

Forgetting the Melting Pot: An Analysis of the Department of Homeland Security Takeover of the INS

*“Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuge of your teeming shore. Send these, the homeless, tempest-tossed to me; I lift my lamp beside the golden door.”*¹

I. INTRODUCTION

When Antje Croton took her three-month-old daughter, Clara, on a trip from New York to Berlin in December 2003 to visit family in Germany, she never could have imagined the ordeal that she would encounter upon her return to JFK airport.² The wife of a United States citizen, Croton was awaiting approval of her application for permanent residency when she made the trip.³ Fearful that unauthorized travel plans would disrupt the grueling process of becoming a permanent resident, Croton took her travel document to an immigration official in New York to verify its validity well before her planned departure.⁴ After the immigration official confirmed the validity of the travel documents, Croton and her daughter went to Germany, only to return three days before Christmas to a hear a border security agent tell her that the original

1. Emma Lazarus, *The New Colossus*, available at <http://www.libertystatepark.com/emma.htm> (last visited Apr. 6, 2005) (quoting inscription of Emma Lazarus' famous poem on base of Statue of Liberty). For years, Emma Lazarus' words embodied the undertone of United States immigration policy, welcoming immigrants at the entrance to Ellis Island. See History of Liberty State Park, at <http://www.libertystatepark.com/history.htm> (last visited Apr. 25, 2005).

2. See Nina Bernstein, *Trip Home from Europe Becomes Kafkaesque Ordeal*, N.Y. TIMES, Jan. 21, 2004, at B3 (describing Croton's rough treatment and subsequent threat of deportation); see also Antje Croton, *I Am Not a Terrorist. So Why Was I Treated Like One?*, GLAMOUR MAG., Aug. 2004, at 144 (recounting Croton's feelings of shock, fear, humiliation, and anger during and after December 2003 incident). Antje Croton is a German citizen who has been living in the United States since 1998 when she came to New York City to study English. See Croton, *supra*, at 144. Her studies soon turned into a more permanent stay when she met Christopher Croton, a United States citizen (USC) and high school English teacher. *Id.* The two fell in love, moved in together, and married in 2001. *Id.*

3. See Bernstein, *supra* note 2, at B3 (recounting Croton's 2003 immigration ordeal). Shortly after they were married, the Crotons filed the necessary paperwork for Antje's green card and she had been awaiting approval for two years at the time of the trip. *Id.*

4. See Bernstein, *supra* note 2, at B3 (noting Croton's detrimental reliance on advice of immigration official concerning validity of her travel document). Croton's travel document, also known as Advanced Parole, had an expiration date of July 2003, but an immigration official told her that it was still valid despite that date because it also bore an "April 2004" stamp. *Id.* Relying on this advice, Croton finalized her plans and traveled to Germany to introduce her daughter to her family abroad. See Croton, *supra* note 2, at 144.

immigration official was wrong, her Advanced Parole had expired in July 2003, and she would have to leave the country.⁵ Poorly treated in a detention center for eighteen hours, Croton compared the ordeal to her former home of communist East Berlin and blamed the bureaucratic confusion on the recent Department of Homeland Security takeover of the Immigration and Naturalization Service (INS), and the United States government's concern for safety rather than innocent people's rights and needs.⁶ Although pressure from national media resulted in a federal ruling that allowed Antje Croton to remain in the United States, she and many others like her continue to believe that a nation with such high regard for family values should not be so quick to tear immigrants and their families apart.⁷

Students of American history have long considered the United States a nation of immigrants who have bolstered our economy and enhanced our culture.⁸ From the Mayflower to Ellis Island, America has been a proverbial melting pot of heritage and nationality as well as a nation of strong family values.⁹ Fearing the compromise of these ideals as well as our national safety following the terrorist attacks of September 11, 2001, the United States government created the Department of Homeland Security, which took over the

5. See Bernstein, *supra* note 2, at B3 (detailing Croton's unwelcome reception upon returning to New York). Placed in a detention center with criminals suspected of drug smuggling and attempting to carry weapons and guns onto a plane, Croton and her baby daughter found themselves classified as security threats rather than what they really were: two people trying desperately to return to a husband and father in time for Christmas. *Id.*; see also Croton, *supra* note 2, at 144.

6. See Bernstein, *supra* note 2, at B3 (attributing Croton's ordeal to changes in immigration and national security policy since September 11th); Croton, *supra* note 2, at 144 (describing deplorable conditions in detention center). After pleading with a supervisor in the detention center, Croton received a thirty-day reprieve to pack her bags before returning to Germany, while her daughter, a United States citizen, would be free to stay. See Croton, *supra* note 2, at 144. Released from the detention center and reunited with her distraught husband, she knew that she would have to fight her deportation within the thirty days. See Bernstein, *supra* note 2, at B3.

7. See Croton, *supra* note 2, at 144 (documenting Croton's opinions of United States government following her detention at JFK airport). An immigration official admitted to regretting Croton's inconvenience but could not apologize for enforcing existing laws. *Id.* The bottom line for the official was that Croton traveled without proper documentation, even though an immigration official told her the document was valid, and the government refused to recognize the extremity of tearing apart a family in the interest of enforcing the law. *Id.*

8. See E. WILLARD MILLER & RUBY M. MILLER, UNITED STATES IMMIGRATION 8 (1996) [hereinafter MILLER] (referencing John F. Kennedy's 1958 book, *A Nation of Immigrants*); see also Joyce C. Viallet, *A Brief History of U.S. Immigration Policy*, in IMMIGRATION POLICY IN TURMOIL 9-20 (Theodore B. Gunderson ed., 2002) (offering brief history of United States immigration policy). Throughout the 19th century, the United States saw a mass of immigrants from Europe, to whom America opened her arms as the country needed new citizens and economic fuel. *Id.* This open policy lasted well into the 1920s until the birth of numerical restrictions geared to preserving a national ethnic heritage. *Id.* at 19.

9. See MICHAEL BARONE, THE NEW AMERICANS: HOW THE MELTING POT CAN WORK AGAIN 3 (2001) (defining melting pot concept). The country became a multiethnic nation, with mixing and mingling first in the cities and then in the suburbs, as people from a variety of nations came to the United States to live and work. *Id.* at 3-5.

former INS, in the largest federal reorganization since 1947.¹⁰ In an effort to secure our borders, however, the government failed to draw a line between terrorists and immigrants coming to the United States to be with their families.¹¹ Although we claim to remain a nation of strong family values, we hesitate to share those values with family-sponsored immigrants, thereby forgetting the melting pot in favor of national security.¹²

Like Antje Croton, many other immigrants have experienced the effects of a post-September 11th immigration policy geared toward catching terrorists rather than assisting people coming to the United States to work or to be with family.¹³ Almost immediately after the attacks—while firefighters in New York and Washington attempted to douse the flames that engulfed the World Trade Center and the Pentagon, victims' families mourned the loss of loved ones, and American citizens at home and abroad wondered if they were next—the nation's capitol was abuzz with talk of national security.¹⁴ A change in policy was almost immediate, first with the enactment of the USA PATRIOT

10. See *Immigration and Naturalization Service Transformed; Functions Transferred to Newly Created Department of Homeland Security*, FED. INFO. & NEWS DISPATCH, INC., Mar. 3, 2003 (News from the Washington File), at 1 (announcing Department of Homeland Security's takeover of INS).

11. See George Lardner, Jr., *New Agency, Old Problems: Family Says Bureaucratic Troubles Persist at Immigration Service*, WASH. POST, Apr. 14, 2003, at A02 (demonstrating INS troubles carryover to new department); *Homeland Security: Taking a Failed Immigration System and Making It Immensely Worse*, LA PRENSA SAN DIEGO ONLINE EDITION, Nov. 27, 2002, at <http://laprensa-sandiego.org/archieve/november27-02/home.htm> (questioning ability of new Department to handle infamous bureaucratic mismanagement in INS).

12. See Nora V. Demleiter, *Conference on Marriage, Families, and Democracy: How Much Do Westerners Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273, 275 (2003) (condemning democracies ignoring value of families in immigration situations). Demleiter suggests that family-sponsored immigrants also face long waiting periods because of terrorism concerns. *Id.* at 285.

13. See Lardner, *supra* note 11, at A02 (recounting story of permanent resident's detention while attempting to re-enter country after vacationing in Mexico); Lornet Turnbull, *American Dream Turns Into Couple's Nightmare*, COLUMBUS DISPATCH, Apr. 21, 2003, at 01A (noting more stringent United States immigration laws since terrorist attacks of September 11, 2001). Jake Johnston, a lawful permanent resident (LPR) in the United States since he was two-days-old, was detained after spending a day with friends in Tijuana, Mexico during a Spring Break trip to San Diego. See Lardner, *supra* note 11, at A02. Although he carried a student ID card, Oregon driver's license, and a Social Security card when crossing the border back into California, Johnston was unable to produce a green card or green card ID number to border officials and therefore had no documentation of his legal status in the United States. *Id.* Jake received LPR status two days after he was born when his parents, who were permanent residents, drove him back to the United States from Canada, but he never received a green card to prove this status. *Id.* Johnston's parents tried everything to get the Department of Homeland Security to issue their son a green card but the agency denied jurisdiction in the matter because it was the fault of the former INS. *Id.* Many other families affected by immigration laws in this country have encountered severe separation anxiety since September 11, 2001. See Turnbull, *supra*, at A01. Alexander Matsheko met Olga Petrosenko while visiting his family in Ukraine. *Id.* Matsheko was a United States permanent resident and had lived in the United States for nine years before he met Olga. *Id.* After the two married in Kiev and in January 2003, they began the lengthy process to have Olga join Alexander in the United States. *Id.* The increased security checks in immigration matters following September 11th has slowed the process of obtaining green cards and officials told the couple they could wait up to six years. *Id.*

14. See HERITAGE FOUNDATION HOMELAND SECURITY TASK FORCE, DEFENDING THE AMERICAN HOMELAND 53 (2002) [hereinafter HERITAGE FOUNDATION] (prioritizing tasks involving coordination of government agencies following attacks).

