, although the ongoing budget debate has seriously threatened existing

appropriations for USCIS. The Administration's FY 2011 budget included requests for more appropriated funds for refugee and asylum processing, military naturalization, and E-verify, and \$18 million dollars for the Office of Citizenship, much of which was slated to fund the citizenship grants program discussed above. There are some mixed messages about the importance of these funds, however. Director Mayorkas told stakeholders in June that USCIS had requested greater appropriations for FY 2011, but then testified before the House of Representatives Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law that "the agency would be able to remain true to its self-funding mandate by reducing costs through improved efficiency and modernization, and reap advantages through Transformation."¹³⁶ In its Annual Report to Congress, however, the Ombudsman called into question whether the agency could indeed continue to rely largely on self-funding, noting how difficult it is for the agency to accurately predict fee revenue several years in advance.¹³⁷

5. Transformation Initiative

USCIS continues to steadily move forward with "Transformation," its effort to convert to online account-based systems that receive and track benefit applications electronically.¹³⁸ The first phase is expected to roll out in Fall 2011 with the creation of initial accounts and core case-management capabilities on registrations for Temporary Protected Status (TPS), applications to extend or change status, employment authorization documentation requests, and applications for travel documents, among others. Four subsequent phases will expand implementation across all immigration benefits and services. All in all, the digitization of files and applications, as well as the online accessibility of a customer's pending matters, will eventually improve individuals' comprehension of how immigration processes proceed.

To its credit, USCIS has sought meaningful stakeholder input through a series of feedback sessions across the country in 2009 and 2010.¹³⁹ Additional webinars were planned for early March 2011.¹⁴⁰ Immigration attorneys and advocates have expressed concerns about access to the requisite technology, and privacy concerns about data contained in individual accounts and at public kiosks. Additionally, the private bar wants USCIS to ensure that customers using public kiosks get adequate time, space, and support while completing applications and conducting business online.

Some accusations have arisen that Transformation has been mismanaged, is over budget, and is behind schedule. The program was originally due to be completed in 2013 and is now set for 2022.¹⁴¹ The original Transformation contract was awarded to IBM for \$491.1 million and has been re-budgeted several times to an estimated \$2.2 billion.¹⁴² USCIS also reportedly had Congressional Appropriations Subcommittee reporting requirements that went unfulfilled.¹⁴³ Moreover, according to the DHS Assistant Inspector General for Information Technology, USCIS was not doing an adequate job of executing or capturing useful information from Transformation-related pilot programs due to "ineffective planning, management challenges, insufficient staffing, and limited post-implementation performance reviews."¹⁴⁴ USCIS disputes these claims, stating that Transformation is not currently over budget; the federal IT dashboard that tracks all major information technology projects includes figures for the underlying contract as well as other costs, such as government salaries, general expenses, program management support contracts, and infrastructure upgrades.¹⁴⁵ Director Mayorkas further explained that any increase in budget figures was the result of reporting the true cost of the initiative (including

personnel, overhead, and other expenses, rather than just contract costs), “resequencing” the project, costs shifting in time, and a contract protest beyond the agency’s control.¹⁴⁶

Stakeholders are being repeatedly assured that their concerns are paramount as Transformation progresses and that the new systems will be deployed slowly, carefully, and thoughtfully. The Office of Transformation Coordination has explained in response to criticism that Transformation does not include a new strategy for issuance of Notices to Appear (NTAs) and that ICE will continue to have the same access to information as it currently does—though, presumably, the information will be more precise and complete than it is at present.¹⁴⁷ Transformation does indeed look promising, but until the new system is rolled out, it is too early to tell whether stakeholder recommendations have been incorporated. In the meantime, USCIS will continue to be challenged by its outdated information and case-management technologies.¹⁴⁸

B. ICE

1. Stakeholder Engagement

Although ICE has not gone to the same lengths as USCIS to promote stakeholder engagement, it has markedly increased its willingness to meet with NGOs on enforcement-related issues. The Obama Administration has continued the work of the Enforcement Working Group, established during the previous Administration, to maintain communication between DHS and the NGO community. The Working Group meets quarterly and provides a forum for NGOs to direct questions to the appropriate people within the agencies. The Enforcement Working Group has become one of the primary means for obtaining information from ICE on issues including state and local law enforcement of federal immigration laws, detainers, worksite enforcement, prosecutorial discretion, and detention. Small subgroups of the Enforcement Working Group have also met with appropriate ICE and DHS staff on an ad hoc basis on discrete issues, including immigration detainers, the asylum-seeker parole memo, and the Secure Communities program.

Advocates generally appreciate these working group meetings as opportunities to relay questions and concerns to the agency and to hear from agency officials. However, advocates sometimes question the sincerity of ICE’s efforts to be transparent, and the impact that advocates’ feedback has had on policymaking. Of course, at issue is the fact that many advocates question DHS’s overall strategy with respect to immigration enforcement, and it is difficult to have meaningful dialogue about the specifics of how policies are implemented when there is little buy-in from the advocacy community to the notion that enforcement must be prioritized and expanded.

2. Transparency of the Detention Reform Process

Since the Obama Administration’s October 2009 announcement of detention reforms, the large Working Group has created two subgroups, one on health issues in immigration detention, and a more general detention subgroup.¹⁴⁹ The detention subgroups meet on a monthly basis with ICE’s Office of Detention Policy and Planning (ODPP) and discuss issues including the online detainee locator system, a Risk Assessment Tool, Alternatives to Detention, the need for legal orientation programs, and general issues surrounding civil detention. In particular, the working

group has pressed ICE and ODPP to make immigration detention more safe and humane, and pushed the agency to reconsider the types of immigrants placed in detention.

Positive accomplishments for ICE in 2010 include the hiring of 42 detention service managers,¹⁵⁰ holding a roundtable to learn about mental health issues within immigration detention, and developing a medical classification tool to be used by medical staff at detention centers.¹⁵¹ While some may question whether these accomplishments fit into the category of transparency, they represent concrete efforts to expand both the personnel who work with advocates and the tools they use to create a more transparent and accountable system.

While these results show a greater commitment to tackling structural issues within detention, results are more mixed with specific programs announced by ICE and DHS. For instance, advocates have called for a tool which would fairly assess an individual's potential flight risk or public safety risk, and would release individuals who do not represent threats of that nature. ICE is automating a Risk Assessment Tool that assesses the level and type of supervision or custody best suited for the immigrant based on their risk of flight and potential danger to the community, but advocates have not seen the tool and worry that it will continue to presume detention and require an immigrant to prove eligibility for release or other alternatives to detention.¹⁵²

Similar issues plague ICE's Alternatives to Detention (ATD) Program, a reform identified in the 2008 Transition Blueprint.¹⁵³ The ATD program, according to ICE, is designed to provide an alternative to detention for those immigrants who pose little flight or safety risk, as determined by the risk assessment tool.¹⁵⁴ While DHS completed successful pilots of the ATD program, it has yet to be implemented nationwide. Advocates have voiced a number of concerns about the piloted ATD programs: that ICE uses ATDs on people who pose no flight or public safety risk and who could be released on recognizance or bond; that ATDs do not accurately gauge an individual's risk to the level of supervision; that the program may place individuals in ATDs after they have already posted bond; and that instead of providing a true alternative, the program "treats people like detainees" by relying heavily on electronic monitoring as opposed to case management.¹⁵⁵ ICE estimated that to put an immigrant in the ATD programs costs at most \$14 per day and may cost as little as \$8.88,¹⁵⁶ while placing them in detention costs about \$122 per day, separates them from their family and caretakers, and imposes severe restrictions on access to lawyers.¹⁵⁷

