

Refugees, Asylum Seekers and the New Department of Homeland Security:

Initial Concerns and Preliminary Recommendations

March 2003

Refugees, Asylum Seekers and the New Department of Homeland Security

Lawyers Committee for Human Rights

On Saturday, March 1, 2003, the enforcement and services functions of the Immigration and Naturalization Service (INS) were transferred to the new Department of Homeland Security. Unless the Administration, the new Department of Homeland Security and the U.S. Congress take concrete steps, asylum seekers and refugees who now fall within the jurisdiction of the new Department will become increasingly more vulnerable as immigration “services” and “enforcement” functions are separated and as immigration functions are viewed narrowly as matters of “security.”

The mission of the Department of Homeland Security is set out in Section 101 of the Homeland Security Act. The Department’s mission includes: preventing terrorist attacks in the U.S., reducing the vulnerability of the U.S. to terrorism, and minimizing the damage from terrorist attacks. There is no stated objective of ensuring that the U.S. lives up to its obligations to refugees and asylum seekers – obligations that stem from both U.S. law and international conventions – as well as its tradition of welcoming those fleeing persecution.

The urgent need for the Department to appreciate this objective is underscored by the fact that the Department has chosen, as two of its initial decisions relating to asylum seekers, to take steps that seek to subject asylum seekers to extended periods of detention based on their nationality – and to deprive these asylum seekers of the chance to have a meaningful review of the need for detention in their individual cases. First, on the eve of war with Iraq, the Department took the extraordinary step of announcing to the press a plan to detain asylum seekers of Iraqi and other unspecified nationalities for extended periods of time – a step which effectively labels refugees seeking asylum in the U.S. as threats to our security. This announcement was quickly followed by the Department’s decision to ask the Attorney General to issue a ruling depriving Haitian asylum seekers (also asserted to be threats to “national security”) of the right to have immigration judges make individualized determinations concerning the need for their detention.

There is no innate contradiction between the new department’s security objective and the broader government interest in providing a welcoming environment for newcomers to the United States, and in particular shelter from persecution. The transfer of responsibilities to the new department however requires an express recognition of the positive contribution refugees make to this country, and a clear mission to safeguard these U.S. values in its pursuit of enhanced security. The conduct of fair refugee and asylum procedures and the maintenance of security are objectives that can both be met. The former need not be sacrificed to the latter.

With the March 1 transfer, immigration functions relating to asylum seekers and refugees are now entrusted to three new bureaus within the Department of Homeland Security: the Bureau of Citizenship and Immigration Services (BCIS, which handles asylum and refugee adjudications); the Bureau of Customs and Border Protection (BCBP,

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which handles immigration inspections functions at airports and borders); and the Bureau of Immigration and Customs Enforcement (BICE, which handles immigration detention).

As a result, a refugee who seeks asylum at a U.S. airport or border will now end up interacting with three different immigration bureaus: BCBP during immigration inspection (and when faced with “expedited removal,” a summary process that gives immigration inspectors at airports and borders the power to order deportations); BCIS in connection with a determination of whether the individual has a “credible fear of persecution;” and BICE in connection with his or her detention.

There is a significant possibility that the transfer of INS immigration services and enforcement functions to three separate bureaus within the new Department of Homeland Security – if not properly conducted and planned – could in fact exacerbate long-standing problems that plagued the INS for years.

Asylum seekers who have fallen under the authority of the “enforcement” functions of the INS have historically been in an especially difficult position. Many asylum seekers have been subject to unnecessary and lengthy detention at the hands of local INS officials; other asylum seekers have been treated improperly during INS immigration “inspections” procedures at U.S. airports and borders and some have been summarily deported under the “expedited removal” process even though they were seeking refuge.¹ Efforts to ensure that asylum seekers were treated fairly – for instance during the immigration inspections process or in connection with detention and parole determinations – were at times undermined by the fact that the “enforcement” divisions of the INS, and in some cases local INS officials, did not always fully understand the special needs of asylum seekers or the nature of U.S. obligations to this vulnerable population. This problem occurred even though the “enforcement” and “services” functions of the INS both reported to the INS Commissioner.