Act and the Homeland Security Act, then with the creation of the Department of Homeland Security.¹⁵ One of the most significant issues surrounding the creation of the new agency was the Department's takeover of the INS.¹⁶ This reorganization blurred the line between immigration policy and terrorism policy, detrimentally affecting many immigrants in this country.¹⁷ An inherently restrictive policy has replaced an unimpeded policy of legal immigration as immigrants and their loved ones stand in long lines, cut through even more bureaucratic red tape, and wait in anxious anticipation for an agency designed to deal with security threats—rather than people—to determine their fate.¹⁸

Driven by economics, immigration serves as a vehicle meeting the demands of the United States economy and the personal needs of the immigrants seeking to come ashore.¹⁹ For some, the desire to migrate is employment-based, while for others, familial relations prompt the move to the United States.²⁰ Still

15. See *All Things Considered: Bush Proposes Creation of Department of Homeland Security* (NPR radio broadcast, June 6, 2002) [hereinafter *All Things Considered*] (describing proposal by President George W. Bush outlining creation of Department of Homeland Security). See generally Leslie A. Holman, *The Impact of September 11th on America's Immigration Law, Policy, and Procedures*, 27 VER. B. J. & L. DIG. 17 (2001) (discussing ramifications of USA PATRIOT Act). The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, was the first of many national security policy changes after September 11th to influence immigration. See Holman, *supra*, at 17. The act, which Congress passed on October 26, 2001, focused on restricting foreign nationals from entering the country if suspected of engaging in terrorist activities and allowed the INS to detain for seven days any alien suspected of terrorism. *Id.* at 17, 19.

16. See, e.g., Jeffrey Manns, *Reorganization as a Substitute for Reform: The Abolition of the INS*, 112 YALE L.J. 145, 147-49 (2002) (declaring agency in need of change); *Homeland Security and the INS: Need to Get It Right, Immigration Experts Say*, U.S. NEWSWIRE, June 27, 2002 (cautioning "Congress to enhance our security without harming . . . our tradition as a nation of immigrants"); *Homeland Security: Taking a Failed Immigration System and Making It Immensely Worse*, *supra* note 11 (realizing importance of intelligence and information but criticizing forcing immigrants to suffer). The former INS became the Bureau of Citizenship and Immigration, now the United States Citizenship and Immigration Services (USCIS), which is responsible for immigrant visa petitions, naturalization, and asylum applications. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW POLICY 3-7 (3d ed. Supp. 2003).

17. See Mark Engler & Saurav Sarkar, *Agency Should Halt U.S. Abuse of Immigrants*, NEWSDAY, Apr. 25, 2003, at A37 (characterizing view of immigration as national security issue); Sean O'Driscoll, *U.S. Immigration Splits Married Couple*, IRISH TRIB., June 25-July 1, 2003, at 8 (pointing to example of negative effects of post-September 11th immigration policy on innocent families). Bridget Reuter has been married to a United States citizen for over thirty-three years, but that did not stop immigration officials at Shannon Airport in Ireland from barring her from boarding a plane back to the United States after she had come to Ireland to attend her niece's wedding. See O'Driscoll, *supra*, at 8. She had failed to apply for Advanced Parole while the INS was reviewing her application for permanent residency. *Id.* Because of a simple mistake, she was forced to remain in Ireland indefinitely, separated from her family. *Id.*

18. See Tom McCann, *Lawyers Scramble to Help Immigrants Caught in the Net of Tighter Enforcement*, CHI. LAW., Aug. 2003, at 8 (providing suggestions for practitioners dealing with post-September 11th immigration policy).

19. See Vialet, *supra* note 8, at 10 (proposing reasons for immigration).

20. See MILLER, *supra* note 8, at 2 (presenting roots of immigration). Family-sponsored immigration results in the largest legal immigrant population in the United States because of an unrestricted number of available visas. See IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 621-22 (9th ed. 2004).

others seek refuge from political or religious tyranny.²¹ This Note will examine family-sponsored immigration, touching upon other aspects of the immigration system as necessary.²²

Part II will commence by examining the history of immigration in this country.²³ Part II.A will trace the changes in United States immigration policy from its early stages until the late-1990s.²⁴ Part II.B will focus on the law and policy affecting family-sponsored immigration.²⁵ Part II.C will discuss the INS, including its problems and inefficiencies, as well as document changes since September 11th, such as the USA PATRIOT Act, the Homeland Security Act of 2002, and most significantly, the creation of the Department of Homeland Security.²⁶ Part II.D will address the Department of Homeland Security's subsequent takeover of the INS and briefly examine the future of the new agency.²⁷ Part III will contain an analysis of the two agencies and their effect on family-sponsored immigration.²⁸ Part III.A will evaluate the former INS from its inception through its takeover, highlighting its positive features while noting its many deficiencies.²⁹ Part III.B will then survey the operations of the Department of Homeland Security on the immigration front, revealing both the positive and negative effects of the takeover while emphasizing areas of weakness.³⁰ Finally, Part IV will analyze the agency's political nature and make policy recommendations aimed at correcting the fundamental problem with the Department of Homeland Security: it is an organization designed to deal with security threats, unfortunately at the expense of its ability to deal with people.³¹

II. FROM THE PILGRIMS TO AL QAEDA: A HISTORY OF UNITED STATES IMMIGRATION LAW AND POLICY

Today, it is difficult to imagine that an open access policy of unimpeded immigration once dominated the United State's immigration laws.³² Early

21. See KURZBAN, *supra* note 20, at 11 (including asylum as basis for immigration).

22. See *infra* Part II.B (summarizing broad range of family-sponsored immigration issues).

23. See *infra* Part II (highlighting family-sponsored immigration).

24. See *infra* Part II.A (discussing history of immigration since birth of United States).

25. See *infra* Part II.B (detailing intricacies of family-sponsored immigration).

26. See *infra* Part II.C (examining INS and effects of September 11th attacks on agency and United States immigration policy).

27. See *infra* Part II.D (describing policy changes in Department of Homeland Security and effect on immigration law).

28. See *infra* Part III (analyzing structure of INS and Department of Homeland Security).

29. See *infra* Part III.A (criticizing INS on treatment of family-sponsored immigrants).

30. See *infra* Part III.B (arguing lack of improvement in Department of Homeland Security and USCIS procedures).

31. See *infra* Part IV (recommending initiatives for change in Department of Homeland Security immigration policy).

32. See MILLER, *supra* note 8, at 3 (indicating existence of few government controls over immigration from early 1600s to 1917). Immigration to America, even before it was the United States, began as early as the

immigrants to this country included settlers and pioneers, those escaping religious and political persecution, and even African slaves.³³ The open door policy did not last forever, a fact that is apparent in examining today's immigration policy.³⁴ There is evidence from as early as the 18th century that demonstrates a trend toward a more negative view of immigration, a view that has carried through to the 21st century.³⁵

A. A Nation of Immigrants and the Origin of the Melting Pot

In his book, *The New Americans: How the Melting Pot Can Work Again*, Michael Barone examines early immigration in the United States and the beginning of this country's ethnic diversification.³⁶ Congress played a large role in shaping early immigration, most notably through the Immigration Act of 1891, which created the precursor to the INS.³⁷ In a speech advising the nation on immigration issues, President Theodore Roosevelt established the fundamentals of United States immigration policy, suggesting, "[w]e can not have too much immigration of the right kind, and we should have none at all of the wrong kind. The need is to devise some system by which undesirable immigrants shall be kept out entirely, while desirable immigrants are properly distributed throughout the country."³⁸ Although this attitude toward

Pilgrims who sailed on the Mayflower from England in search of a new world free from the tyranny of religious persecution. *Id.* George Washington announced in 1783, "[t]he bosom of America is open to receive not only the opulent and respectable stranger but the oppressed and persecuted of all nations and religions." *Id.*

33. See Vialet, *supra* note 8, at 12 (portraying actors in early United States immigration).

34. See Vialet, *supra* note 8, at 13 (examining early switch from view of immigration as benefit to burden).

35. See MILLER, *supra* note 8, at 4-6 (assuming threat to available labor caused emergence of KKK and generally negative view of immigrants). In the late 18th century and into the 19th century, anti-Catholic and anti-Chinese sentiments began to brew, as well as negative views toward immigrants from Southern and Eastern Europe. *Id.* at 4-5. In one of the first steps toward politicizing immigration, Congress passed the Alien Act of 1798, which in the two years before its expiration gave the President the power to deport dangerous immigrants. See KURZBAN, *supra* note 20, at 1.

36. See BARONE, *supra* note 9, at 5 (dubbing early immigration veritable melting pot of cultures). Barone highlights the similarities between today's immigrants and the outlook of 19th and 20th century immigrants and urges the present government not to forget this country's history when formulating future immigration policy. *Id.* at 13, 279.

37. See MILLER, *supra* note 8, at 6 (discussing initial government agency in charge of immigration). Despite the introduction of steerage laws that required crewmembers and officials to record the names of passengers aboard ships entering the United States, immigration to the United States before 1880 was still largely unimpeded, as relatives in the old country waited for the "American letter" encouraging them to join their families who had already made the journey. See Vialet, *supra* note 8, at 15. In 1882, Congress passed the first general immigration law, which required a tax of fifty cents on each person entering the United States and explicitly excluded "idiots, lunatics, convicts, and persons likely to become public charges." KURZBAN, *supra* note 20, at 1.

38. DEBRA L. DELAET, U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS 23 (2000) (addressing Theodore Roosevelt's caution to America on difference between good and bad immigration). In response to complaints by American workers about competition and in an effort to preserve racial purity, Congress passed the Exclusion Acts in the late 19th century, which prevented Japanese and Chinese laborers from coming to the United States. See *id.* at 23-25. The methods of regulating the undesirables have evolved from the Asian

immigration was still rather ambivalent, restrictions sharply increased following World War I, especially as hordes sought refuge from a war-ravaged Europe.³⁹

One of the first milestones in immigration law came in 1952 when Congress passed the McCarran-Walter Act, which established the basic structure of today's immigration laws found in the Immigration and Nationality Act (INA).⁴⁰ A preference system for family-sponsored immigrants replaced the original quota system, emphasizing an underlying policy of family reunification consistent with the notion of family values inherent in United States political rhetoric.⁴¹ Because the 1952 Act was the first comprehensive codification of immigration law, a subsequent need for revision and reform was inevitable.⁴²

Congress paid little attention to immigration policy throughout the 1970s, undoubtedly because lawmakers were focusing on the war in Vietnam, and it was not until 1986 when the issue arose again.⁴³ The Immigration Reform and Control Act of 1986 (IRCA) targeted the burgeoning problem of illegal

Exclusion Acts into quotas and onto modern racial profiling. *Id.* at 23-24.