Yet another area where policy and implementation are at odds with the efforts to revise Performance Based National Detention Standards (PBNDS), which govern the treatment of detainees and involve issues such as searches, transportation, and access to appropriate food, medical care, and legal information.¹⁵⁸ Advocates continue to criticize the basic assumptions of the standards, which are based on a penal rather than a civil model of detention. Moreover, the standards are not judicially enforceable (making it difficult for detainees and advocates to challenge abuse) and don't even apply to state and local jails holding immigration detainees unless doing so is explicitly written into the Intergovernmental Service Agreement with ICE.¹⁵⁹ Finally, the 2010 standards have not been implemented at any ICE detention centers, and even the 2008 standards have not been fully implemented nationwide. The 2010 standards were scheduled to be implemented at facilities holding 55% of the detained population by the end of 2010, and for 85% of the detained population by the end of 2011, but this schedule has been delayed—ICE claims by labor-management negotiations.¹⁶⁰ Whatever the reasons, these

failings and implementation setbacks have led, according to the Detention Watch Network, to “repeated, consistent and widespread complaints of human rights violations in detention facilities.”¹⁶¹

The problems with the current PBNDS framework came to a head in August 2010, when it was revealed that a male guard employed by the Corrections Corporation of America (CCA) groped a number of female detainees between April 2009 and May 2010 (he recently pleaded guilty to several charges).¹⁶² The harassment occurred while the guard transported female detainees from the detention facility to an airport for release—a violation of CCA’s contract with ICE, which mandates that detainees only be transported by members of the same sex.¹⁶³ The conduct was shocking enough in this lone instance, and the fact that similar incidents have happened before at the *same facility* makes it even more egregious that it occurred.¹⁶⁴ Clearly, ICE must prioritize bringing the PBNDS process to completion, as ensuring well-being and safety of detainees is a critical responsibility of the agency.¹⁶⁵

Generally speaking, the detention subgroup meetings with ICE have increased the level of transparency and communication between the agency and advocates. Information has been shared on a regular basis, ICE takes the time to listen to the advocates’ questions and concerns, and the agency has made adjustments to its plans based on NGO input. However, by isolating ODPP issues, the detention subgroup is unable to influence broader enforcement issues that do not fall under ODPP’s purview, such as a reduction in overall detention numbers and the detention of immigrants who do not need to be detained. Future progress relies on not only the continuation of current dialogues, but openness on the part of ICE to reconsider positions currently set in stone.

3. Transparency of the Secure Communities Program

Since its inception, there has been a marked lack of transparency surrounding the Secure Communities program. Advocates and local communities have received little information about how the program works, how prioritization takes place, and for what crimes the “criminal aliens” identified through the program have been charged or convicted. The lack of information about the Secure Communities program has also resulted in serious questions about localities’ ability to decline to participate in the program and DHS’s willingness to be truthful and transparent about the program. Given ICE’s stated intention to eventually install the system in all state and local detention facilities nationwide, it has been unclear whether the program will be mandatory or optional for all law-enforcement agencies, or if there are penalties for law-enforcement agencies that opt not to participate.

Although Secure Communities relies on the participation and cooperation of local jurisdictions, it became increasingly clear in 2010 that local authorities have little control over how the program functions. For instance, the Secure Communities Memorandum of Agreement (MOA) that implements the program is an agreement between DHS and states, not the local jurisdictions. It increasingly appears that a state can force local jurisdictions to participate in the program without input.

In 2010, several local jurisdictions—including the Santa Clara (CA) Board of Supervisors, the Arlington County (VA) Board, and the Sheriff of San Francisco—asked to opt-out of Secure Communities, and were given different and conflicting responses from DHS.¹⁶⁶ In August 2010,

ICE released a memo (which has since been removed from the ICE website) setting forth an opt-out policy, and DHS Secretary Napolitano later confirmed that process to be accurate.¹⁶⁷ However, in a September 30, 2010, *Washington Post* article, a senior ICE official stated that:

Secure Communities is not based on state or local cooperation in federal law enforcement. The program's foundation is information sharing between FBI and ICE. State and local law enforcement agencies are going to continue to fingerprint people and those fingerprints are forwarded to FBI for criminal checks. ICE will take immigration action appropriately.¹⁶⁸

When asked about opting out of Secure Communities during an October 6, 2010, press conference, Secretary Napolitano confirmed that ICE could work with jurisdictions to delay implementation, but she did not see Secure Communities as an "opt-in/opt-out" program.

New documents released by DHS in response to a FOIA request from the National Day Laborer Organizing Network (NDLON), the Center for Constitutional Rights, and Cardozo Law School Immigration Justice Clinic highlight internal shifts regarding the voluntary or mandatory nature of the Secure Communities program, as well as a lack of transparency about the program.¹⁶⁹ These internal documents indicate that ICE was purposefully vague and misleading about its definition of "voluntary" program and "opting out" so that they could deploy Secure Communities as widely as possible before communities began to question it.¹⁷⁰ The documents also indicate that DHS continues to search for a clear legal basis for making Secure Communities mandatory.¹⁷¹ To date, no legal analysis supporting ICE's ability to coerce localities into the program has been made public. At the same time, the newly released documents indicate that it is, in fact, technically possible to opt out of the program.¹⁷²

These internal documents are troubling in terms of the substance of the Secure Communities program and the lack of transparency they demonstrate. If DHS is truly interested in creating a well-functioning program and getting buy-in from local communities, they must be much more open and truthful with the information they provide.

C. CBP

Problems with transparency continue to plague CBP. Few outside the agency understand CBP's priorities or processes. Advocates and DHS officials alike report that CBP is loathe to go on the record about its policies and procedures. CBP has made some efforts to liaise with the private bar through twice yearly meetings with the AILA CBP Committee, and met with NGOs for the first time in two and a half years in March 2011. CBP headquarters staff have also indicated that they hope to create local port liaison contacts to better address problems that arise at a particular POE.¹⁷³ Moreover, there are reports that CBP will be putting port specialists in place who have specialized immigration knowledge to assist CBP officers whose foundational expertise is in customs law. One such port specialist was placed temporarily in Seattle as of December 2010. While that program has since been terminated, it is hoped that it will be reinstated at Seattle and other ports of entry.

An additional, less formal conduit for information-sharing related to CBP is the DHS-managed social network and blog, "Our Border," launched in August 2009.¹⁷⁴ The site provides a forum for stakeholder engagement with DHS employees, border residents, and others with an interest in border issues. By the end of 2010, Our Border boasted more than 1,700 members.

These initiatives are welcome and provide an avenue for advocates to report problems and concerns, but the agency generally fails to elaborate whether and how specific issues will be handled thereafter. CBP does not share its “musters” (guidance to employees), leaving the public guessing as to whether an issue was resolved, what guidance was given to the field, and whether the necessary training was given to ensure implementation.¹⁷⁵

Although other agencies have published their operations manuals, such as the USCIS Adjudicator’s Field Manual¹⁷⁶ and ICE’s Detention and Removal Officer’s Field Manual,¹⁷⁷ CBP has failed to publish its Inspector’s Field Manual (IFM).¹⁷⁸ The public can only view those copies made available by third parties who have successfully received redacted portions of the IFM following requests and appeals under FOIA.¹⁷⁹ As a result, it becomes difficult for the vast number of immigrants and nonimmigrants affected by the procedures in this manual to educate themselves about the applicable inspections and admissions practices. Moreover, there is no way to know whether the information found online on third party sites is accurate and up to date. Reportedly, a more complete version of the IFM is available for a fee, which may make it difficult for indigent individuals to access.¹⁸⁰

This refusal to publish the IFM and other important policy documents online disregards instructions from President Obama, the Office of Management and Budget (OMB), and the Attorney General to make efforts to improve transparency. Immediately after taking office in January 2009, President Obama issued a memorandum directing the heads of executive departments and agencies to disclose information to the public in order to enhance engagement and collaboration.¹⁸¹ That same day, President Obama separately directed agencies to work proactively in the context of information disclosure and “use modern technology to inform citizens what is known and done by their Government.”¹⁸² OMB elaborated more specific actions that should be taken pursuant to the President’s orders in December 2009.¹⁸³ Finally, Attorney General Eric Holder had issued revised FOIA guidelines to establish a presumption of openness by the U.S. Government in consideration of FOIA requests.¹⁸⁴ Although CBP has in fact released a substantial portion of the IFM to individual requesters through a prolonged FOIA process, it seems illogical that CBP has not made the manual public, following the practice of its sister agencies which have already done so.