This problem, if it is not remedied, will only get worse as the immigration “enforcement” functions will now be further isolated in two separate bureaus (which report to a separate directorate) from the immigration “services” functions which oversee, and have expertise on, asylum matters. Indeed, one troubling effect of the decision to “split” the INS’s services and enforcement functions may be to leave vulnerable populations that are subject to “enforcement” – including detention and expedited deportation – in an even more vulnerable position than they were when they were under the authority of the INS.

¹ These problems have been documented in a series of reports issued by the Lawyers Committee for Human Rights, including *Refugee Women at Risk; Unfair U.S. Laws Hurt Asylum Seekers* (Jan. 2003), *Is This America? The Denial of Due Process to Asylum Seekers in the U.S.* (Oct. 2002) and *Refugees Behind Bars; The Imprisonment of Asylum Seekers in the U.S.* (Aug. 1998). These reports are available at www.LCHR.org.

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While it is impossible to formulate detailed and comprehensive recommendations so soon after the transfer – particularly in light of the dearth of public information about the transition – it is important to flag some preliminary concerns and questions, as well as to advance some preliminary recommendations.

Our preliminary recommendations appear at the end of this paper. The bottom line however is that a series of high-level and other mechanisms and safeguards should be instituted in the new Department, and in its three immigration bureaus, to ensure that asylum seekers, refugees and other vulnerable immigrant populations are treated fairly and in a manner consistent with U.S. law and values and in accord with international law.

The Mission of the New Department and U.S. Obligations to Refugees

The U.S. has a long tradition of providing refuge to victims of religious, political, and other forms of persecution. This tradition was reaffirmed when the U.S. chose to bind itself to the legal and moral obligations stemming from the 1951 Convention Relating to the Status of Refugees – the cornerstone of the international refugee protection regime that grew out of the wake of World War II – and again when the U.S. enacted a special law in 1980 to govern the granting of asylum status to refugees.

In the years since, the U.S. has granted refuge to a wide range of individuals: peaceful pro-democracy and human rights advocates jailed by repressive regimes; women persecuted because of their resistance to restrictive gender-based rules; torture survivors from Liberia, Iraq, Tibet and other places; victims of religious persecution from China, Egypt, Iran, Iraq, and Sudan; journalists targeted in Colombia, Haiti, and other countries because of their efforts to expose the truth; victims of forced abortions from China; and many other victims of human rights abuses from around the world.

The U.S. has administered its obligations to asylum seekers primarily through the actions of the Immigration and Naturalization Service. (The U.S. Department of State and the Executive Office for Immigration Review are also involved.) While the “services” side of the INS, through the Asylum Office, has, particularly since significant reforms were implemented in the 1990s, processed and supervised asylum adjudications in a generally fair and timely manner, the treatment of asylum seekers at the hands of the “enforcement” side of the INS has been more problematic. Among the issues that have sparked the most concern have been the needless detention of many asylum seekers by local INS district officers and the mistreatment and mistaken deportations of asylum seekers during the INS “inspections” and expedited removal processes.²

² These problems have been documented in a series of reports issued by the Lawyers Committee (see note 1).

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Asylum seekers and refugees, often the victims of horrendous human rights abuses, have long been among the most vulnerable of immigrant populations. In the year and a half since the tragic events of September 11, the difficulties facing those who seek refuge in the United States have increased significantly. Even before September 11, refugees faced many obstacles in their efforts to win asylum in the U.S. A 1996 immigration law imposed a new filing deadline on asylum claims and a summary deportation process at airports and borders, called “expedited removal.” Asylum seekers subject to this expedited process face mandatory detention upon arrival, and cannot appeal the decision to detain them to an independent authority. They are held in jails and detention facilities across the country.

In the wake of September 11, a barrage of new measures have been initiated, which have or will adversely affected asylum seekers and refugees. These measures include new limits on the immigration appeals process, a “safe third country” agreement with Canada and the expansion of immigration detention authority through the issuance of new regulations. At the same time, a combination of factors – including a post-September 11 moratorium on refugee processing, a review of security issues, and significant delays in the processing of cases and conduct of security checks – have resulted in the drastic decline in refugee resettlement in the last year and a half. The U.S. resettled only about 27,000, rather than the planned 70,000, refugees last year, and if refugee processing continues at its current pace, the U.S. will only resettle about 13,000 refugees this year.