39. See Vialet, *supra* note 8, at 18 (recognizing change in immigration policy following First World War); see also MILLER, *supra* note 8, at 6 (researching reasons for restrictions on immigration following World War I). The United States government cited concerns about labor as the reason for a more restrictive policy and began requiring literacy tests for all new immigrants. See MILLER, *supra* note 8, at 6. The 1921 Quota Act introduced a quota system, which made quantitative restrictions on immigration, unlike the qualitative restrictions of the 1882 Act. See Vialet, *supra* note 8, at 19 (stating change in policy from type restrictions to numerical restrictions); see also MILLER, *supra* note 8, at 7 (demonstrating quota limitations in Immigration Act of 1924). The Immigration Act of 1924 made the National Origin Quota System permanent by restricting immigration through a percentage system. See KURZBAN, *supra* note 20, at 2. For example, the number of new Italian immigrants could not exceed two percent of the total number of Italian immigrants already in the United States as determined by the 1890 census. *Id.*

40. See MILLER, *supra* note 8, at 7 (inferring large number of displaced persons following World War II caused policy change). The Immigration Act of 1924 established the basic framework for today's immigration law. *Id.* at 89. The McCarran-Walter Act of 1952 codified a number of immigration laws from 1917 and 1924, including racial quotas for previously barred Asians, employment-based preferences, and deportation procedures. See KURZBAN, *supra* note 20, at 2-3. This was hardly a liberalization of existing laws but rather an example of the restrictive tendencies of the Cold War era. See Vialet, *supra* note 8, at 22. One of the foremost critics of the 1952 Act was President Truman, who sarcastically deemed it "fantastic," announcing that America was "protecting ourselves as we were in 1924 against being flooded by immigrants from Eastern Europe" when, in fact, these were the people the United States should have been helping. *Id.*

41. See Vialet, *supra* note 8, at 24 (attributing new policy to heavily democratic 89th Congress, which focused on civil rights legislation). The 1965 Act also defined special immigrants and regulated admissions. See MILLER, *supra* note 8 at 95-97 (listing provisions of 1965 Act). In an effort to continue the support for family reunification, special interest groups organized strong opposition to any efforts by Congress to restrict legal immigration. See DELAET, *supra* note 38, at 87.

42. See MILLER, *supra* note 8, at 8 (enumerating 1965 amendments to 1952 Act). The Act abandoned the quota, which, despite appearing to favor legal immigration, instead turned out to increase illegal immigration. *Id.* at 8. Mexicans came in search of work in the southwestern states, and, because there was no longer a bar against Asian immigrants, their numbers drastically increased causing overpopulation, especially in the western states. *Id.* at 8-9.

43. See DELAET, *supra* note 38, at 49 (citing next major immigration milestone as 1986 crackdown on illegal immigrants).

immigration in the United States, especially from across the Mexican border.⁴⁴ During the 1980s there was also an intense policy debate spurred by the 1982 Simpson-Mazzoli legislation drafted in an effort to cap legal immigration to the United States.⁴⁵

While nothing solid came out of the policy debates of the 1980s, a few modified proposals found a new home in the Immigration Act of 1990 as restrictionists and immigration advocates compromised on quotas and preferences.⁴⁶ The Act was the most comprehensive restructuring of immigration law since 1952, and included provisions on granting political asylum, providing unlimited visas to the spouses and minor children of United States citizens (USC), revising the definition of skilled workers, and increasing the number of visas available for people with specialized occupations.⁴⁷ After decades of examining the problem of illegal immigration, the Immigration Act of 1990 focused on legal immigration, especially on the numerical limits on permanent immigration.⁴⁸ President George H. W. Bush hailed the Act as recognizing “the fundamental importance and historic contributions of immigrants to our country” and believed it was “good for families, good for business, good for crime fighting, and good for America.”⁴⁹ At the time, he was unaware of the events that would unfold during his son’s presidency that would cause a grand shift in these feelings of hospitality toward immigrants.⁵⁰

B. Family Matters: The Basics of Family-sponsored Immigration

As of 2004, seventy-five percent of the workload for United States

44. See MILLER, *supra* note 8, at 10-11 (criticizing IRCA as ineffective in fight against illegal immigration).

45. See DELAET, *supra* note 38, at 85-86 (explaining legislation capping family-sponsored immigration failed because of public support for family reunification). Although the Simpson-Mazzoli legislation eventually failed in the House of Representatives despite passing in the Senate, Simpson had a chance to renew his bill under a new name, the Kennedy-Simpson bill. *Id.* at 85-87. The new bill proposed to increase the cap on immigration from a total of 425,000 to 630,000 but failed again despite being more flexible. *Id.* at 87-89.

46. See DELAET, *supra* note 38, at 89 (noting adoption of flexible cap on legal immigration in Immigration Act of 1990).

47. See MILLER, *supra* note 8, at 103 (enumerating provisions of Immigration Act of 1990); see also DELAET, *supra* note 38, at 90-91 (debating predominant forces behind various provisions of Immigration Act of 1990). Family reunification and employment-based immigration still account for the majority of immigration to the United States. See DELAET, *supra* note 38, at 90. The 1990 Act also added a third category, known as diversity immigration, in which people from countries underrepresented in the United States populations may enter a lottery for a permanent visa. *Id.*

48. See Vialet, *supra* note 8, at 28 (determining focus shifted from illegal immigration to number of family-sponsored immigrants entering each year). The Act addressed concerns that the number of family-sponsored immigrants detracted from the number of employment-based immigrants, and led opponents to question the preference and quota systems. *Id.*

49. DELAET, *supra* note 38, at 91.

50. See *infra* Part II.C (linking September 11th attacks to subsequent infusion of immigration law into national security policy).

Citizenship and Immigration Services (USCIS) officials was family-based.⁵¹ Different types of family members receive different immigration classifications, depending on whether they are the spouses, minor children, or parents of USCs, the spouses and minor children of lawful permanent residents (LPR), or the adult children or siblings of USCs.⁵² Family-sponsored visas are available according to a preference system designed to encourage family reunification by giving first preference to those family members who have a stronger degree of familial relation with people already in the United States.⁵³

The most favored of the family-sponsored immigrant classifications is the immediate relative category, consisting of spouses, minor children, and parents of adult USCs.⁵⁴ Fiancé(e)s of USCs not already in the United States are not included in the immediate relative category until they get married.⁵⁵ Preference immigrants, who receive the remaining available family visas, include spouses and minor children of LPRs, adult or married children of USCs, and siblings of USCs.⁵⁶ Despite making up the overwhelming majority of immigrants, family-sponsored immigrants—aside from immediate relatives—do not have free reign over the immigration system; they are still subject to the per-country limits designed to ensure that no nationality dominates the flow of immigrants into the United States.⁵⁷

Currently, there is more than one way to unite a USC with her immigrant spouse.⁵⁸ The USC can file a visa petition for her spouse and when that petition

51. See Jan H. Brown, *Temporal Trends in Family Immigration*, 1446 PLI/CORP 265, 271 (2004) (discussing predominance of family-sponsored cases in USCIS workload).

52. See Ruth Ellen Wasem, *Immigration and Naturalization Fundamentals*, in IMMIGRATION POLICY IN TURMOIL 1-3 (Theodore B. Gunderson, ed., 2002) [hereinafter Wasem, *Fundamentals*] (outlining family immigration preference categories).

53. See Laura L. Lichter, *Nuts and Bolts of Family-Based Immigration*, SJ080 A.L.I.-A.B.A. 159, 161 (2004) (establishing basics of family-sponsored immigration for immigration practitioners).

54. See KURZBAN, *supra* note 20, at 598 (summarizing provisions related to immediate relative category). Previously, immediate relatives were not part of the overall immigration cap, meaning there was no limit to the number that could enter each year. *Id.* Now immediate relatives are subject to the overall immigration cap of 480,000 announced in 1990, but are not subject to any numerical limits, making them the most favored of the preference categories. *Id.* at 621. Any number of immediate relatives can come in and that number is then deducted from the overall cap, leaving less space for immigrants in other preference categories. *Id.*

55. See Lichter, *supra* note 53, at 168 (qualifying K-1 visa as method for fiancé(e) of USC to avoid presumption of immigrant intent). Fiancé(e)s apply for a special nonimmigrant visa that allows them to enter the country to marry their intended within ninety days of their arrival. *Id.*; see also KURZBAN, *supra* note 20, at 581.

56. See Lichter, *supra* note 53, at 169 (introducing preference categories). The preference immigrant categories are as follows: first, unmarried sons and daughters of USCs, followed by spouses and unmarried minor children of LPRs and unmarried adult sons and daughters of LPRs; then, married sons and daughters of USCs; and, lastly, brothers and sisters of USCs, where the USC is an adult. *Id.*

57. See Lichter, *supra* note 53, at 166-67 & n.19 (noting preference immigrants subject to per-country limits of seven percent of available visas).