CBP problems with FOIA are not limited to the IFM. Often times, applicants for admission are not provided a copy of the Record of Intercept or other sworn statements the applicant signed during the admission process.¹⁸⁵ When FOIA requests are made, the responses are so heavily redacted for law enforcement or security reasons that an individual cannot meaningfully address problems or understand the allegations for the applicant’s inadmissibility.¹⁸⁶ In light of these challenges, CBP should revisit its disclosure and record-sharing policies to foster a more just and transparent process.

Similarly, although administered by the Transportation Security Administration (TSA) and not CBP, travelers encounter other opaque processes through the DHS Traveler Redress Inquiry Program (DHS TRIP), to which travelers are directed when they seek resolution of concerns such as watch-list issues, airport-screening problems, and unfair boarding delays.¹⁸⁷ Rather than issuing a letter confirming, denying, or explaining adverse information against a complainant, standardized letters often are issued which do none of the above.¹⁸⁸ In an effort to increase transparency, CBP reported that additional letters with improved language regarding how to handle non-watch-list-related problems had been authorized for use in April 2010.¹⁸⁹ Despite these new templates, advocates

continue to observe redress problems due to a lack of transparency in the complaint process. The better that travelers understand the problem they face, the better able they are to produce documents to overcome it.

IV. INTER-AGENCY COORDINATION

With more than 200,000 employees and 21 separate agencies,¹⁹⁰ coordination at DHS is a monumental—and especially critical—task. This challenge is most acutely felt among DHS’s three immigration agencies, all formerly a part of the INS. When disputes arise, or more commonly, diverging interpretations and applications of the law occur, DHS is tasked with taking the reins and facilitating resolution of discrepancies. Proactive and effective leadership by DHS would be instrumental in avoiding inconsistencies and resolving inter-agency disagreements that are otherwise at an impasse.

CBP presents one of the many examples of inconsistent action that disregards competing interpretations of law within DHS. For instance, in the case of a Canadian visitor without an I-94 card, the USCIS Adjudicators Field Manual and the Department of State’s Foreign Affairs Manual indicate that the individual will not accrue unlawful presence so long as the person remains in valid status, even if the stay in the U.S. exceeds six months.¹⁹¹ CBP disagrees with this interpretation and begins to attribute unlawful presence to such an individual if s/he stays in the U.S. over six months.¹⁹² Attorneys have reported internal inconsistencies at CBP as well, such as different ports of entry near the U.S.-Canada border making contradictory determinations about whether proposed activities in the U.S. can be performed by a B-1 business visitor or require employment authorization through a TN visa.¹⁹³ CBP should issue guidance to the field requiring ports to defer to earlier ports’ determinations except in the case of fraud.¹⁹⁴

A. A Call for Leadership

By most accounts there has been a leadership void at DHS in terms of coordinating the policies and operations of its immigration agencies. While DHS has strong and knowledgeable leaders in place, in many cases they lack the authority to actually require the agencies to comply with broader DHS policy goals and objectives. Specific examples of this are provided in the case studies relating to Haiti and Refugee/Asylum issues, but one example demonstrates how even the smallest and most innocuous of actions can create a major crisis in the Department.

In August of 2010, reports surfaced that ICE had begun closing certain immigration court cases where the individual in proceedings also had an application pending with USCIS. To head off criticism, ICE released its memo on the issue, characterizing it as an effort to address major immigration court backlogs. The August 20th memorandum, “Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions,”¹⁹⁵ reflected a cooperative arrangement between ICE and USCIS that requires the agencies to coordinate actions in cases where both agencies have an interest. Under the terms of the memo, ICE officers were directed to notify USCIS when a non-citizen is in removal proceedings who also has an application for relief before USCIS. USCIS, for its part, agreed to resolve the pending application within 30 days for non-citizens in detention and 45 days for non-citizens who are not detained. ICE would move to dismiss cases where a non-citizen appears eligible for immediate relief from USCIS and the non-citizen is not a national security or public-safety risk, has no criminal convictions, and is not suspected of fraud.

Only about 17,000 people were expected to benefit from the new policy, but Administration critics such as Senator Charles Grassley quickly labeled it as an attempt to circumvent Congress and give a “free pass” to illegal immigrants. In fact, the memo represented a common-sense solution to overcrowded dockets and a rare example of coordination between ICE and USCIS. Unfortunately, while this should have been an action supported by the Department and reinforced by USCIS, ICE officials received little back up publicly—and, in fact, reverted to the standard explanation that this small effort at streamlining shouldn’t be confused with the overall level of record deportations to date.¹⁹⁶ It took USCIS an additional six months to release the companion memo providing guidance on how applications or petitions for individuals in proceedings should be handled.¹⁹⁷ While it might be argued that the controversy had died down by the time that USCIS released its memo, the broader concern is that the lack of a publicly coordinated plan for rolling out the memo gave immigration critics an easy opportunity to mischaracterize the Administration’s efforts.

While it may oversimplify the issue to call this a case of bad messaging, it reflects the long-running criticism which predates the Obama Administration that DHS lacks clear lines of communication and authority for resolving immigration issues.¹⁹⁸ Many say that coordination was easier and more consistent in the days of the INS, when immigration functions were at least housed together and decision-making had an integrated chain of command. At present-day DHS, immigration benefit and enforcement functions are siloed, with separate entities in separate buildings, all of whose leadership have a direct line to the Secretary. Structurally, DHS’s reporting chain is flawed and exacerbates many of the INS-era problems with coordination. While the DHS Office of Policy claims to be tasked with leading the coordination of department-wide policies, the organizational reality is that none of the immigration components are required to report to the Assistant Secretary for Policy.¹⁹⁹ The Secretary’s plate is too full tending to the range of Homeland Security duties to meaningfully engage with or resolve every operational, policy, or legal dispute related to immigration. The creation of an Under-Secretary for Immigration would be a strong start towards better coordination and mediation of inter-agency disagreements.

B. Regulations and Information Sharing

Additional institutional flaws exist within the DHS structure that have significantly affected immigration enforcement and benefits adjudication. Most notably, the DHS process for handling immigration-related regulations has essentially ground to a halt. During calendar year 2010, DHS published nine technical or administrative regulations, none of which were on a matter of substantive immigration law: seven pertained to Privacy Act exemptions, one related to electronic signatures on Form I-9, Employment Eligibility Verification, and one amended the rules governing professional conduct of immigration practitioners.²⁰⁰ The immigration agencies fared no better: USCIS promulgated only three regulations in 2010, including a new fee schedule²⁰¹ and more obscure changes affecting employment authorization for dependents of certain employees of foreign governments and international organizations²⁰² and treaty investors in the Commonwealth of Northern Mariana Islands (CNMI).²⁰³ CBP issued four regulations, pertaining to Visa Waiver traveler fees, administrative procedures related to seizures and forfeitures, and eligibility requirements for customs broker license exams.²⁰⁴ The only rule that pertained to ICE was one that changed its and CBP’s official names to drop “Bureau” from their original titles.²⁰⁵ All other changes to policy and practice were done by memorandum, whether externally vetted or not. For instance, in lieu of a regulation implementing the American Competitiveness in the 21st Century Act (AC21), all interpretations and guidance since 2005 have been offered by policy memo.

This trickle of regulations is particularly disappointing considering that so many critical regulations have been needed, anticipated, drafted, and stalled. Regulations on ineffective assistance of counsel following the Attorney General's 2009 decision in *Matter of Compean*²⁰⁶ have been in the works for over two years and remain unissued. A regulation pertaining to application of the persecutor bar following the Supreme Court's decision in *Negusie v. Holder*²⁰⁷ has also failed to move through DHS after two years of drafting. Even further overdue are the EB-5 (employment-based preference category for foreign investors) regulations to implement legislation from 2002. Despite a mandate from Congress to promulgate regulations by 2003, these regulations have been sitting for years.²⁰⁸ And, of course, regulations on gender-based asylum claims and particular social group have been stuck for over 10 years.