The mission of the Department of Homeland Security is set out in Section 101 of the Homeland Security Act. The Department’s mission includes: preventing terrorist attacks in the U.S., reducing the vulnerability of the US to terrorism, and minimizing the damage from terrorist attacks. There is no stated objective of ensuring that the U.S. lives up to its obligations to refugees and respects the rights of non-citizens. The Department is however instructed to ensure that the functions of the agencies within the Department “are not diminished or neglected” – hardly a ringing endorsement for improving long-standing problems that have long plagued the immigration system or for ensuring the protection of refugees.

In another section of the Act (Section 478), however, Congress indicates its intent that the transfer should improve the quality and efficiency of immigration services, and directs the Secretary of the Homeland Security Department to guarantee that concerns over the quality and efficiency of immigration services be addressed.

At this critical time, as the new Department and the bureaus within it are being structured, the Administration and Congress should make clear that protecting the rights of asylum seekers and refugees is an important obligation and objective of the Department of Homeland Security. In turn, the Department will also need to fully

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appreciate its special obligations to refugees and asylum seekers. The urgent need for the Department to fully appreciate this special responsibility is underscored by the Department's recent decision to announce to the press, on the eve of war with Iraq, a decision to subject asylum seekers from Iraq and other countries to prolonged detention – an announcement which effectively labels refugee who seek asylum in the U.S. as threats to security.

One way for the Department to make clear its appreciation of its new responsibilities would be to create a position of Refugee and Humanitarian Affairs Coordinator, reporting directly to the Secretary. The real measure of the Department's ability to live up to the U.S.'s tradition and obligation to protect refugees will however be reflected in the day to day decisions made by the Department that affect refugees and asylum seekers. In these decisions, the Department must bear in mind both its important security objectives and its obligation to protect the victims of human rights violations who seek refuge in this country.

The Bureau of Citizenship and Immigration Services: Maintaining Accountability and a Commitment to Refugee Protection

In the Department of Homeland Security, it will be critically important for the Bureau of Citizenship and Immigration Services (BCIS) to take those steps necessary to ensure that the U.S. fulfills its moral and legal obligations to refugees. The Bureau, at the highest levels, must fully appreciate its special obligations to refugees and asylum seekers. These obligations should remain central to policies, procedures and decisions relating to refugee and asylum matters. Sufficient resources should be provided to ensure that asylum and refugee processing is properly conducted in a timely manner.

In the eighteen months since the September 11 attacks, refugee resettlement has declined drastically – leaving tens of thousands of refugees (including many who had been interviewed and determined to merit asylum, and had then been security cleared for resettlement) stranded abroad in difficult and sometimes dangerous situations. Following an initial moratorium on resettlement and the implementation of enhanced security procedures, resettlement has resumed – though resettlement processing has moved at a very slow pace. Asylum seekers have also had their cases delayed, as the INS has struggled to deal with delays in the conduct of security checks. The new Bureau of Citizenship and Immigration Services needs to devote adequate resources to improving the pace of resettlement processing and ensuring the accurate and timely conduct of security checks.

Congress has indicated, in the Homeland Security Act, that it expects the quality and efficiency of immigration services to improve. A crucial first step towards improving the quality and efficiency of refugee processing would be to create a refugee corps within BCIS. The decision to create a refugee corps – a specially trained corps of officers who

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will conduct refugee resettlement interviews and will report through a direct chain of command to a refugee director in Washington – was made by former INS Commissioner Jim Ziglar last year. The decision to create this dedicated corps of officers (modeled on the successful asylum corps created in the 1990s to conduct domestic asylum interviews), should be fully implemented in the new BCIS. These officers should be specially trained, like asylum officers, in both asylum law and country conditions. Initial reports indicate that BCIS will indeed launch such a corps, a decision that is most welcome. Adequate resources will need to be devoted to resettlement processing in order to improve the drastically reduced pace of refugee resettlement.

While many immigration functions have over the years suffered from a chronic lack of accountability, the INS Asylum Office, with its direct chain-of-command stretching from individual asylum officers in the field up to a director of the Asylum Office at INS headquarters, has – as a result of the reforms that created the asylum corps – been a notable exception.

This direct chain of command, essential to maintaining accountability, should be maintained within the new Bureau of Citizenship and Immigration Services for both asylum adjudications and for the newly created refugee corps which will conduct overseas refugee determinations. Any proposal that involves inserting local district officials – who are not directly accountable to a high-level director with asylum and refugee expertise – would be a step backwards and would undermine accountability.