58. See Adrienne Lacau, *When Can I Live with My Spouse?: Marriage and Immigration Law in the U.S.*, 27 S. F. ATT'Y 21, 23 (2001) (advising USCs and immigrant spouses on marriage plans and setting forth possible alternatives).

is approved the spouse can either consular process at a United States consulate overseas once a visa number becomes available, or, if he is in the United States, he may remain and adjust his status to that of a LPR.⁵⁹ Despite being in the immediate relative category, the voluminous paperwork and long waiting periods still place a large burden on a USC and her spouse, especially since the enactment of the Immigration Marriage Fraud Amendments Act (IMFA).⁶⁰ In 1986, Congress passed IMFA, which requires couples in good faith marriages to prove that they still have a bona fide union two years after their initial filing.⁶¹

Family-sponsored immigrants not in the immediate relative category also face significant burdens in attempting to move to the United States to be with their loved ones.⁶² There is a 480,000 cap on available family-sponsored immigrant visas.⁶³ Family preference immigrants receive what remains of the 480,000 family-sponsored visas after the issuance of all immediate relative visas, as well as any unused employment-based visas for the given year.⁶⁴ While a surplus of immediate relatives in any given year cuts into the overall cap, the law provides for a base of 226,000 visas for preference immigrants, regardless of how many immediate relatives come in.⁶⁵

59. *Id.* (accounting for different methods of reunification). When a USC petitions for her spouse, a certificate of marriage must accompany the visa petition, as well as documentation evidencing the termination of all prior marriages of either the USC or the beneficiary. See *Matter of Brantigan*, 11 I. & N. Dec. 493, 495 (BIA 1966).

60. See *Liu v. INS*, 13 F.3d 1175, 1176-77 (8th Cir. 1994) (exposing factors immigration officials consider in family reunification cases). The immigration official considers the extreme emotional hardship to the USC. *Id.* Thus, a couple who has not known each other for very long would have more difficulty proving extreme emotional hardship than a married couple who is separated or a parent who is separated from his child. *Cf. id.*; *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 56 (BIA 2001) (defining "exceptional and extremely unusual hardship" used in removal proceedings). In addition, in 1996, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), requiring sponsors of family-sponsored immigrants to sign a binding affidavit of support ensuring that the immigrant will not become a public charge. See Lee A. Webb, Note, *A Nation that Values Family, Except when a Family Member Is Foreign: An Overview of Proposed Changes in Immigration Law and Their Devastating Effects on Many U.S. Families*, 35 U. LOUISVILLE J. FAM. L. 795, 810-11 (1996/1997). The sponsor must be a USC or LPR, living in the United States, with an income 125 percent above the federal poverty line. *Id.*; see also KURZBAN, *supra* note 20, at 47.

61. See KURZBAN, *supra* note 20, at 608 (reviewing legislation introduced to curb marriage fraud among those in search of green cards); see also MICHELLE MALKIN, *INVASION 10-11* (2002) (discussing repercussions of conditional residence on good faith marriages). Due to rising concerns among policymakers, this legislation requires those applying for permanent residency through marriage to a USC to prove that the marriage is a bona fide one. See KURZBAN, *supra* note 20, at 608-21. The applicant receives conditional permanent residency for a period of two years, after which time he must apply to remove the conditions on his residency by producing evidence of a shared life together. *Id.*

62. See generally Demleiter, *supra* note 12 (criticizing Western ideals of nuclear families as hindering efforts of family reunification).

63. See KURZBAN, *supra* note 20, at 621 (providing cap numbers).

64. See KURZBAN, *supra* note 20, at 621 (identifying calculation for family-sponsored immigrant preference visas).

65. See KURZBAN, *supra* note 20, at 621 (applauding legislation allowing minimum of preference visas in light of large numbers of immediate relatives).

To improve family reunification efforts, Congress passed the Legal Immigration Family Equity (LIFE) Act, which includes the expanded K-3 visa and the V visa.⁶⁶ The K-3 visa allows the spouse of a USC who is not already in the United States to enter the United States while awaiting approval of his visa petition.⁶⁷ The V visa allows the spouses and minor children of LPRs to enter the United States if they have been waiting for visa approvals for more than three years, provided they filed their original petition prior to December 12, 2000.⁶⁸ In addition, the government sought to promote family reunification through the legalization of the millions of illegal immigrants who have been living and working in the United States for a long period of time.⁶⁹ President George W. Bush, however, abandoned efforts to establish the legalization system following the September 11, 2001, terrorist attacks, and the future of this program remains unclear.⁷⁰

C. The INS Nightmare

For decades, immigration advocates and their restrictionist counterparts have criticized the INS for its incompetence, negligence, and corrupt management.⁷¹ This inadequacy was not entirely the agency's fault; Congress often cut INS

66. See KURZBAN, *supra* note 20, at 16 (enumerating provisions of 2000 LIFE Act).

67. See KURZBAN, *supra* note 20, at 16 (highlighting provisions of expanded K-3 visa reuniting USCs with spouses).

68. See KURZBAN, *supra* note 20, at 16 (indicating eligibility of family reunification for LPRs); see also Ruth Ellen Wasem, *Immigration Legalization and Status Adjustment Legislation*, in IMMIGRATION POLICY IN TURMOIL 55, 61-62 (Theodore B. Gunderson ed., 2002) [hereinafter Wasem, *Legalization*] (discussing LIFE Act provisions). This legislation was extremely important for LPRs and their relatives who could not obtain a visitor visa because of a pending petition. See Wasem, *Legalization, supra*, at 58.

69. See Wasem, *Legalization, supra* note 68, at 57-59 (discussing criticism of proposed legalization program for millions of illegal and undocumented immigrants). Criticism also extends to the legalization program because, without requiring documents, it could be easier for terrorists to infiltrate the United States and plan an attack. See MALKIN, *supra* note 61, at 13-14 (admonishing section 245(i) for undermining fight against terrorism). Like critics of the legalization program, some critics argue that section 245(i) of the INA facilitated terrorism by allowing immigrants already in the country to receive permanent residence despite visa overstays, employment without authorization, and illegal entry, provided they paid \$1,000. See STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 463 (3d ed. 2002); see also MALKIN, *supra* note 61, at 12-13. While section 245(i) survived only until January 14, 1998 and saw only a temporary resurrection in the LIFE Act, restrictionists such as Michelle Malkin continue to criticize the provision as undermining the fight against terrorism. See LEGOMSKY, *supra*, at 463; MALKIN, *supra* note 61, at 12-13.

70. See Wasem, *Legalization, supra* note 68, at 55 (showing government's willingness to pass legalization program before terrorist attacks); see also "Bush, Fox Meet to Mend Rift over Immigration, Iraq War," ASIAN POL. NEWS, Jan. 16, 2004, available at 2004 WL 6586192.

71. See MALKIN, *supra* note 61, at x (dubbing INS incompetent agency unable to handle assigned tasks). United States immigration policy, which the INS enforced, is largely political. See James J. Orlow, *America's Incoherent Immigration Policy: Some Problems and Solutions*, 36 U. MIAMI L. REV. 931, 933 (1982). Despite claims of being bipartisan, congressional concerns keep immigration policy from assisting those who actually need help. *Id.* In addition, the INS lacked the funding to carry out the necessary enforcement and services. *Id.* at 935 (criticizing government for making INS police agency as opposed to effective tool for immigration policy).

funding and staffing for budgetary reasons.⁷² Despite these cuts, however, Congress passed a bill requiring INS staffers to move people through the ports of entry within forty-five minutes of their arrival at the airport, causing incomplete document checks.⁷³ One of the biggest criticisms of the agency was its inability to track non-citizens while they were in the United States, regardless of whether they were here for business or pleasure, with or without the intent to immigrate.⁷⁴ Not only was the INS unable to track visitors and other aliens, but it was also unable to prevent previously convicted criminal aliens from entering and reentering the country, despite a computer database created specifically for that purpose.⁷⁵

Problems with the INS went beyond the understaffing and lack of training and funding.⁷⁶ Interagency fraud and corruption charges were prevalent during the Service's history.⁷⁷ In addition, the attorney general did not have the power to terminate INS officials at will, as he does in the case of FBI and CIA agents guilty of corruption and fraud.⁷⁸ It should come as no surprise, therefore, that many people blame the INS for the events of September 11th.⁷⁹

72. See Orlow, *supra* note 71, at 935 (reasoning budget cuts by Congress led to inefficiency of INS).

73. See MALKIN, *supra* note 61, at 64-66 (citing forty-five minute time limit at port of entry major contributor to INS inefficiency). At New York's John F. Kennedy airport, one of the busiest international airports in the country, INS workers admitted to not examining every visa before stamping an approval because it would take too much time. *Id.* at 4.

74. See William J. Krouse & Ruth Ellen Wasem, *Immigration: Visa Entry/Exit Control System*, in IMMIGRATION POLICY IN TURMOIL 67, 69 (Theodore B. Gunderson ed., 2002) [hereinafter Krouse & Wasem] (faulting INS for inability to track immigrants and nonimmigrants following arrival in United States). In an effort to better track non-citizens, section 110 of IIRIRA called for the implementation of an entry/exit control system at every border: land, sea, and air. *Id.* at 68. The INS issued Arrival-Departure Records (Form I-94) to each alien upon arrival, which officials collected when the alien departed the country in an effort to track lengths of stay. *Id.* at 70. Unfortunately, airlines often forget to collect the document despite being required to do so by law, and the requirement has been even more difficult to enforce at land borders. *Id.* at 71-73.

75. See MALKIN, *supra* note 61, at 102 (describing problems with INS's IDENT database designed to keep criminal aliens from entering country). IDENT, the INS's Automated Biometric Fingerprint Identification System, maintains digital photographs, fingerprints, and other biometric information about criminal aliens and those aliens who had previously been deported. *Id.* at 251-52. Many criminals have entered and reentered the country despite the existence of IDENT, and many INS officials admitted to not using or even knowing how to use the system, despite receiving the initial training. *Id.* at 108.

76. See generally MALKIN, *supra* note 61 (citing numerous problems with INS).

77. See MALKIN, *supra* note 61, at 147-58 (illustrating various charges of fraud and corruption within INS). Over the years, INS officials have smuggled illegal aliens, sold visa stamps and other immigration documents, and even demanded sexual favors in exchange for green cards. *Id.* at 146-52. Acts of interagency fraud include bypassing the standard of review in processing green card applications and providing intermediaries with immigration papers in exchange for lavish gifts, thereby allowing illegal aliens to enter the country and work. *Id.* at 155.

78. See MALKIN, *supra* note 61, at 167 (citing attorney general's inability to terminate INS employees at will for fraud and corruption).