It may be encouraging that DHS announced plans, just prior to publication of this report, to conduct a retrospective review of all DHS rules "to make DHS's regulatory program more effective or less burdensome in achieving its regulatory objectives."²⁰⁹ The Department published a Notice and Request for Comments in the *Federal Register* on March 14, 2011, to comply with Executive Order 13563, "Improving Regulation and Regulatory Review," which aims to make Federal regulations more affordable and less intrusive. One of the mandates of Executive Order 13563 is to encourage public participation in this review. It remains to be seen whether DHS will use this exchange with the public to exclusively focus on budgetary concerns and ways to improve the Department's bottom line, or whether it will take this opportunity to meaningfully jump-start the DHS regulatory process. Hopefully, the Department will recognize that the absence of long-overdue and much-needed regulations most certainly does not improve agency effectiveness.

As the prior discussion on transparency makes clear, there is also an extremely uneven application of basic information-sharing within DHS. While there is greater openness prospectively, much of the basic information attorneys need to serve their clients, or which policy analysts need to evaluate DHS programs objectively, are difficult to obtain without going through the FOIA process or resorting to litigation.

V. RECOMMENDATIONS

Reform never occurs in a vacuum. The continuing fiscal pressures of a struggling economy, the demands of midterm election politics, and the changing fortunes of many key players in the efforts to reform our immigration system all contributed to a year that began with promise, but ended in defeat. Neither the President nor Congress could muster the votes necessary to pass even modest immigration reform, such as the DREAM Act. Instead, more funds were appropriated for border enforcement, more resources were put into interior-enforcement programs like Secure Communities, and very little was done to create a better system from the laws currently in place. As this survey of the DHS's efforts in 2010 demonstrates, there are good ideas and initiatives aplenty, but they tend to get short shrift. The Administration is caught in a mixed message—elegant and sincere speeches that emphasize the importance of immigration as a tool for advancing our economic and cultural future, but tremendous pride in deporting more people than ever before.

Breaking this pattern has proven more difficult than many believed, not only because of the politics of immigration, but because of the rigidity of DHS as an institution after only eight years in existence. Efforts focused on reform, such as those within the detention arena, have been frustrated by internal pushback from employees. Other efforts that started off well, such as policy reviews, seem to have

been overcome by inertia. And, more often than not, good ideas are pushed aside for fear that Congress will give the Department or its agencies a hard time.

If immigration reform is to take place under the Obama Administration, the executive branch must put much more energy into reforming the institutions and practices currently in place, as well as pushing for reform of the law. While this is a tall order, it is the duty of the executive branch to press for reforms that make the most of the law that it has to work with, even when that law is less than ideal. It is insufficient to argue that DHS is all about enforcing the law when enforcement is only directed at deportation. Enforcing the law is also about ensuring that everyone is given the best possible chance to qualify for benefits, that our immigration system is infused with integrity and respect for the individual, and that all applicants or petitioners be given the full opportunity to share in the American dream. In that respect, 2010 has been a disappointing year.

Marked improvement in 2011 could be accomplished by meeting the following recommendations:

- **Bring practice in line with priorities:** Particularly in enforcement programs such as Secure Communities and I-9 audits, DHS has repeatedly emphasized that it has put in place priorities that instruct officers to focus on the most egregious offenders and most dangerous criminals. In reality, however, current practices generally fail to distinguish between those who pose a genuine threat to society and those who are non-criminal immigrants, between employers with paperwork violations and employers with criminal violations of labor and employment laws. There is little evidence that equities such as length of residence in the United States, community ties, or membership in a mixed-status family have any bearing on charging decisions. Once an immigrant in the country illegally is placed into immigration-court proceedings, the likelihood of deportation is almost certain, regardless of priority status. Consequently, DHS should take steps that limit the chances that non-priority individuals are caught in enforcement actions:
 - **DHS should ensure that priorities for immigration enforcement established in 2009 and 2010 are followed by ICE officials and by state and local partners where applicable.** At the federal level, this requires more rigorous application of the priorities, ensuring that those who truly seek to do our country harm are the target of enforcement actions. The number of removals must become less important than the threat level associated with the persons removed.
 - **State and local law-enforcement partnerships must be carefully monitored and supervised to ensure that individuals who are not ICE priorities are not caught up in the net of Secure Communities or 287(g) programs.** Implementing clear detainer standards, including advice regarding local jurisdiction's discretion to release individuals, is essential.
- **Detention reform cannot be allowed to stall.** Continuing to engage with non-governmental organizations to improve the process is critical, as is working through internal conflicts. The public critique of ICE tools such as the national detention standards, the risk assessment tool, and alternatives to detention should be taken seriously and incorporated into the final programs. Ensuring the health and safety of detainees must remain an ICE priority and is most likely to occur with consistent and meaningful dialogue between all stakeholders, including government officials, ICE rank and file, and NGOs .

- **Extensive public engagement and public comment on policies was an important development in 2010 and should continue.** CBP, in particular, must engage in greater and more meaningful dialogue with stakeholders.
- **Promoting better funding for immigration services, particularly immigrant integration, must be treated as an investment in the future.** The Obama Administration has demonstrated a genuine commitment to reforming the USCIS fee structure, shifting a higher percentage of services to appropriated funds in each subsequent budget request. While the House has stripped funding for the Office of Citizenship from the most recent Continuing Resolution, DHS should push for the restoration of funds and should push even harder for the support provided in the FY 2012 budget.
- **DHS must assert its executive branch authority, even in the face of Congressional challenges.** There is much evidence that DHS has been reluctant to move forward on administrative measures that could reform the system because it feared that such actions could lead to backlash in Congress or jeopardize comprehensive immigration reform efforts. Even if that strategy had merit in the early years of the Obama Administration, the likely deadlock over immigration matters in Congress demands a new direction for reforms that can be accomplished administratively. Such reforms are not end runs around Congress, but are instead critical exercises in interpreting, implementing, and enforcing existing law within the context of changed circumstances. Numerous groups, including Members of Congress, have asked for administrative action. These requests range from formalizing a process for deferring removal of students who would qualify for lawful permanent resident status under the DREAM Act, redesignation of TPS for Haitians to cover a broader period of first entry into the country, and revisiting current policies affecting waivers for the spouses of U.S. citizens who entered the country unlawfully long ago.²¹⁰ DHS should also continue to push forward on broadening its exercise of exemption authority to ensure that protection for legitimate refugees and asylum seekers is neither delayed nor denied based on the application of overly broad terrorism-related inadmissibility grounds.
- **DHS must expand its coordination functions to prevent conflicts in the interpretation of law and policy.** Despite efforts to coordinate through DHS Policy, there remains a lack of mutual agreement and coordination among the three immigration agencies. This criticism has been levied against DHS since its inception, but as the cultures of ICE, USCIS, and CBP become ever more distinct, the lack of a final arbiter to ensure that immigration laws are enforced and implemented with consistency and fairness is detrimental to DHS and to the citizens and immigrants it serves. The Secretary of DHS must empower political appointees at the headquarters level with the necessary operational control over the agencies. There must be DHS officials who can ensure that the immigration agencies are both coordinating and in compliance with the policies and expectations of the Department. Immigration reporting and command functions within the Department should be reorganized to ensure that the key point person on immigration is empowered to block operational decisions that are inconsistent with Department policy.
- DHS must also improve and streamline its regulatory process, which is widely acknowledged to be virtually impossible to navigate. Without a working regulatory review process, implementing laws and holding the agencies accountable for their actions becomes ever more difficult

VI. CONCLUSION

Twice within the last year, President Obama has spoken of a new vision for immigration policy that acknowledges the hard work of immigrants who built this country and the hard work of immigrants who are helping fuel the economic recovery. The need to change the immigration mindset—from one that focuses on punitive enforcement measures to one that looks at immigration as a boon to our economy and our future—is a difficult transition. The President’s attempts to reshape that dialogue are admirable, but in many ways the continued actions of DHS undermine that grander vision. DHS cannot fulfill that function as long as it brags about record removals and issues fewer deferrals of removal than during the Bush era. Change starts from within, and DHS will need to change significantly in the coming year or risk sliding further down the deportation-only rabbit hole.