The Bureau of Immigration and Customs Enforcement and the Bureau of Customs and Border Protection

Asylum seekers who have been in the hands of the “enforcement” apparatus of the INS have historically been in a difficult position. Efforts to ensure that asylum seekers were treated fairly – for instance during immigration inspection and expedited removal or in connection with detention and parole determinations – were at times undermined by the fact that the “enforcement” divisions of the INS, and in some cases local INS district officials, did not always fully understand the special needs of asylum seekers or the nature of the U.S.’s obligations to this vulnerable population. These officers, whose training and responsibilities were in immigration “enforcement,” were not adequately trained for interacting with refugees and did not view refugee protection as a priority. This problem occurred even though the “enforcement” and “services” functions of the INS both reported to the INS Commissioner.

This problem, if it is not remedied, will only get worse as the immigration “enforcement” functions are now further isolated in two separate bureaus within a separate “directorate” from the immigration “services” functions which oversee, and have expertise on, asylum matters. Under current plans, immigration “enforcement” functions of the INS will be transferred to two new bureaus: the Bureau of Customs and Border

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Protection (which handles immigration inspection) and the Bureau of Immigration and Customs Enforcement (which handles immigration detention). Both of these Bureaus report to the Under Secretary who heads the Directorate of Border and Transportation Security.

The two “enforcement” bureaus in the border and transportation security directorate will be isolated both bureaucratically and by their distinct mandates from the services bureau. Indeed, one disturbing effect of the decision to “split” the INS services and enforcement functions may be to leave vulnerable populations that are subject to “enforcement” in an increasingly vulnerable position. This increased vulnerability may be further compounded if the Directorate of Border and Transportation Security, together with BICE and BCBP, as they take steps to fulfill their security-related missions, do not also bear in mind their special obligation to protect asylum seekers.

Local District Fiefdoms Undermine Accountability

The ability of past INS Commissioners to ensure that asylum seekers and refugees were treated fairly was further undermined by the inordinate level of power that had been given to local INS district directors. Local INS districts were, in the past, regularly described as “fiefdoms” because they operated as independent entities resisting direction from headquarters. For instance, at one point, a regulation had to be issued simply to confirm to some district directors that the INS Commissioner and other high-level officials in Washington had the power to authorize the release of non-citizens on parole.³ A direct chain of command from the field directly to headquarters – without the intervention of local “districts” or “regional” offices – would help to promote increased accountability.

Asylum Seekers Subject to Inspections and Expedited Removal

Individuals who arrive at U.S. airports or borders without proper documents – including genuine refugees – face the risk of immediate deportation on the orders of an immigration inspector during a process known as “expedited removal.” (Prior to a 1996 law, the power to deport people had only been entrusted to immigration judges.) While asylum seekers are not supposed to be deported until they have had a chance to meet with an asylum officer, INS immigration inspectors have mistakenly deported asylum seekers during the six years since expedited removal went into effect.⁴

³ See INS No. 2004-99, Clarification of Parole Authority, 65 Fed. Reg. 82254-82256, Dec.28, 2000.

⁴ The Lawyers Committee has documented serious flaws relating to expedited removal and secondary inspection in several reports, including *Is This America?: The Denial of Due Process to Asylum Seekers in the U.S.*, and, most recently, *Refugee Women at Risk: Unfair U.S. Laws Hurt Asylum Seekers*. (See note 1) The press and the reports of The Expedited Removal Study, a comprehensive academic review of expedited removal, have also documented abuses associated with expedited removal. Eric Schmidt, *When Asylum Requests are Overlooked*, N.Y. TIMES, Aug. 15, 2001. The Expedited Removal Study is a project of the

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Last year, in response to the arrival of a boat of Haitian asylum seekers, the INS announced that it was expanding the application of expedited removal to future sea arrivals – a decision which was justified in part on “national security” grounds, apparently maintaining that the diversion of Coast Guard resources to rescue Haitian asylum seekers would somehow amount to a threat to “national security.”