79. See generally MALKIN, *supra* note 61 (criticizing inefficiency of government and INS in failing to prevent September 11th). In her ongoing criticism of the INS and United States immigration policy, Malkin does make various policy recommendations, which range from the more harsh suggestions, such as barring all foreign students from obtaining visas, to more conservative remedies, such as enhancing the efficiency of databases and honing in on the problem of illegal immigration. *Id.* at 230-35.

Immigration policy became an issue of national security following the September 11, 2001, attacks on the World Trade Center and the Pentagon because the hijackers were non-citizens.⁸⁰ Congress drafted an antiterrorism bill within two weeks of the attacks and after some redrafting and compromising, the USA PATRIOT Act was born.⁸¹ In addition to severely restricting access to the United States for anyone suspected or confirmed to have relations with terrorist organizations, the Act also came down hard on foreign students, as many of the hijackers were in the country on student, or F-1, visas.⁸² Following September 11th, non-citizens seeking to enter the country—including LPRs—underwent much more thorough security checks and, in addition, visa requirements became much stricter.⁸³ The government also introduced a special registration database, the National Security Entry-Exit Registration System (NSEERS), for nationals from approximately thirty to fifty countries with suspected ties to terrorism.⁸⁴ Soon after its inception, the database's scope expanded to include the registration of nationals of the selected countries who were already in the United States at the time of the

80. See MALKIN, *supra* note 61 at xiii (echoing theme of Malkin's thesis requesting treatment of immigration policy as matter of national security). *But see* DELAET, *supra* note 38, at 2 (indicating immigration matter of national security long before 2001); KURZBAN, *supra* note 20, at 8-11 (discussing 1996 changes in immigration policy with enactment of AEDPA and IIRIRA); April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1164 (2004) (quoting President Bush's address before September 11th where he encouraged immigration as sign of success). Immigration policy was a matter of national security long before September 11th. See DELAET, *supra* note 38, at 2. Both the government and the general public called for tighter border controls following the 1994 terrorist attack on the World Trade Center. *Id.* AEDPA dealt largely with deportation proceedings for suspected terrorists and eliminated judicial review in cases where an alien committed a deportable offense. See KURZBAN, *supra* note 20 at 8. IIRIRA, on the other hand, established a number of previously mentioned provisions, including the automatic entry/exit system and the requirement for a family sponsor with an income 125 percent above the federal poverty line, and established new grounds for inadmissibility and deportability. *Id.* at 8-9. Just two months before the attacks, however, President George W. Bush declared, "immigration is not a problem to be solved. It is the sign of a confident and successful nation. . . . New arrivals should be greeted not with suspicion and resentment, but with openness and courtesy." McKenzie, *supra*, at 1164.

81. See Holman, *supra* note 15, at 18 (debating early impact of terrorist attacks on immigration policy); see also Ruchir Patel, Article, *Immigration Legislation Pursuant to Threats to U.S. National Security*, 32 DENV. J. INT'L L. & POL'Y 83, 92 (2003) (noting need to protect national security influenced United States immigration legislation). Non-citizens became deportable for any connection to terrorist activities, whereas prior to the USA PATRIOT Act only non-citizens actually engaging in terrorist activities were deportable. See Patel, *supra*, at 92.

82. See Patel, *supra* note 81, at 101 (elucidating ramifications of Act on legitimate students seeking entry to United States to study). Other provisions in the USA PATRIOT Act include an increase in the number of border patrol officials at the Canadian border, the development of an interagency database allowing INS officials to verify the identity and history of visa applicants, the implementation of functioning entry/exit data systems at all borders, and an expansion of the student tracking system. See KURZBAN, *supra* note 20, at 17-18.

83. See Holman, *supra* note 15, at 19 (outlining changes in policy toward aliens following enactment of USA PATRIOT Act).

84. See Robert F. Loughran & Delisa J. Futch, *New Laws Keep Immigration Lawyers on Their Toes*, TEX. LAW., May 26, 2003, at 28 (describing NSEERS as fundamental change in immigration law after September 11th).

program's introduction and thus not tracked through their arrival and departure records.⁸⁵

Following September 11th, many policymakers sought to devise a better system to deal with terrorism.⁸⁶ The Heritage Foundation Homeland Security Task Force designed a system based on six priorities for the federal government and agencies to address, including the strengthening of the visa approval and border security methods.⁸⁷ Members of the Brookings Institution also made recommendations, including stricter visa granting procedures, tighter controls on falsified documents, and improved methods for verifying that a person trying to enter the country matches the person depicted in his corresponding documentation.⁸⁸ The INS continued to make mistakes following September 11th, including the notable March 2002 blunder when the INS sent the F-1 visa approval notices to the flight school where two of the hijackers learned their "skills."⁸⁹

In June 2002, President George W. Bush unveiled a plan to create a cabinet-level homeland security agency to take over the INS in an effort to "secure[] the homeland of America and protect the American people."⁹⁰ Shortly before

85. See *id.* at 28 (demonstrating increase in tracking of nationals from countries with suspected terrorism ties).

86. See generally HERITAGE FOUNDATION, *supra* note 14 (prioritizing tasks necessary to enhance communications and intelligence gathering across government agencies); MICHAEL E. O'HANLON ET AL., PROTECTING THE AMERICAN HOMELAND: A PRELIMINARY ANALYSIS (2002) [hereinafter O'HANLON, PRELIMINARY] (outlining initial recommendations for policymakers regarding new practices aimed at United States borders); MICHAEL E. O'HANLON ET AL., PROTECTING THE AMERICAN HOMELAND: ONE YEAR ON (2003) (revamping policy recommendations one year after initial implementation of safeguarding practices).

87. See HERITAGE FOUNDATION, *supra* note 14, at 54-55 (listing priority tasks to implement in wake of September 11th). Other identified tasks included direct threat assessment, improvement of information and intelligence gathering, and reduction of identity theft and fraud. *Id.* In addition, the Heritage Foundation requested that Congress repeal the rule requiring INS officials to process immigrants and nonimmigrants within forty-five minutes of their arrival time at the airport. *Id.* at 65; see also MALKIN, *supra* note 61 at 64-67 (addressing forty-five minute bill). The Enhanced Border Security and Visa Entry Reform Act of 2002 repealed the forty-five minute rule but noted INS officials should aim to process applications within forty-five minutes of arrival. See MALKIN, *supra* note 61, at 66-67. The Heritage Foundation outlined other recommendations, including the development of biometrics in immigration documents, the strengthening of the entry/exit system at all ports of entry, and an amendment to the Visa Waiver Program, which allows nationals from a host of countries to come to the United States for a period of ninety days without a visa. See HERITAGE FOUNDATION, *supra* note 14, at 66-67.

88. See O'HANLON, PRELIMINARY, *supra* note 86, at 27-28 (recommending border security measures). In their initial analysis, members of the Brookings Institution also advocated for a comprehensive database enabling federal agencies to share information with one another regarding visitors. *Id.* at 28 (citing USA PATRIOT Act as authorization for shared database).

89. See Sheela Murthy, *Impact of September 11, 2001 on U.S. Immigration*, 37 MD. B.J. No. 2 at 3, 4 (2004) (discussing dead hijacker visa incident); see also MALKIN, *supra* note 61, at 6 (introducing numerous incidents following September 11th where INS officials seriously blundered). In the spring of 2002, INS officials became aware that thirteen crewmembers had abandoned their ships and fled to cities in the United States; despite this intelligence, the INS never caught these individuals. *Id.* Additionally, "ineffective" orange traffic cones and signs indicating a closed post dotted the Canadian border. *Id.* at 8-9.

90. *All Things Considered*, *supra* note 15. In the largest federal reorganization since 1947, President George W. Bush proposed that the Department of Homeland Security would combine 100 different agencies

this announcement, House Minority Leader Richard Gephardt stated, “[w]e saw in the September 11th incident some of the problems in the INS that many of us had seen before. . . . It became clear, I think, to everybody in the country and in the Congress that we needed reform.”⁹¹ Congress responded to Gephardt’s plea in November 2002, when it passed the Homeland Security Act, wherein Congress abolished the INS and placed its functions within the responsibility of the new Department of Homeland Security.⁹² The Act established several new organizations to operate within the agency: the Bureau of Citizenship and Immigration Services (BCIS), the Bureau of Immigration and Customs Enforcement (ICE), the Bureau of Customs and Border Protection (CBP), the Director of Shared Services, and the Office of Refugee Resettlement of the Department of Health and Human Services.⁹³

D. Takeover: Inheriting the Nightmare

The actual dissolution of the INS occurred on March 1, 2003, just under a year and a half after the September 11th attacks.⁹⁴ In a State Department press release distributed two days after the reorganization, officials claimed that the new agency would maintain “the commitment to service set forth by the INS, modernizing the business of immigration to improve processing times and preserving national security.”⁹⁵ Almost immediately after the takeover, the Department of Homeland Security implemented new procedural changes, such as requiring international airlines to submit pre-flight passenger lists to immigration authorities.⁹⁶ Additionally, a month after its inception, the Department of Homeland Security launched the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) utilizing complex biometric information to separate the legitimate travelers from the suspected

that had responsibilities related to homeland security. *See id.* The proposed agency would control borders, develop new technologies, and consolidate intelligence information. *Id.*

91. Manns, *supra* note 16, at 145 (discussing plans for new department of homeland security).

92. *See* KURZBAN, *supra* note 20, at 20-21 (laying out provisions of Homeland Security Act of 2002). Congress officially established the Department in 2003 with a mission to help prevent terrorist attacks and to reduce the country’s vulnerability to terrorism; *All Things Considered*, *supra* note 15.

93. *See* KURZBAN, *supra* note 20, at 20-21 (outlining provisions of 2002 Homeland Security Act). The BCIS, now the United States Citizenship and Immigration Services (USCIS), is responsible for all immigration petitions and visa applications. *Id.* at 20. ICE deals with the detention and deportation aspects of immigration. *Id.* CBP deals solely with border inspections. *Id.* The Director of Shared Services acts as a liaison between the three above-named agencies. *Id.* at 21. Finally, the Office of Refugee Resettlement deals primarily with unaccompanied minor aliens in the custody of the former INS. *Id.*

94. *See Immigration and Naturalization Service Transformed*, *supra* note 10, at 1 (announcing takeover and detailing facts of reorganization).