CASE STUDY ONE: REFUGEES AND ASYLUM

The first half of 2010 saw two distinct efforts to tackle the challenges of prioritization and transparency encountered in the Asylum and Refugee Programs. On the legislative front, in March 2010 Senators Patrick Leahy (D-VT) and Carl Levin (D-MI) introduced the Refugee Protection Act of 2010 (S. 3113).²¹¹ The bill focused on filling gaps in several areas of U.S. asylum and refugee-resettlement laws and policies, including eliminating the asylum filing deadline, revising statutory definitions in the “terrorism” bars to be more targeted, improving decision-making procedures and conditions of immigration detention, and correcting some of the procedural and evidentiary challenges that have emerged in the past decade through case law and legislation. Although hearings were held in May, the bill failed to get out of committee and died with the end of the 111th Congress.²¹² On the administrative side, the USCIS Office of the Ombudsman issued a number of recommendations for improving the U.S. Refugee Admissions Program (USRAP), focused largely on making the adjudicative and appeals process more transparent and accessible. While USCIS has been responsive to the Ombudsman, the agency has failed to seize opportunities to be an advocate for itself and the immigrants it serves in the midst of legislative debates that could have affected its programs profoundly. In lieu of successful legislative reform, DHS’s immigration agencies should actively consider ways in which they can use their discretion and the regulatory process to improve their programs.

A. PRIORITIZATION

1. Applicability of Terrorism-Related Inadmissibility Grounds (TRIG)

The Refugee Protection Act tried to tackle one of the foremost challenges facing the refugee and asylum programs: the mislabeling of *bona fide* refugees and asylees as terrorists under the overly broad definitions in the terrorism-related inadmissibility grounds. Under section 212(a)(3) of the Immigration and Nationality Act (INA), “terrorist activity” includes virtually any unlawful use of a weapon against persons or property, even if the actions were taken against a dictator or the United States supported such efforts. Although this legal provision has existed since 1990, it has taken on new meaning since the terrorist attacks of September 11, 2001. The USA PATRIOT Act of 2001 and REAL ID Act of 2005 created expanded definitions of “terrorist organizations” and “material support” of these organizations. Specifically, the new, sweeping category of “undesignated terrorist organizations” (or “Tier III organizations”) includes almost any group of two or more individuals who engage in terrorist activity. While national-security provisions in the INA do serve a legitimate purpose, the excessive statutory language casts too wide a net, often ensnaring refugees whose involvement was tangential, immaterial, involuntary, or occurred in the course of routine commercial or medical services.

After legislating such sweeping provisions, Congress gave the executive branch authority to make the tough calls as to who gets pulled out of that net, but authorized the exercise of that authority in a way that is extremely cumbersome, slow, and deliberative. In 2007, Congress expanded the executive branch’s authority to issue “exemptions” from most of the terrorism-related grounds, but thus far that expanded authority has been exercised on only a handful of occasions, in part due to bureaucratic delays. In order to exercise its waiver authority under INA 212(d)(3)(B)(i), DHS and the Department of State (in consultation with the Department of Justice) have to confer and agree—at the Secretary level—on who may benefit. As a result, in 2010 several thousand cases remained on hold, most often involving already-granted asylees and refugees who have resided in the U.S. for years, present no threat to the security of the

United States, and now seek to become lawful permanent residents. These delays have left refugees, asylees, and asylum seekers in legal limbo, keeping them separated from their families or prevented from becoming lawful permanent residents and, in the case of asylum seekers, in lengthy adjudications and, in some instances, in prolonged and unnecessary detention.

As applied to the USRAP overseas, refugee applicants are placed at particularly grave risk while their applications sit in limbo pending resolution of admissibility concerns. Moreover, the risk of DHS denying or holding cases based on an overly broad TRIG application has virtually shut down the ability of United Nations High Commissioner for Refugees (UNHCR) to refer certain individual cases or groups of refugees to the USRAP. Instead, UNHCR turns to third countries with a more reasonable approach to protection. For example, Iraqi refugees, as well as U.S.-affiliated Iraqis (who are eligible for special immigrant visas), face excessive delays in the processing of background checks—five months or longer—making it virtually impossible to provide protection in a timely manner.²¹³

In the absence of legislative reform, the White House-led Inter-Agency Working Group (which includes DHS) made some strides by revising the Foreign Affairs Manual to tighten the definition of an undesignated terrorist organization.²¹⁴ Whereas a “subgroup” of such an organization was previously interpreted very broadly, it now must entail one group directing another.²¹⁵ DHS met its announced calendar year 2010 goal of releasing from hold for processing over 50% of the 6,700 cases that were on hold as of May 2010.²¹⁶ Approximately 4,000 cases are currently on hold, including 700 new cases placed on hold since mid-2010.²¹⁷ Most recently, DHS exempted aliens (such as child soldiers) who, under duress, received military-type training from a terrorist organization, as well as those who, also under duress, solicited funds or members for a terrorist organization.²¹⁸ Advocates continue to press the department to revisit its interpretation of what kind of support is truly “material,” despite the difficulties with establishing a bright-line rule for determining what is and is not actually *de minimus* in a variety of situations. Additional exemptions are being sought for routine commercial transactions and medical care.

At this point, the Inter-Agency Working Group’s focus is primarily on identifying and reviewing the remainder of the over 350 groups that meet the Tier III definition, such as the All India Sikh Students Federation–Bittu Faction (AISSF-Bittu) and the All Burma Students Democratic Front (ABSDF), which were recently exempted from application of INA 212(a)(3).²¹⁹ The Group has committed to releasing from hold the cases associated with the remaining groups within Calendar Year 2011 and prioritizing those countries that have the largest number of groups and cases.²²⁰ The challenge going forward, however, is that many of the “easiest” groups have already been exempted; some not-yet-exempted “freedom fighter” groups have a history of targeting civilians or ethnic minorities, whether or not any one person being affiliated with the group was involved.

2. One-Year Filing Deadline

The Refugee Protection Act (S. 3113) also sought to eliminate the one-year filing deadline for asylum seekers, since it prevents many legitimate refugees in the United States from receiving the protection they need.²²¹ A separate bill on the House side, the Restoring Protection to Victims of Persecution Act (H.R. 4800), introduced in March of 2010, simply eliminated the filing deadline and did not attempt to tackle the many other areas of reform addressed by the Refugee Protection Act. H.R. 4800 was able to gain some bipartisan support in the 111th

Congress, but stalled after introduction. When the filing deadline was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,²²² it was assumed that “real refugees” would come forward within one year of arrival in the United States to apply for asylum. Instituting the one-year filing deadline was viewed as a mechanism for combating fraud within the asylum program, although that fraud had largely been addressed through regulatory reforms prior to the enactment of the 1996 immigration law. In reality, however, there are myriad reasons why a legitimate refugee does not come forward in a timely way, such as language barriers, lack of knowledge about the asylum system or deadlines, trauma from persecution faced abroad, or difficulty finding and affording legal counsel to help navigate the process.²²³ Furthermore, the filing deadline does not serve a meaningful fraud-prevention purpose. A 2010 study showed that, since April 1998, more than 15,000 affirmative asylum applications (involving 21,000 refugees) were rejected that otherwise would have been granted on the merits.²²⁴ The filing deadline also presents USCIS with unnecessary costs, with precious adjudicator time spent on receiving and considering testimonial and documentary evidence to establish one’s date of arrival, rather than on an applicant’s eligibility for asylum.²²⁵ The filing deadline also causes cases to be referred, unnecessarily, to the backlogged immigration courts for further adjudication of issues that could have otherwise been resolved by the USCIS Asylum Office. For these reasons, the administration supports legislative elimination of the filing deadline.