With the airport and border immigration inspections functions of the INS moving to a new Bureau of Customs and Border Protection, asylum seekers will be left in an even more precarious position. So too will tourists, visiting non-citizen relatives, and business travelers – all of whom can be summarily deported during immigration inspections under “expedited removal.” The ultimate solution to this problem is legislative – the elimination or limitation of the use of expedited removal.

The Department and the Bureau of Customs and Border Protection should take steps to ensure that asylum seekers and other travelers are treated properly during the immigration inspection process by creating mechanisms to ensure adequate oversight by high level officials within the Bureau and the Department. This should include oversight by BCIS officials who are charged with improving immigration “services” and officials who have substantial expertise on asylum matters.

Oversight mechanisms could include the creation of a reinvigorated high-level working group to examine issues relating to expedited removal, oversight of all inspections and expedited removal functions relating to asylum seekers by the BCIS division charged with handling asylum-related matters, and regular additional training of inspectors by the asylum division.

The Department of Homeland Security, its Bureau of Citizenship and Immigration Services and its Bureau of Customs and Border Protection should also take steps to ensure that credible fear interviews (the interviews conducted during expedited removal which determine whether an asylum seeker has a “credible fear of persecution” and will, as a result, be allowed to apply for asylum) continue to be conducted by trained asylum officers (who will now be housed in the Bureau of Customs and Immigration Services) and to expand the involvement of trained asylum specialists in the conduct and oversight of expedited removal processing at airports and other ports of entry. In no case should officers who are not highly trained immigration specialists (such as customs officers who will now be part of BCBP) be given the authority to order individuals deported under expedited removal.

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In addition, the many recommendations for improvements made by the Lawyers Committee in our prior reports should be implemented.⁵ The Department should also withdraw the prior extension of expedited removal to sea arrivals.

Detained Asylum Seekers

For years the INS failed to effectively administer its own asylum parole guidelines and failed to parole many genuine asylum seekers who present no risk to the community. The result has been the unnecessary detention of many refugee men, women and children – at significant costs to traumatized refugees and to U.S. taxpayers.⁶ Efforts within the INS to improve this situation were so undermined by the resistance of some district directors that, as noted above, a regulation had to be issued simply to confirm that the INS Commissioner and other high-level officials in Washington had the power to authorize paroles.⁷ An additional flaw in U.S. asylum detention procedures is the fact that arriving asylum seekers, although subject to “mandatory detention,” are not given a procedure to appeal the decision to detain them to an independent court, or even an immigration judge.

With the transfer of the “detention and removal” functions of the INS to the Bureau of Immigration and Customs Enforcement, detained asylum seekers could end up in an even more vulnerable position. So too could other immigration detainees. Asylum seekers who are held in jails and detention facilities will also be even more isolated from those arms of the Bureau of Citizenship and Immigration Services that have the relevant expertise on asylum issues and the international standards that apply to the treatment of asylum seekers. At this stage, it is not known what steps if any the Department and the relevant bureaus will take to prevent this situation from creating additional problems.

The ultimate solution to this problem requires a mix of legislative, regulatory and policy reforms, including the institution of individualized initial determinations on the necessity of detention, access to a prompt independent review of detention decisions, and the expanded use of alternatives to detention.⁸ The Department and the relevant bureaus

⁵ See reports listed in note 2.

⁶ The Lawyers Committee has documented this long-standing problem in a series of reports issued since the early 1990s, the most recent of which are *Refugees Behind Bars*, and *Refugee Women at Risk*. (See note 1).

⁷ See note 3 and accompanying text.

⁸ There are a number of successful models of alternatives to detention that have been tested in the United States. These models have demonstrated high appearance rates for asylum seekers – ranging from 93 per cent to 96 per cent -- and significant cost savings for the U.S. government. The most comprehensive model alternative program was a “supervised release” pilot project conducted by the Vera Institute of Justice in contract with the INS. The Vera Institute pilot project, reported a very high appearance rate of 93 per cent for asylum seekers released through its appearance assistance program, and also concluded that the cost of supervision was 55 per cent less than the cost of detention -- “[i]t costs the INS \$3,300 to supervise each asylum seeker who appears for hearings compared to \$7300 for those detained.” Based on its research, the Vera Institute actually concluded that: “Asylum seekers do not need to be detained to appear for their

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should ensure that adequate resources are devoted to alternatives to detention (and in no case should resources that have been designated for alternatives *to* detention be spent on alternative forms *of* detention). Regulatory changes should include provision for the review by immigration judges of decisions to detain asylum seekers.