95. *See Immigration and Naturalization Service Transformed*, *supra* note 10, at 1 (quoting mission of BCIS).

96. *See* Loughran & Futch, *supra* note 84, at 28 (characterizing changes in immigration system as accounting for gaps in INS stored information).

terrorists.⁹⁷ Having discontinued similar visitor tracking methods over twenty-five years earlier, the United States government decided that an entry/exit database had become a necessity, especially after the 1994 and 2001 World Trade Center attacks.⁹⁸

In its takeover, the Department of Homeland Security inherited the INS backlog of petitions pending adjudication.⁹⁹ Thus, family-sponsored visa petitions are still subject to long wait times, even for immediate relatives.¹⁰⁰ The Department of Homeland Security departed from the INS regime when it turned immigration policy into a matter of national security.¹⁰¹ For example, a Department of Homeland Security annual report issued in September 2004 showed a decrease in immigration numbers, leaving critics to assume that the Department is unsuccessfully distinguishing between legitimate immigrants and suspected terrorists.¹⁰²

Finding a replacement for Secretary of Homeland Security Tom Ridge, who resigned following the 2004 presidential elections, proved a daunting task.¹⁰³

97. See Loughran & Futch, *supra* note 84, at 28 (recounting creation of database presently used at international airports).

98. See Stewart Verdery, *Changing the Face of Immigration: A Year in Transition*, 19 ST. JOHN'S J. LEGAL COMMENT. 59, 66 (Fall 2004) (addressing status of Department of Homeland Security at its one year anniversary).

99. See *Backlog-Reduction Plan For Immigration Benefits: Hearing Before the House Judiciary Comm., Immigration, Borders and Claims Subcomm.*, 108th Cong. (June 17, 2004) (statement of Rep. John Hostettler, Chair) [hereinafter *Backlog-Reduction Plan*] (addressing current issues in immigration system). The Director of USCIS claims that the agency will eliminate the backlog by 2006. *Id.* (lauding USCIS for its accomplishments in wake of inheriting dysfunctional organization).

100. See Brown, *supra* note 51, at 268 (questioning wait time for immediate relatives despite lack of real legal impediments to reunification). Ideally, immediate relatives would have no wait for a green card once they receive an approval. *Id.* Department of Homeland Security officials have begun to implement a rarely enforced 1996 law requiring immigration officials to refrain from considering family ties in deportation proceedings. See Nina Bernstein, *A Mother Deported, and a Child Left Behind*, N.Y. TIMES, Nov. 24, 2004, at A1. Recently, the Department of Homeland Security deported a mother, forcing her to leave behind her young daughter, who was a United States citizen. *Id.* Officials call the separation of families unfortunate but necessary. See Nicole Tsong, *Ordered Away; Grandma Facing Deportation Hopes to Adopt Kids So She Can Care for Them; Immigration Law Divides Families*, ANCHORAGE DAILY NEWS, Dec. 20, 2004, at B1.

101. See generally Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173 (2004) (comparing war on terror to war on immigrants).

102. See Spencer E. Ante, *Keeping Out the Wrong People*, BUS. WEEK, Oct. 4, 2004, at 90 (analyzing decrease in immigration numbers in relation to implementation of stricter border controls).

103. See generally Kerik Apologizes to President, *White House May Look Beyond Previous Candidates for Post*, CHARLESTON GAZETTE & DAILY MAIL, Dec. 12, 2004 (giving details of Kerik's withdrawal following reports of immigration issues); Eric Lichtblau, *Nomination May Revisit Case of Citizen Seized in Afghanistan*, N.Y. TIMES, Jan. 13, 2005 (noting decision to review files of war on terror case for misleading comments of candidate); Richard W. Stevenson & Eric Lichtblau, *Bush Names Judge as Homeland Security Secretary*, N.Y. TIMES, Jan. 12, 2005 (evidencing hope in pick for new security head given antiterrorism background of candidate). In 2004, an election year, both restrictionists and immigration advocates anxiously awaited what presidential candidate Senator John Kerry and incumbent President George W. Bush would say on the topic. See generally Jacques Billeaud, *Immigration Overshadowed on Presidential Campaign Trail: Candidates Saying Little on Issue of Immigration*, PRESS-ENTERPRISE, Oct. 12, 2004. Neither candidate articulated a strong position, preferring to focus on foreign policy, the war in Iraq, and domestic issues, such as education, taxes, and health care. *Id.* President George W. Bush did propose renewable three-year labor visas for some

In January 2005, President George W. Bush announced his new choice: Michael Chertoff, a federal appellate court judge.¹⁰⁴ With Chertoff's Senate confirmation still pending, President Bush gave his first State of the Union address of his second term on February 2, 2005, devoting a mere three sentences to immigration.¹⁰⁵ Then, on February 15, 2005, in a 98-0 vote, the Senate confirmed Chertoff as head of an agency that deals with numerous issues, including terrorism and immigration law.¹⁰⁶

III. FOR BETTER OR WORSE: FAMILY-SPONSORED IMMIGRATION UNDER TWO INEPT REGIMES

An examination of both the INS and the Department of Homeland Security certainly begs the question: Would Antje Croton have been better off under the old regime?¹⁰⁷ Not surprisingly, there is no clear answer.¹⁰⁸ There was a variety of legitimate reasons that caused critics to baptize the INS as "Incompetent and Negligent Service," "Information Not Sought," or "Ignoring National Security."¹⁰⁹ Under the Department of Homeland Security, the

temporary workers but he stated that these visas would not lead to legalization or permanent residency. *Id.* Senator Kerry, on the other hand, suggested legalization of law-abiding, undocumented workers who have been in the United States for at least five years. *Id.*

104. See Lichtblau, *supra* note 103, at A22 (viewing examination of Chertoff's statements during Lindh trial necessary before confirmation); Stevenson & Lichtblau, *supra* note 103, at A1 (presenting Chertoff as choice to head Department of Homeland Security). President Bush's first pick, former New York City police commissioner Bernard Kerik, withdrew from the nomination in December 2004 after reports that he employed an illegal nanny and housekeeper. See *Kerik Apologizes to President*, *supra* note 103, at P7B (reasoning candidate with immigration problems not suited for position as head of Department). The Senate delayed Chertoff's confirmation to investigate allegations that Chertoff may have made misleading statements to Congress regarding John Walker Lindh, the American citizen charged with assisting Taliban forces in Afghanistan. See Lichtblau, *supra* note 103, at A22.

105. George W. Bush, State of the Union Address (Feb. 2, 2005), *available at* <http://www.nytimes.com/2005/02/03/politics/03btext.html>. In his address, President Bush noted,

America's immigration system is also outdated, unsuited to the needs of our economy and to the values of our country. We should not be content with laws that punish hardworking people who want only to provide for their families, and deny businesses willing workers, and invite chaos at our border. It is time for an immigration policy that permits temporary guest workers to fill jobs Americans will not take, that rejects amnesty, that tells us who is entering and leaving our country, and that closes the border to drug dealers and terrorists.

Id.

106. See generally Mary Curtius, *Chertoff OKd As Homeland Security Chief*, L. A. TIMES, February 16, 2005, at A11 (confirming Michael Chertoff as head of Department of Homeland Security). Senators hoped that their confirmation of Chertoff could make the agency both more effective in the war on terror and better equipped to handle immigration matters. *Id.*

107. See Bernstein, *supra* note 2, at B3 (detailing how woman with permanent residence pending caught at airport without proper travel documentation); Croton, *supra* note 2, at 144 (blaming government's suspicious attitude toward immigrants on national security concerns following 2001 terrorist attacks).

108. See *infra* Part III.A (analyzing former INS); *infra* Part III.B (critiquing Department of Homeland Security).

109. MALKIN, *supra* note 61, at 145-46 (criticizing heavily the ineptitude of former INS). One can also use

backlog persists and there are far more denials of family-sponsored visa petitions than before September 11th.¹¹⁰ It is difficult to determine which is worse: an agency unable to handle the volume of cases due to a lack of both funding and training, or an agency unable to draw a line between terrorism and family-sponsored immigration.¹¹¹

A. Incompetence and Inefficiency: A Recipe for Disaster

In eliminating an open access immigration policy and creating the INS, the government sought to limit the volume of immigrants seeking entrance to the United States.¹¹² By doing so, the government went too far, and the impact on families was extraordinarily harsh.¹¹³ President Theodore Roosevelt correctly attempted to strike a balance between good and bad immigration.¹¹⁴ Unfortunately, however, his successors have failed to follow his lead.¹¹⁵

Both immigration advocates and restrictionists rightly criticize the INS for its inefficiency.¹¹⁶ Before solely blaming the agency, however, one must acknowledge Congress's budget cuts and forty-five minute rule.¹¹⁷ Congress

these phrases to condemn a highly ineffective agency unable to process petitions in a timely manner. *See id.*

110. *See Backlog-Reduction Plan*, *supra* note 99 and accompanying text (devising plan to eliminate backlog Department of Homeland Security inherited from INS); *see also* DELAET, *supra* note 38, at 91-93 (arguing immigration laws better equipped to deal with employment-based immigrants than family-sponsored immigrants).

111. *See* McCann, *supra* note 18, at 8 (noting unmistakable change in immigration system following September 11th); Engler & Sarkar, *supra* note 17, at A37 (emphasizing lack of correlation between majority of non-citizens entering country and terrorism).

112. *See supra* note 37 and accompanying text (considering change from open access to more restricted immigration policy with creation of INS).