Although the only way to resolve both the inefficiency challenges and fill the protection gaps created by the filing deadline is through statutory elimination, DHS can mitigate the harm of the deadline to bona fide applicants through administrative means. As the law currently stands, asylum applicants must demonstrate by “clear and convincing evidence” that the application was filed within one year of arrival; otherwise, they must show changed or extraordinary circumstances that affected eligibility and filing, respectively.²²⁶ DHS can amend the regulations to expand the list of exceptional circumstances that permit an asylum seeker to miss the filing deadline and be able to proceed with an asylum application.²²⁷ While the list of exceptional circumstances included in the regulations is explicitly non-exhaustive, it should incorporate additional reasons (such as those included in Asylum Officer training materials) to minimize disparities in Asylum Officer discretion.²²⁸ Meanwhile, since the regulation process as noted previously has been unduly cumbersome and yields few results, USCIS can adopt a more flexible interpretation of the current regulations under the explicit “non-exhaustive” provision. USCIS should also expand upon its Asylum Officer training materials to require Asylum Officers to consider more evidence to determine the entry date of those who were not inspected. Finally, Asylum Officers should receive additional training on how to probe applicants on the ways in which they may qualify for a filing deadline exception, rather than expect asylum seekers to be able to independently present such reasons on their own.²²⁹

3. Detention of Asylum Seekers

This past year began on a promising note for some detained asylum seekers, as new parole policy guidance issued by ICE in December 2009 took effect on January 4, 2010. Under the revised guidance, ICE’s process for parole determination now takes effect immediately once an arriving individual is found to have a credible fear, notifies the individual about the parole process, and does not rely on asylum seekers to affirmatively request a parole determination in writing.²³⁰ The new guidance also clarified that certain aliens can meet the “public interest” standard for parole determinations if they are found to have a credible fear of persecution, can

establish their identities, pose neither a flight risk nor a danger to the community, and have no additional factors weighing against release.²³¹ This clarification was designed to promote consistency by standardizing parole determinations across the country.

While these changes were largely seen as a “step in the right direction,” their scope is limited only to those asylum seekers arriving at a port of entry who are determined to have a credible fear of persecution; more than half of those in expedited removal are not considered “arriving” aliens. In addition, over 30 immigrant advocacy organizations, think tanks, and academics submitted a petition for rulemaking in March 2010 that sought the promulgation of parole *regulations*, rather than guidance.²³² The petition requested that DHS create enforceable rules to establish a presumption that an asylum seeker who passes a “credible fear” interview with an Asylum Officer and has no criminal history should be released from immigration detention.²³³ The present standards are not enforceable by law, making it harder to hold local immigration officers accountable.²³⁴ Denials of parole requests can also be appealed to ICE, but there is no independent review of custody decisions by an immigration judge. In December, Secretary Napolitano denied this petition for rulemaking, citing the need to retain greater discretion and flexibility over the statutory mandate to make “case-by-case” decisions.²³⁵ She also noted that the new guidance had only recently taken effect and more time was needed to observe implementation and determine what changes might be needed. Immigrant advocates continue to keep a watchful eye on how the parole guidance is implemented across the country and have renewed a call to promulgate binding regulations. Doing so would improve accountability and ensure that ICE remains mindful of its humanitarian obligations and not its enforcement mandate alone.

4. Expedited Removal

In 2005, the U.S. Commission on International Religious Freedom issued a report focusing on whether asylum seekers’ protection concerns are properly handled and screened when they are subjected to expedited removal (“credible fear screening”).²³⁶ At the time the report was commissioned in the fall of 2003, expedited removal was a process by which an immigration officer could summarily return someone seeking admission at a Port of Entry (POE) if he/she did not establish eligibility to enter.²³⁷ It also applied to undocumented non-Cubans who arrived in the U.S. by sea within the prior two years.²³⁸ Between 2004 and 2006, however, DHS twice expanded expedited removal to cover those found within two weeks of entry and 100 miles of a land border.²³⁹ Problems with the implementation of credible fear screenings for those with protection concerns had not been addressed prior to this expansion. Many more people in new places across the country are now subject to expedited removal and no follow-up study on expanded expedited removal has been conducted.²⁴⁰ The average pass rate of those referred for a credible fear screening has dropped from 93% in the period 2000-2004, to 59% in FY 2008, suggesting that adjudicative standards have changed.²⁴¹ An increasing number of credible fear interviews are conducted by video conference as well.²⁴² At its June stakeholder meeting, the Asylum Division said that they are working with ICE and CBP to examine their credible fear procedures in order to improve efficiencies without adversely affecting the quality of the decision.²⁴³

The Asylum Division also reported a “dramatic increase” in reasonable fear cases this year, with some non-citizens reportedly waiting four or five months for a reasonable fear interview.²⁴⁴ This increase is presumably reflective of the record number of ICE removals of criminal aliens,

some of whom are ineligible by law for review of protection concerns by an Immigration Judge. Instead, these individuals are interviewed by an Asylum Officer who determines whether the alien has a reasonable fear of persecution or torture upon return to his home country.²⁴⁵ The Asylum Division stated that it generally aims to complete these interviews within one month and provided instructions to advocates for contacting local asylum offices in cases where a client has waited longer.²⁴⁶

B. Transparency of Process

The Asylum Affairs Division in the Refugee, Asylum, and International Operations Directorate (RAIO) does a better job than most at memorializing its procedures and making them publicly available. For instance, the 250-plus page Affirmative Asylum Procedures Manual (Revised July 2010) is posted online for applicants and advocates to consult.²⁴⁷ More impressively, all of the training materials from the Asylum Officer Basic Training Course have been available on the USCIS web site for many years.²⁴⁸ But certain elements of asylum and refugee adjudications have remained elusive, due either to the current status of the law or a lack of procedures in place to share information. Greater clarity is desperately needed on how persecution claims based on membership in a particular social group will be handled. Similarly, USCIS should articulate in greater detail how refugee applications, decisions, and appeals are handled, as well as how the employment authorization clock is calculated for asylum seekers.

1. Particular Social Group Rule

The Refugee Protection Act of 2010 tried to accomplish what should have been remedied by regulation and is long overdue: clarifying the definition of a “particular social group” and the requirements that one’s fear of persecution be “on account of” a protected ground (nexus). In over ten years, DHS and its predecessor agencies have been unable to promulgate the regulatory fix needed to protect many women fleeing domestic violence and other gender-based persecution, despite the fact that DHS finally supported a grant of asylum in 2009 for the petitioner in *Matter of R-A-* (who had survived horrific domestic violence).²⁴⁹ Moreover, Board of Immigration Appeals (BIA) case law in recent years has added new elements to the nexus requirement by insisting that asylum seekers demonstrate that a particular social group to which one belongs must be discrete and socially visible.²⁵⁰ Asylum seekers, as well as the USCIS Asylum Officers and ICE trial attorneys who prosecute their cases in court, are in desperate need of a clear regulation that articulates a consistent and just interpretation of the law.²⁵¹

2. U.S. Refugee Admissions Program Application Process

The USRAP had great success this year in approving nearly 75,000 refugees who were admitted to the U.S. in FY 2010—the highest number since 1999.²⁵² The program lacks, however, a formal and transparent system for expediting refugee cases where an individual or family faces imminent risk of harm.²⁵³ These concerns were echoed in a list of recommendations released by the USCIS Office of the Ombudsman last year to improve the adjudication of applications to the USRAP.²⁵⁴ The Ombudsman made four key recommendations. First, USCIS should publicly state the criteria by which the agency expedites certain emergent refugee cases and how applicants can access that process. Second, USCIS should clearly articulate the reason(s) for denying a refugee application. Third, USCIS should issue guidance on how to request reconsideration of a denied refugee application. Finally, the Refugee Affairs Division should

acknowledge receipt of such requests for reconsideration.²⁵⁵ In his July reply to the Ombudsman, USCIS Director Mayorkas informed the Ombudsman that most recommendations had either been implemented or that the USRAP was making plans for implementation, and in cooperation with the Department of State as necessary.²⁵⁶ The agency's receptivity to these recommendations is commendable. Advocates look forward to full implementation of these modifications.