The Department, the Bureau of Immigration and Customs Enforcement and the Bureau of Citizenship and Immigration Services should institute concrete mechanisms to ensure that those within the Department who have the most direct expertise and institutional responsibility for asylum issues have some direct and supervisory oversight of, and input into, issues surrounding the detention of asylum seekers. Parole determinations for asylum seekers should be conducted and overseen by the Bureau of Citizenship and Immigration Services, which is charged with handling asylum determinations.

The Department, as it makes decisions relating to the detention of asylum seekers, should bear in mind its special obligations to asylum seekers under U.S. and international law. The need for the Department to appreciate these obligations is underscored by the fact that the Department has chosen, as two of its initial decisions relating to asylum seekers,⁹ to take steps that seek to subject Haitian, Iraqi and other asylum seekers to extended periods of detention based on their nationalities – and to deprive these asylum seekers of the chance to have a meaningful review of the need for detention in their individual cases. These efforts to detain asylum seekers – even if they can demonstrate, in their individual cases, that they present no security risk and otherwise satisfy the criteria for parole – reflect a fundamental lack of understanding of U.S. obligations to asylum seekers and a perception that asylum seekers should be treated as threats to U.S. security.

The Department has a critically important objective of protecting the United States. The irony is that, with these recent detention decisions, the Department, in the name of “national security,” is actually seeking to deprive asylum seekers of various nationalities of the chance to demonstrate in an individualized release determination that

hearings. They also do not seem to need intensive supervision.” Vera Institute of Justice, Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, Volume 1, pp iii, 8, 27, 31 (August 2000).

⁹ As detailed above, on the eve of war with Iraq, the Department took the extraordinary step of announcing to the press a plan to detain asylum seekers of Iraqi and other unspecified nationalities for extended periods of time – a step which effectively labels refugees seeking asylum in the U.S. as threats to our security. This announcement was quickly followed by the Department’s decision to ask the Attorney General to issue a ruling depriving Haitian asylum seekers (who are also asserted to be threats to “national security”) of the right to have immigration judges make individualized determinations concerning the need for their detention.

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they present no risk to security. The result will be the prolonged and sometimes lengthy detention in jails and facilities across the country of asylum seekers who have already in some cases been victims of unfair imprisonment, torture and other human rights violations in their home countries. Prior to initiating measures that affect asylum seekers, the Department should carefully examine: the impact of the measures on asylum seekers, including survivors of torture and persecution; the consistency of the measures with U.S. and international law, and with the U.S.'s commitment to the protection of refugees; and whether the proposed measure is actually necessary to promote security.

Children

In the wake of significant public concern about the INS's detention of children, the Homeland Security Act transferred responsibility for unaccompanied alien children to the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services. Children may still, however, interact with the "enforcement" bureaus. For instance, children will likely interact with the Bureau of Customs and Border Protection when they initially arrive unaccompanied at U.S. airports or borders and prior to their transfer to the custody of ORR. Unaccompanied children may also interact with the Bureau of Immigration and Customs Enforcement if they are mistakenly determined to be adults and detained in jails or detention facilities. Teenage children have, in the past, been mistakenly determined to be adults based on the use of dental and wrist examinations – the accuracy of which have been challenged by medical experts. These tests should not be used by the Department of Homeland Security.

The Homeland Security Department and the bureaus within it will need to take steps, in close consultation with ORR and organizations with expertise relating to children, to ensure that children are treated properly and that their special needs are met. These steps should include initiating procedures that will ensure involvement of ORR as soon as any bureau or other entity within the Department comes into contact with an unaccompanied alien child.

Maintaining Coordinated Legal Advice

Within the INS, the General Counsel's office was historically in a position to give direct advice to the INS Commissioner with respect to a range of immigration issues that impacted both "services" and "enforcement" functions. There are a multitude of issues relating to asylum seekers and refugees that impact on both "services" and "enforcement" functions, including issues relating to the decisions of individual INS trial attorneys (see the discussion below), the standards for parole from detention for asylum seekers who present no risk to the community, the appropriate treatment and legal standards relating to asylum seekers during secondary inspection and expedited removal, the interpretation of bars to asylum, and the required security checks.