113. *See supra* note 57 and accompanying text (discussing per-country limits for preference immigrants); *supra* note 61 and accompanying text (explaining conditional residence and proof of bona fide marriage requirement); *see also* KURZBAN, *supra* note 20, at 16 (indicating Congress responded to long wait times for family-sponsored immigrants by enacting LIFE Act). The per-country limits applicable to all family-sponsored immigrants other than immediate relatives both benefit and burden the individuals they affect. *See* Lichter, *supra* note 53, at 166-67. The limitations restrict large numbers from any one country, which in turn provides greater visa availability for individuals in other countries. *Id.* By regulating the number of people that enter the United States from any one country, however, the per-country limitations keep families apart simply because there is too great a demand for visas from particular countries. *Id.* In addition, the IMFA forces newly married couples to complete voluminous paperwork. *See* KURZBAN, *supra* note 20, at 608-12. While the IMFA provision regarding conditional residence decreased marriage fraud by punishing those who marry solely to acquire immigration benefits, individuals who use the institution of marriage for immigration purposes have created problems for those who legitimately want to get married. *See* MALKIN, *supra* note 61, at 11. As if filing the initial paperwork is not enough, the couple must file yet another petition ninety days before the two-year anniversary of the initial filing in order to remove the conditions on residency. *See* KURZBAN, *supra* note 20, at 608-09.

114. *See supra* note 38 and accompanying text (discussing Theodore Roosevelt's view of immigration).

115. *See infra* Part IV (recommending ways to remedy ills in immigration system in light of September 11th).

116. *See supra* note 71 and accompanying text (noting various factors leading to demise of INS).

117. *See supra* notes 72-73 and accompanying text (acknowledging negative impact of congressional rulings on immigration processing). INS staff was overworked and underpaid. *See id.* Moreover, the agency provided poor facilities and insufficient means for staff to accomplish tasks, all of which contributed to long

repeatedly cut INS funding without first considering the ramifications.¹¹⁸ In addition, Congress inately urges INS officials to process all visitors within forty-five minutes of their plane landing.¹¹⁹ Furthermore, inadequate tracking devices, lack of training, and interagency fraud neither assisted immigrants in coming to the United States, nor secured our borders from potential threats, as the September 11th terrorists' blatant manipulation of the system made apparent.¹²⁰

The takeover of the INS did not immediately follow the events of September 11, 2001.¹²¹ Following the attacks, change in national security policy was necessary; however, limiting the misconstrued connection between immigration law and terrorism policy is imperative.¹²² The government attacked not only terrorism with the USA PATRIOT Act and the Homeland Security Act, but immigrants as well, even though only a miniscule number of immigration cases present national security issues.¹²³ Both the American public and the government regard the treatment of the Chinese in the late 1800s and of the Japanese following World War II as abhorrent and discriminatory.¹²⁴ There is

waits at airports. *Id.*

118. See Orlow, *supra* note 71, at 935 (discussing effect of congressional budget cuts on INS staffing, INS resources, and immigration enforcement). By cutting INS funding, Congress left the agency without sufficient manpower or equipment to process arriving immigrants. *Id.* Inadequate funding affected both immigration officials and the people trying to enter the country. *Id.* In the future, more funding could potentially help to alleviate long wait times and to ensure more accurate document checks. *Id.*

119. See *supra* note 73 and accompanying text (acknowledging absurdity of forty-five minute provision). The rule is illogical because a visitor must endure the same background and document check as a person coming to work or live. *Id.* Additionally, visitors unreasonably complain about long wait times: the government cannot possibly accommodate the American public's requests for greater airport safety without sacrificing some convenience at ports of entry. *Id.*

120. See MALKIN, *supra* note 61, at 147-58 (discussing problems with INS, especially interagency fraud and corruption). The attorney general lacked the power to terminate INS officials suspected or guilty of fraud and corruption. *Id.* at 167.

121. See Murthy, *supra* note 89, at 4 (discussing problems with INS such as sending approval notices to dead hijackers); *infra* Part IV and accompanying text (giving policy recommendations to remedy current state of department). See *generally Immigration and Naturalization Service Transformed*, *supra* note 10 (indicating one-and-a-half-year lapse between attacks and takeover of INS). Some argue that the transformation should have occurred sooner, especially in light of sending the dead hijackers' approval notices to their flight school. See Murthy, *supra* note 89, at 4. Given the present unorganized state of the new agency, however, it remains questionable as to whether the Department of Homeland Security would have managed to avoid such a mistake. See *infra* Part IV and accompanying text.

122. See *supra* note 101 and accompanying text (noting incorporation of immigration into national security and terrorism policy).

123. See *supra* note 15 and accompanying text (detailing various legislative tactics introduced following September 11th). When the Department of Homeland Security took over the INS, immigration practitioners and advocates worried that the reorganization would cause even longer delays for families trying to unite through legal immigration. See *Homeland Security: Taking a Failed Immigration System and Making It Immensely Worse*, *supra* note 11.

124. See DELAET, *supra* note 38, at 23-24 (comparing historical and current reactions to racial profiling); *supra* note 38 and accompanying text (discussing historic discrimination and evolution of modern racial profiling). The government considered certain categories of immigrants undesirable because of their race and restricted their immigration to the United States through various prohibitions and quotas. See DELAET, *supra*

little difference between those policies and the racial profiling that has sprouted since September 11th, evident in programs such as NSEERS and special registration.¹²⁵ Furthermore, almost immediately following the attacks, President George W. Bush ended negotiations with Mexico regarding the legalization of millions of illegal immigrants in what would have been the largest amnesty program to date, leaving these illegal immigrants and their families to suffer the consequences because of an incident in which they took no part.¹²⁶

Many blame the INS for the attacks of September 11th.¹²⁷ The INS deserves this criticism, especially for the unforgivable mistake of sending the F-1 approval notices of the dead hijackers to their flight schools.¹²⁸ People can blame the INS, they can blame the government, but they should not punish innocent immigrants trying to make a life for themselves and their families.¹²⁹

B. Terrorist Until Proven Innocent?

The State Department press release announcing the takeover of the INS stated that the Department of Homeland Security would maintain the INS commitment to service and would work to modernize the immigration system

note 38, at 23.

125. See Loughran & Futch, *supra* note 84, at 28 (discussing NSEERS bias against specific nationalities and special registration provisions implemented after September 11th). There are parallels between the treatment of the Chinese and Japanese and the blatant racial profiling seen in airports and in the underlying policies of NSEERS and special registration, but civil liberties groups have failed to curb the government's actions. Compare *id.* (discussing post-September 11th restrictions) with DELAET, *supra* note 38, at 23 (examining immigration restrictions during 19th and 20th centuries) and Murthy, *supra* note 89, at 5-6 (noting inability of civil liberties groups to change government tactics in war on terror).

126. See MALKIN, *supra* note 61, at 31 (suggesting legalization program harmful to national security); Wasem, *Legalization*, *supra* note 68, at 55 (discussing pre-September 11th proposal to legalize three million Mexicans working without authorization in United States); see also "Bush, Fox Meet to Mend Rift Over Immigration, Iraq War," *supra* note 70 (noting Bush abandoned plans for mass amnesty and replaced with three year guest worker proposal).

127. See MALKIN, *supra* note 61, at 12-14 (blaming INS and government for America's lack of safety); Manns, *supra* note 16, at 145 (quoting Richard Gephardt's statement criticizing INS inherent bureaucratic inefficiencies for events of September 11th).

128. See Murthy, *supra* note 89, at 4 (noting approval notices sent to flight school as evidence of INS slow processing and inefficiency).

129. See generally Tumlin, *supra* note 101 (explaining desire to fight terrorists translates to desire to fight both legal and illegal immigrants). New security measures introduced after September 11th, in an effort to combat terrorism, have affected immigrants and their families, such as the Crotons, the Reuters, and the Matshekos. See *supra* notes 2-7 and accompanying text. See generally O'Driscoll, *supra* note 17 and accompanying text (describing plight of Irish woman who left United States without proper travel documents); Turnbull, *supra* note 13 and accompanying text (recounting lengthy processing time affecting ability of Ukrainian couple to live together following their marriage). Perhaps if immigration had not become a pawn in the war on terror, then Antje Croton would not have spent hours in a detention room for a wholly unintentional mistake, Bridget Reuter would not have had to stay in Ireland and away from her family, and the Matshekos would not have had to wait so long before they could live together. See generally *supra* note 5 and accompanying text; *supra* note 13 and accompanying text; *supra* note 17 and accompanying text.

with improved processing times and safer borders.¹³⁰ Despite amendments to the bureaucratic complications of the INS, family-sponsored visa petitions are still subject to long wait times, which defeats the purpose of the family reunification philosophy.¹³¹ The abolition of the INS wrongly placed immigration policy and terrorism policy under the same umbrella of national security, as the name of the Department makes apparent.¹³² Still, there is little doubt that the United States claims to be a nation that appreciates the importance of strong family values.¹³³ When it comes to recognizing this importance as it relates to immigration and family reunification, however, the government only pays lip service to a near-extinct philosophy.¹³⁴ The recent decrease in the number of immigrants displays the Department's inability to distinguish terrorists from immigrants; in trying to deter threats, the government has kept legitimate visitors and immigrants from entering the country to be with their families.¹³⁵ The irony is stunning: by incorporating immigration into the Department of Homeland Security, many people, all of whom, as Americans, are the descendants of immigrants, now view immigration as a threat to national security instead of as the economic benefit and cultural enrichment that it once was.¹³⁶

Most LPRs reach such status through family ties, not employment, and thus policies that focus on both family values and family reunification are extraordinarily important in the immigration arena.¹³⁷ These family-sponsored immigrants, however, are still feeling the negative effects of the takeover of the

130. See *Immigration and Naturalization Service Transformed*, *supra* note 10, at 1 (declaring new Department picks up where INS left off, vastly improving service and safety).

131. See Turnbull, *supra* note 13, at 01A (suggesting backlog and lengthy processing times divide families). As one immigration attorney noted, "September 11[th] has changed the mentality and the way people look at immigration. Everything is now about security checks. There's not as much compassion for the individual problem." *Id.*

132. See Demleiter, *supra* note 12, at 285 (citing terrorism concerns as major factor in increased wait times). Not only are family members subject to longer wait times before they can reunite, the mere suspicion of a terrorist connection can keep family members from entering the United States, with or without concrete proof that the connection actually exists. *Id.*; see also Patel, *supra* note 81, at 92.