3. Fixing the Employment Authorization Asylum Clock

A study by the Penn State Law Center for Immigrant Rights and the American Immigration Council Legal Action Center, released in February 2010, brought attention to problems with how the employment authorization asylum clock is operated by USCIS and the Executive Office for Immigration Review (EOIR).²⁵⁷ The "clock" calculates the time that passes between filing an asylum application and the critical 150-day marker before an applicant can apply for an employment authorization documents (EAD). In general, USCIS or EOIR can stop the clock when the agency with jurisdiction determines that the applicant has caused a delay in the process. The report focused on the lack of transparency in the management of the clock, as well as the clarity and comprehensiveness of the government's policy.²⁵⁸ It also detailed how the existing regulations are misinterpreted and improperly implemented.

While some of the study's recommendations were directed at EOIR and how it should develop and institutionalize better policy, USCIS was likewise encouraged to implement a policy that correctly interprets the EAD asylum clock regulations for widespread dissemination. In addition, USCIS must have a transparent and accessible system for resolving disputes over clock calculations that asylum offices and applicants can follow. Asylum seekers also need better information about their own EAD asylum clock. Greater transparency about these processes will more effectively guarantee consistent resolution of clock-related issues across asylum offices.

CASE STUDY TWO: HAITI UPDATE

In many ways, DHS's handling of the January 2010 earthquake in Haiti is emblematic of the triumphs and tribulations echoed throughout this report. DHS earned much praise in 2010 from the Immigration Policy Center and others for its swift and humanitarian response; deportations to Haiti were immediately suspended and Secretary Napolitano quickly designated Haiti for Temporary Protected Status (TPS), thereby enabling thousands of Haitians who had been present in the United States to remain lawfully and receive employment authorization for 18 months.²⁵⁹ Mid-year, USCIS extended the registration period from six months to a full year to allow more individuals the opportunity to apply.²⁶⁰ ICE issued guidance to its Field Office Directors on distributing information about TPS registration to Haitian detainees.²⁶¹ USCIS conducted extensive outreach in English, French, and Creole to be sure that Haitians already in the U.S. had the information they needed to consider registration for TPS.²⁶² When the registration deadline arrived in mid-January 2011, more than 53,000 Haitians had applied for TPS (with more than 46,000 approved), though the number of applications is far short of the estimated 100,000 Haitians who are eligible.²⁶³ USCIS was also particularly generous in its consideration of TPS fee waivers.

Many injured and orphaned children were granted humanitarian parole to come to the U.S. for medical care and to resettle with prospective adoptive parents.²⁶⁴ Applications for parole to further the inter-country adoption process were ceased on April 14, 2010, in response to a request by the Haitian government; normal adoption procedures resumed thereafter.²⁶⁵ In the end, well over 1,000 parole requests were granted to children available for adoption.²⁶⁶ Less than two weeks after the Help HAITI Act of 2010²⁶⁷ was passed in early December 2010, USCIS issued a timely interim memo to implement procedures for adjusting the status of paroled orphans who were otherwise ineligible for permanent resident status.²⁶⁸

By the end of 2010, however, it seemed that the Department was acting at cross-purposes. Without any written notice or formal guidance, ICE decided to resume deportations of certain Haitians. Immigrant advocates were universally outraged by both the callous nature of the decision and the lack of information provided to the community.²⁶⁹ It seemed that, in the blink of an eye, the Department's prioritization had shifted to one of extreme enforcement. It has also become apparent that the decision was made with minimal, if any, intra-departmental coordination, and has resulted in the erasing of much of the public goodwill generated at the outset of the catastrophe.

For several months, ICE had only explained this dramatic change in policy verbally; it announced to some community groups in December 2010 that it would initially remove Haitians with serious criminal convictions and anticipated deporting approximately 700 Haitians by the end of 2011.²⁷⁰ It wasn't until March 7, 2011, that ICE posted a written policy about removals to Haiti on its website, claiming it to be "pre-decisional/deliberative"—despite the fact that deportations had resumed six weeks earlier. Moreover, ICE initially provided only five business days for public comment, later extending it by one week.²⁷¹ Presumably, incorporating the harsh criticism it had received since late January, the draft policy states that there will be a "limited removal of criminal aliens *with a focus on serious offenders* such as violent felons."²⁷² It also said that ICE will not be removing non-criminal aliens unless they are determined to be a significant threat to national security.²⁷³ However, the policy lists "serious offenders" to include persons convicted of simple assault (a misdemeanor), larceny (a non-violent crime), and selling marijuana (as opposed to smuggling or trafficking). A mere "focus" on serious offenders leaves broad discretion to ICE to fill deportation flights to Haiti with as many non-serious

offenders as they choose. Experience has also shown that ICE's definition of "criminal" can be broad, and advocates fear that individuals with very minor criminal histories could be deported.

Unsurprisingly, anxiety abounds in the Haitian community. Given that ICE made its announcement to resume deportations one month before the end of the TPS registration period, some were too afraid to file for TPS out of concern that they would bring themselves to ICE's attention. As of early January 2011, ICE had detained over 300 Haitians and transferred many to remote detention centers in Louisiana in preparation for removal, leaving detainees far from and less able to communicate with their attorneys and families.²⁷⁴ The resumption of removals is particularly inhumane given an outbreak of cholera that has sickened 252,640 Haitians and killed 4,672 as of March 10. The outbreak could sicken up to 779,000 Haitians and kill up to 11,100, according to researchers from the University of California, San Francisco.²⁷⁵ The police detention centers where deportees are routinely held upon arrival in Haiti (under the long-time policy of the Government of Haiti to detain U.S. deportees with criminal records) have no access to clean water or medical care, leaving cholera to run rampant. An utter lack of infrastructure and housing, in addition to post-election political instability and violence, render deportations impracticable and unconscionable, most especially for those Haitians who have long-standing ties to the U.S. and few resources available in Haiti.²⁷⁶ The U.S. resumption of removals also encouraged the Dominican Republic to do the same, in mass numbers.²⁷⁷

The consequences of this renewed push for deportation are real. Ten days after the first group of criminal deportees was removed to Haiti, one man—a lawful permanent resident who had lived in the U.S. for 17 years—reportedly died of cholera-like symptoms in a Haitian jail cell, while another deportee was reportedly showing signs of cholera and released.²⁷⁸ This horrible incident likely caused ICE to belatedly state in writing in the draft policy that "...it is working in coordination with the Department of State and the Government of Haiti, to resume removals in as safe, humane, and minimally disruptive a manner as possible."²⁷⁹ Given that a representative from the Department of State participated in the December announcement to advocates, many remain skeptical that this new statement of intent will translate into any real difference for Haitian deportees. Although immigrants convicted of crimes who have completed their incarceration cannot be held in civil immigration detention indefinitely,²⁸⁰ the United States is better equipped to handle any public safety concerns they might present than is Haiti, with its crumbled infrastructure and dysfunctional rule of law. Years of experience dealing with Cuban criminals who cannot be removed also provides the template for handling these cases.

Immigrant advocates have pleaded with Secretary Napolitano to halt these deportations.²⁸¹ A formal request for an audit by the DHS Office of Inspector General has been made based largely on the lack of transparency.²⁸² And the Inter-American Commission on Human Rights has vocally sided with the advocates. On February 4, 2011, in response to an emergency petition for precautionary measures filed by rights groups in January, the Inter-American Commission urged the U.S. Government to cease deportations to Haiti for individuals with serious illnesses or family members in the U.S.²⁸³ DHS should heed this recommendation and reverse its decision to resume removals to Haiti.