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The Homeland Security Act, which separates immigration “services” and immigration “enforcement” functions, provides for a Legal Advisor for the Bureau of Citizenship and Immigration Services and a Legal Advisor for the “Bureau of Border Security.” The Department of Homeland Security has instead decided that two bureaus will be entrusted with immigration enforcement functions: the Bureau of Customs and Border Protection and the Bureau of Immigration and Customs Enforcement (both will report to the Undersecretary for Border and Transportation Security). All three new bureaus conduct activity which directly impacts on asylum seekers, and if each bureau has its own “legal advisor,” each bureau could potentially issue varying legal advice on matters affecting asylum seekers. The balkanization of legal advice between three bureaus has the potential to fracture legal guidance on asylum-related matters.

At this stage, there is little public information about the plans for the structure and functioning of the legal offices within the Homeland Security Department. As a result, it is difficult to make specific recommendations about the various legal offices.

As a preliminary matter, however, the Department of Homeland Security will need to devise a structure that will ensure that the Department, its three immigration-related bureaus, and any other entities within it (for instance the Coast Guard, in cases of interdictions) will accurately and consistently apply the legal standards relating to asylum and refugee issues. The attorneys entrusted with this responsibility must have extensive expertise regarding legal obligations to refugees and asylum seekers under U.S. and international law. This expertise will rest in the Bureau of Citizenship and Immigration Services, which is given the responsibility for refugee and asylum adjudications under the Homeland Security Act. Thus, mechanisms will need to be created to ensure that the guidance of the Bureau of Citizenship and Immigration Services on asylum matters is followed by other bureaus and entities within the Homeland Security Department.

The Role of INS Attorneys

The Legal Advisor to the Assistant Secretary for the “Bureau of Border Security” is charged, under the Homeland Security Act, with representing the Bureau in exclusion, deportation and removal proceedings before the EOIR. These individual attorneys will regularly be required to take positions with respect to whether individual asylum seekers merit asylum. They will also be required to take positions on various legal issues – such as the definition of “refugee,” whether a particular incident constitutes a bar to asylum, or whether an exception to the one-year asylum filing deadline now in force has been met.

Advice on these legal issues must be formulated by lawyers who have highly specialized legal expertise on asylum issues – an expertise that will certainly exist in the Legal Advisor’s office of the Bureau of Citizenship and Immigration Services, since this bureau is specifically given, under the Homeland Security Act, oversight of asylum and refugee determinations. This type of legal guidance must be formulated in a manner

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consistent with US and international law. A shift in reporting responsibilities in asylum cases, or at least the creation of high-level coordination mechanisms, is needed to ensure that individual immigration “trial attorneys” are required to follow the expert asylum advice issued by the Legal Advisor’s office in the Bureau of Citizenship and Immigration Services.

An Enforcement Ombudsman

The Homeland Security Act, in Section 452, specifically calls for an Ombudsman, who will report directly to the Deputy Secretary of the Department, to identify immigration service problem areas, report those problems and propose changes. This Ombudsman will also have local offices. A similar parallel Ombudsman should be created to report to the Deputy Secretary problems relating to immigration enforcement, and to report and propose changes as well.

The Need for Information and Consultation

Little information has been made public about the plans for structuring the immigration bureaus in the new Department. In part this is because time is short and decisions are being made quickly, but it is also because requests by legal and other non-profit organizations to meet with government officials to discuss the plans for the new immigration bureaus have gone largely unheeded.

There is a significant possibility that the transfer of the INS’s immigration services and enforcement functions to three separate bureaus within the new Department of Homeland Security – if not properly conducted and planned – could in fact exacerbate long-standing problems that have plagued the INS for years.

Groups that work with refugees, asylum seekers and other immigrant populations have, over the years, documented significant deficiencies in the functioning of the INS, and have made numerous recommendations for improvements. Many non-profit organizations are intimately familiar with the structural problems that have negatively impacted the vulnerable populations that they assist, and would like to be constructive partners in efforts to improve U.S. immigration services and enforcement functions.

The Lawyers Committee urges that the Secretary of the Department designate a deputy to convene regular meetings with non-profit and other concerned organizations to discuss the future structure and functioning of the new immigration-related bureaus.