133. See Demleiter, *supra* note 12, at 275-76 (admonishing western cultures for failing to incorporate their value of family into their immigration policies). Even before September 11th, the United States was moving away from its foundation of family values and forgetting its inception as a nation of immigrants. See *supra* note 8 and accompanying text.

134. See MILLER, *supra* note 8, at 7-8 (crediting family reunification policies with number of early- and mid-20th century immigration changes following World War II). Family reunification policies have existed since the 1952 establishment of immediate relative status and the family preference system. *Id.* at 7. The lack of numerical restrictions in the immediate relative category makes perfect sense when the goal is to unite closely related individuals. See DELAET, *supra* note 38, at 39-40.

135. See *supra* note 102 and accompanying text (analyzing correlation between tighter security controls and decrease in family-sponsored immigration).

136. See generally Tumlin, *supra* note 101 (emphasizing difference in attitude toward immigration since creation of Department of Homeland Security).

137. See Brown, *supra* note 51, at 271 (linking large amount of family-sponsored adjustment of status caseloads with predominance of family-sponsored LPRs).

INS.¹³⁸ Jake Johnston could not enjoy a typical Southern Californian college night out in Tijuana because of an initial mistake by the INS, which the Department of Homeland Security proved unable to remedy.¹³⁹ A grandmother in Alaska faces deportation while her daughter works two jobs, leaving her baby granddaughter, suffering from Down Syndrome, without care.¹⁴⁰ Backlogs and long waits kept an LPR away from his Ukrainian wife for an excruciating amount of time, almost as punishment for falling in love with a non-citizen.¹⁴¹ Antje Croton stared at the walls of a detention room in JFK airport, wondering how strict adherence to the instructions of an immigration official landed her in a room with drug and weapon smugglers.¹⁴² Unfortunately, an agency designed to ameliorate the entire immigration experience for legal immigrants continues to wreak havoc on innocent families.¹⁴³

IV. OP-ED: WHERE DO WE GO FROM HERE?

[T]he new Americans of today, like the new Americans of the past, can be interwoven into the fabric of American life. In many ways, that is already happening, and rapidly. It can happen even more rapidly if all of us realize that that interweaving is part of the basic character of the country and that the descendants of the new Americans of today can be as much an integral part of their country, and as capable of working their way into its higher levels, as the descendants of the new Americans of one hundred years ago.¹⁴⁴

First, the American government and the public must overcome the stereotype that immigrants and terrorists are one and the same, and remember that the United States is a nation of immigrants, a melting pot of ethnic diversity and culture.¹⁴⁵ The new America is impossible to ignore: “[e]thnic diversity is as American as apple pie—or pizza or bagels, or soul food or tacos

138. See *infra* notes 139-142 and accompanying text (discussing individual accounts of family-sponsored immigrants currently suffering under Department of Homeland Security policies).

139. See Lardner, *supra* note 11, at A02 (recounting ordeal of LPR stopped at border without green card even though entitled to one).

140. See Tsong, *supra* note 100, at B1 (discussing unnecessarily harsh burdens immigration law places on families unable to afford separation).

141. See *generally* Turnbull, *supra* note 13 (recounting security hurdles to overcome for married couple to live in the United States).

142. See *supra* notes 2-7 and accompanying text (describing Antje Croton’s encounter with immigration officials at JFK airport).

143. See *supra* notes 139-142 and accompanying text (recounting plights of four unrelated immigrants dealing with family-sponsored immigration issues).

144. MICHAEL BARONE, *THE NEW AMERICANS: HOW THE MELTING POT CAN WORK AGAIN* 279 (2001).

145. See *id.* at 5 (examining beginning of ethnic diversification of United States); see also *supra* note 36 and accompanying text (discussing origin of melting pot concept).

or dim sung.”¹⁴⁶ Immigration is hardly a new phenomenon and therefore dealing with it as a national security threat is not necessarily the appropriate governmental response.¹⁴⁷ Over the next four years, President George W. Bush and the director of the Department of Homeland Secretary, Michael Chertoff, should adopt a policy reflecting an understanding of this division between immigration and terrorism.¹⁴⁸

Current policy recommendations range from creating stricter immigration legislation to assist in the war against terrorism, to giving immigration officials the necessary funding and training to more effectively deal with immigrants as people, as opposed to terrorists.¹⁴⁹ Some believe that the current immigration policy lacks the teeth to deal with terrorism concerns.¹⁵⁰ Michelle Malkin’s policy recommendations are extremely severe—banning all new travelers with ties to “al Qaeda breeding grounds,” ending adjustment of status forcing all prospective LPRs to return to their home countries before obtaining permanent residency, expanding detention centers, and reducing political asylum—and should be tailored to a more moderate level.¹⁵¹

The system needs more humane treatment of people and improved processing times.¹⁵² While additional visas would be ideal because there are currently not enough to meet demand, in the meantime, there needs to be an effective plan to deal with the backlog of over six million pending visa petitions.¹⁵³ Not only does the backlog negatively affect family-sponsored immigration and Washington’s family reunification philosophy, but it also harms national security by hindering the ability of the Department of Homeland Security to track the millions of people legally in the United States.¹⁵⁴ There is

146. BARONE, *supra* note 144, at 5.

147. *See* BARONE, *supra* note 144, at 13 (discussing troubles of forgetting history in creating new laws and policies).

148. *See generally* George W. Bush, *supra* note 105 (referencing immigration policy in first State of Union address of second term); Curtius, *supra* note 106 (reporting Chertoff confirmed as new head of Department of Homeland Security). Think tanks such as the Brookings Institution, authors like Michelle Malkin, and this Note all make policy recommendations for the new administration in dealing with immigration in light of the war on terrorism. *See* MALKIN, *supra* note 61, at 230-35; *supra* note 86 and accompanying text.

149. *See* MALKIN, *supra* note 61, at 230-35 (advocating for tighter immigration controls regardless of negative effect on families); *supra* note 81 and accompanying text (highlighting restrictionist view of necessity to blend immigration and terrorism policy).

150. *See* MALKIN, *supra* note 61, at 230-35 (suggesting stricter immigration law will aid in national security effort); *see also supra* note 81 and accompanying text (discussing need for broad-based immigration policy sufficient to deal with national security issues).

151. *See* MALKIN, *supra* note 61, at 230-33 (discussing various policy recommendations for immigration law strategy). Malkin also makes more conservative suggestions, such as focusing on the problem of illegal immigration. *Id.* at 231-33.

152. *See generally supra* note 99 and accompanying text (examining immigration advocates’ policy recommendations and congressional support for their suggestions).

153. *See generally supra* note 99 and accompanying text (blaming visa backlog for contributing to illegal immigration because of long wait times keeping families apart).

154. *See generally supra* note 99 and accompanying text (noting terrorists took advantage of backlog, workloads, and poor record checks in implementing attacks).

also a necessity for more consular officers with better technical skills to provide greater assistance to the millions of immigrants requiring their services.¹⁵⁵ Funding should go to training officials to effectively use databases rather than increasing border patrol officials; with more consistent use of databases there will be less need for border patrol agents.¹⁵⁶

Although Congress repealed the rule requiring airport immigration officials to process arriving non-citizens within forty-five minutes, officials are still *encouraged* to finish the processing within that time limit.¹⁵⁷ Officials should be required to tell their staff that they may take as much time as they need to process arriving non-citizens, which will reassure both non-citizens and the American public that the officials are doing their job.¹⁵⁸ In addition, when President George W. Bush announced the Department of Homeland Security's takeover of the INS, there was still no law allowing the attorney general to terminate at will agency employees engaged in fraud or corruption.¹⁵⁹ Without such a provision, the fraud and corruption in the new agency will persist, undermining the overreaching goals of the government in assisting immigrants and preserving national security.¹⁶⁰

V. CONCLUSION

Keeping our front door open to legal immigrants and our back door closed to terrorists and other potential threats is an ongoing struggle in our nation's history. Although the words at the base of the Statue of Liberty call out to all people "yearning to breathe free," current attitudes toward immigration suggest the inscription is an empty promise. Historical texts boast of our inception from a nation of immigrants into a culture rich in ethnic diversity. Patting ourselves on the back for valuing families is largely hypocritical considering the recent treatment of family-sponsored immigrants, such as Antje Croton.

Following the attacks of September 11, 2001, the government saw a need for change in the structure of this country's national security system. The government created a behemoth of an agency—the Department of Homeland Security—to take over the INS. By folding immigration enforcement into

155. See MALKIN, *supra* note 61, at 102-108 (discussing training of INS officials and need for better training in future). All people must learn to use the tools of their trade; immigration officials must learn how to use computerized databases if that is going to be a significant part of their job. *Id.* at 197-98.

156. See Patel, *supra* note 81, at 103 (evaluating provision of USA PATRIOT Act requiring increase in border patrol agents).

157. See *supra* note 119 and accompanying text (demonstrating change in forty-five minute rule not executed in practice).

158. See *supra* note 119 and accompanying text (advocating for importance of repeal of forty-five minute rule).

159. See MALKIN, *supra* note 61, at 167-68 (indicating provision for termination at will overlooked during takeover).

160. See MALKIN, *supra* note 61, at 232-33, 235-36 (discussing need for attorney general to have power to terminate at will agency employees).

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national security policy, the government has managed to make a threat out of what it previously considered a benefit to our culture and economy.

The INS was an inefficient agency desperately in need of an extreme makeover. Interagency fraud and corruption as well as inadequate training and poor funding led to mistakes and excruciatingly long processing times. Neither immigration advocates nor restrictionists believed the Department of Homeland Security would ameliorate the bureaucratic mess that the INS left behind. Two years after the takeover, the need for additional reforms is evident because the system as a whole is outdated. The government must update databases in order to improve service and processing times, and devise a comprehensive backlog reduction plan.

As the government improves the system to deal with illegal immigration, it must not punish legal immigrants in doing so. By effectively dealing with legal immigration, increased national security will follow. In an attempt to strike a balance between “good” and “bad” immigration, all parties involved—government, restrictionists, and even immigration advocates—must never forget the melting pot in favor of national security.

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