As Haiti's designation for TPS approaches its expiration in July 2011, DHS should extend the designation for another 18 months and re-designate Haiti to include those Haitians who have arrived in the United States after January 11, 2010. Most of the Haitians who arrived post-earthquake arrived on tourist visas. On March 14, 2011, 16 members of the House of Representatives, including Rep. Ileana Ros-Lehtinen (Chairwoman of the House Committee on Foreign Affairs) and Rep. John Conyers (Ranking Member of the House Committee on the Judiciary) urged Secretary Napolitano to do exactly that.²⁸⁴ In addition, DHS should implement a program to grant humanitarian parole to the estimated 55,000

Haitian already approved beneficiaries of family-based visa petitions, just as has been done for Cubans under the Cuban Family Reunification Parole Program. If paroled, visa beneficiaries would be able to await a visa from the safety of the United States, where they have family and where they can earn money to remit to others left behind. DHS should also extend humanitarian parole to parents who want to visit with their children receiving medical care in the United States.²⁸⁵

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³ Royce Bernstein Murray and Mary Giovagnoli, [DHS Progress Report: The Challenge of Reform: An Analysis of Immigration Policy in the First Year of the Obama Administration](#) (Washington, DC: Immigration Policy Center, American Immigration Council, March 2010).

⁴ See U.S. Department of Homeland Security, Fact Sheet: [“Department of Homeland Security 2010 Accomplishments and Reforms,”](#) December 21, 2010.

⁵ *Ibid.* ICE set a record for overall removals in fiscal year 2010 with more than 392,000 aliens removed, representing an increase of 23,000 removals from the previous year. Border Patrol arrests were down 17% from the last fiscal year and down 70% from fiscal year 2000. The number of Border Patrol agents reached an all-time high of 20,500 agents; 1,200 National Guard troops have been dispatched to the border as well.

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⁷ See John Morton, [“Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens,”](#) U.S. Immigration and Customs Enforcement, June 30, 2010; and John Morton, [“Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions,”](#) U.S. Immigration and Customs Enforcement, August 20, 2010. These two memos built upon a foundation of memos issued in 2009. On December 8, 2009, ICE issued the memorandum, [“National Fugitive Operations Program: Priorities, Goals, and Expectations.”](#) Earlier that year, a new Worksite Enforcement Strategy was announced on April 30, 2009.

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⁹ Shoba Sivaprasad Wadhia, [Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion](#) (Washington, DC: Immigration Policy Center, American Immigration Council, December 2010), p. 10.

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¹³ Memorandum from Clinton A. Folsom, Supervisory Detention and Deportation Officer, For: [Redacted] Immigration Enforcement Agent, Subject: [“Performance Appraisal Element #2,”](#) January 4, 2010. In addition, a November 2009 memo was released showing that certain enforcement officers are expected to issue at least three charging documents per day in addition to their other duties. See [email](#) sent to [redacted], Attn: SC Officers, From: [redacted] SDDO [Supervisory Detention and Deportation Officer], November 20, 2009.

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¹⁶ Michele Waslin, [“ICE Slip Up Casts Serious Doubt on Immigration Enforcement Strategy,”](#) Immigration Impact (blog), March 29, 2010.

¹⁷ Miriam Jordan, [“Crackdown on Illegal Workers Grows,”](#) *Wall Street Journal*, January 20, 2011.

¹⁸ *Ibid.*

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²¹ *Ibid.*

²² John Morton, Director, U.S. Immigration and Customs Enforcement, and M. Patricia Smith, Solicitor of Labor, Department of Labor, [“Revised Memorandum of Understanding Between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites,”](#) March 31, 2011.

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²⁶ U.S. Immigration and Customs Enforcement, “Form I-9 Inspection Overview” (undated) at AILA InfoNet Doc. No. 09111920 (Posted 11/19/09). See also 73 FR 10130 (February 26, 2008) for the most recent adjustment of fines.

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²⁹ U.S. Department of Homeland Security, News Release: "[DHS/ICE Reveal Highest Immigration Enforcement Numbers on Record in Fiscal Year 2010](#)," October 8, 2010.

³⁰ See U.S. Immigration and Customs Enforcement, "[Fact Sheet: Delegation of Immigration Authority Section 287\(g\)](#)," January 21, 2010. See also U.S. Department of Homeland Security, Press Release: "[Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements](#)," July 10, 2009.

³¹ See Michele Waslin, [The Secure Communities Program: Unanswered Questions and Continuing Concerns](#) (Washington, DC: Immigration Policy Center, American Immigration Council, November 2009); American Civil Liberties Union of North Carolina Legal Foundation and Immigration & Human Rights Policy Clinic of the University of North Carolina at Chapel Hill, [The Policies and Politics of Local Immigration Enforcement Laws: 287\(g\) Program in North Carolina](#), February 2009; Aarti Shahani and Judith Greene, [Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement](#) (Brooklyn, NY: Justice Strategies, February 2009); A. Elena Lacayo, [The Impact of Section 287\(g\) of the Immigration and Nationality Act on the Latino Community](#), Issue Brief No. 21 (Washington, DC: National Council of La Raza, 2010). Also see Andrea Guttin, [The Criminal Alien Program: Immigration Enforcement in Travis County, TX](#) (Washington, DC: Immigration Policy Center, American Immigration Council February 17, 2010).

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³⁶ Secure Communities prioritization system has changed since the program's inception. Initially it was:

- Level 1 – Individuals who have been convicted of major drug offenses and violent offenses such as murder, manslaughter, rape, robbery, and kidnapping;
- Level 2 – Individuals who have been convicted of minor drug offenses and property offenses such as burglary, larceny, fraud, and money laundering; and
- Level 3 – Individuals who have been convicted of other offenses

As of late summer 2009, ICE's online Secure Communities web page stopped referring to a three-level prioritization system and instead referred to a "risk-based approach" that prioritizes criminal aliens for enforcement actions and removal based on their threat to public safety. After changes to the website made in late October, 2010, there is nothing regarding prioritization on the website. The June 30, 2010, ICE enforcement priorities memo creates new definitions of Secure Communities levels.

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⁴⁰ U.S. Immigration and Customs Enforcement, "[Draft Detainer Policy](#)," August 1, 2010. The following day, ICE issued an Interim Policy on Detainers. See also the American Immigration Council's [comments](#) to ICE reflecting concerns and making recommendations for changes to the guidance.

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⁴² "[Comments on U.S. Immigration and Customs Enforcement Draft Detainer Policy](#)."

⁴³ The draft guidance does make one exception for persons charged only with traffic-related misdemeanors: detainers should not be issued in the case of traffic-related misdemeanors except when the person has a prior criminal conviction, was previously deported or has been ordered deported, presents a danger to national security or public safety, or if the traffic offense involved drugs or alcohol or resulted in injury. There are no provisions for persons charged with other, non-traffic related misdemeanors or for crimes that do not rise to the level of misdemeanor. This section on traffic-related offenses is not included in the Interim Policy on Detainers. Thus the interim policy contains no reference to prioritization.

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- ⁴⁹ U.S. Citizenship and Immigration Services, [Fraud Detection and National Security Directorate](#), last updated October 12, 2010; USCIS Written Response to Immigration Policy Center Questions, March 21, 2011.
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- ⁵³ *Ibid.*
- ⁵⁴ FDNS reports that its Immigration Officers (IOs) are taught in the seven-week USCIS BASIC training course, as well as during specialized training courses, to distinguish between grounds of inadmissibility that involve fraud, willful misrepresentation, or omission of facts. These IOs also attend the three-week FDNS Officer Basic Training Course; experienced IOs attend a two-week FDNS Officer Journeymen Training Course as well, in addition to ongoing supervisory review. See USCIS Written Response to Immigration Policy Center Questions, March 21, 2011.
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- ⁵⁶ U.S. Citizenship and Immigration Services, [“USCIS American Immigration Lawyers Association \(AILA\) Meeting: Questions and Answers,”](#) October 12, 2010.
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- ⁵⁸ U.S. Citizenship and Immigration Services, [“USCIS Response to the Citizenship and Immigration Service Ombudsman’s 2010 Annual Report,”](#) November 9, 2010, p. 6.
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- ⁶⁴ *Ibid.*
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