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Preliminary Recommendations:

While it is impossible, given the dearth of public information available, to issue comprehensive recommendations regarding the new Department of Homeland Security and the new bureaus, a few initial recommendations can be made. These recommendations may be revised or further expanded as additional information becomes available.

- *U.S. Commitment to Refugees.* The Administration, and Congress through its oversight functions, should make clear that it expects the Department of Homeland Security – at the highest levels – to ensure that refugees and asylum seekers, who are often the victims of human rights violations, are treated fairly and in a manner consistent with U.S. obligations under U.S. and international law.
- *High-level Mechanisms.* The Department should create supervisory and coordinating mechanisms at high levels to ensure that the interests of asylum seekers and refugees – including those who are subject to the jurisdiction of the “enforcement” bureaus – are protected within the new Department. Some more specific recommendations are listed below.
- *Legal Advice.* The Department of Homeland Security will need to devise a structure that will ensure that the Department, its three immigration-related bureaus, and any other entities within it will accurately and consistently apply the legal standards relating to asylum and refugee issues. Reporting lines should be shifted, or mechanisms should be created, to ensure that the guidance of the Bureau of Citizenship and Immigration Services on asylum and refugee matters is followed by other bureaus and entities within the Homeland Security Department, and also by individual immigration “trial attorneys.”
- *Professional Asylum and Refugee Corps.* A professional asylum corps should be maintained, and as decided last year a professional refugee corps launched, within the new Bureau of Citizenship and Immigration Services. A direct chain of command from individual officers in the corps to their director should be maintained. The officers in the new refugee corps should be specially trained, like asylum officers, in asylum law and other relevant areas.
- *Enforcement Ombudsman.* The Department should create an Ombudsman for immigration enforcement functions which should report to the Deputy Secretary of the Department and should serve a parallel function to the Ombudsman created for immigration services functions.

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- *No More Fiefdoms*. In order to promote accountability, a direct chain of command should be created from the field to the Directors of the immigration bureaus. The new structure should not include anything akin to the INS district structure – a structure in which districts were often described as “fiefdoms” because the excessive delegation of authority to them permitted them to disregard guidance from headquarters.
- *Inspections and Expedited Removal*. The Department and the Bureau of Customs and Border Protection should take steps to ensure that asylum seekers and other travelers are treated properly during secondary inspection by creating mechanisms to ensure adequate oversight by high level officials within the Bureau and the Department, including oversight by BCIS officials who are charged with improving immigration “services” and BCIS officials who have substantial expertise and responsibility on asylum matters. These mechanisms could include the creation of a reinvigorated high-level working group to examine issues relating to expedited removal, oversight of all inspections and expedited removal functions relating to asylum seekers by the BCIS division charged with handling asylum-related matters, and regular additional training of inspectors by the asylum division. The Department should also take steps to ensure that credible fear interviews continue to be conducted by trained BCIS asylum officers and to expand the involvement of trained asylum specialists in the conduct and oversight of expedited removal processing at airports and other ports of entry.
- *Detention of Asylum Seekers*. The Department, the Bureau of Immigration and Customs Enforcement and the Bureau of Citizenship and Immigration Services should institute concrete mechanisms to ensure that those branches of the Department that have the most direct expertise in asylum issues have some direct and supervisory oversight of and input into issues surrounding the detention of asylum seekers. Parole determinations for asylum seekers should be conducted and overseen by BCIS, which is charged with handling asylum determinations. The Department and the relevant bureaus should also ensure that adequate resources are devoted to alternatives to detention (and in no case should resources that have been designated for alternatives *to* detention be spent on alternative forms *of* detention). Additional regulatory changes should include provision for immigration judge review of decisions to detain asylum seekers.
- *Unaccompanied Children*. The Department and the bureaus within it will need to take steps, in close consultation with ORR and organizations with expertise relating to children, to ensure that children are treated properly and that their special needs are met. These steps should include initiating procedures that will ensure involvement of ORR as soon as any bureau or other entity within the Department comes into contact with an unaccompanied alien child.

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- *Meeting with Non-profits and the Public.* The Secretary of the Homeland Security Department should designate a deputy to convene regular meetings between officials involved in the transition and non-profit and other concerned organizations in order to discuss the future structure and functioning of the Department and the three new immigration bureaus. Additional public outreach should also be conducted.