

U.S. House of Representatives
Subcommittee on Immigration, Border Security, and Claims

**“New ‘Dual Missions’ of the Immigration
Enforcement Agencies”**

May 5, 2005

Testimony of Janice L. Kephart

Former counsel, The National Commission on Terrorist Attacks Upon the United States and an author of *September 11 and Terrorist Travel, A Staff Report of the National Commission on Terrorist Attacks Upon the United States*

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Introduction

Good afternoon and thank you for the opportunity to discuss *terrorist travel* and *immigration enforcement* with you today. My testimony is based on my work as a counsel on the 9/11 Commission “border security team,” as an author of the 9/11 staff report, 9/11 and Terrorist Travel, and a 380 page report on the current state of terrorist activity in the United States I conducted as a consultant. At the Commission, I was responsible for the investigation and analysis of the INS and current DHS border functions as pertaining to counterterrorism, including the 9/11 hijackers’ entry and acquisition of identifications in the United States. My current work includes a study of terrorist travel tactics in the United States, specifically focusing on the abuse of our immigration system by 118 indicted and convicted terrorists.

Please note that the views I present here today are my own, and do not necessarily reflect those of the 9/11 Commission. I want to thank both Chairman Hostettler and Ranking Member Jackson Lee for holding this important hearing. I also wish to applaud Congress for passing the National Intelligence Reform Act of 2004. That Act contained many valuable terrorist travel provisions born of the 9/11 Commission’s recommendations. I look forward to seeing the national terrorist travel strategy and the implementation of the new passport rules for all visitors come to fruition as required by the Act. It is the hope of many of us who are working on this important topic that this Subcommittee and Congress as a whole will continue to exercise their oversight authority on the important issue of terrorist travel and overall border security, ensuring that our Government continues to implement the lessons learned as a result of the tragic events of September 11, 2001.

From the outset, let me make it clear that I, like many, consider the benefits and wealth of human potential that immigration brings to this country to be one of our greatest strengths as a nation. However, I also believe that we owe it to all Americans to maintain the integrity of our borders. To do so, we must scrutinize effectively those who seek to come here. September 11 has taught us that secure borders are a matter of national security.

We will not have secure borders until we enforce the laws already in place; until we properly train, equip and support our first line of defense; and until we are prepared to share more information with frontline personnel. Nor will we have full immigration reform until we understand the extent of our vulnerabilities and devise a long term plan to fix the border system, so that policy priorities can be set and executed with political

credibility; clarify and streamline our complex immigration laws where necessary; and allocate and account for funds and other resources appropriately; and restructure our border system to reflect the importance and mission of our immigration apparatus.

Today I plan to discuss with you whether the current structure of our border security system accomplishes its most important responsibility: to provide security for U.S. citizens and legal residents of the United States from foreign visitors who seek to do us harm. To understand why structure matters, we must first gain an understanding of how foreign terrorists are exploiting the vulnerabilities in our border system, why these vulnerabilities exist, and then why the structure of the border system matters. Based upon these findings and analysis, recommendations follow.

U.S. Border System Vulnerabilities

Despite good initiatives by the administration, such as the deployment of U.S. VISIT to international airports, weaknesses in the U.S. border system still exist. Terrorists will continue to successfully enter the United States because we still lack adequate technologies; integrated information systems that house biometric travel histories of visitors and immigrants; and specialized training in terrorist travel tactics. As noted in 9/11 and Terrorist Travel, front line immigration officers are not adequately trained to detect fraudulent travel stamps in passports, terrorist indicators in passports, or behavioral cues. Indeed, as a staff member for the 9/11 Commission I had access to more information about the techniques that terrorists use to gain unlawful entry in the United States than frontline officers.

Without repeating the content and findings of 9/11 and Terrorist Travel, terrorists will use any infiltration tactic if it works, from hiding in a ship's hull or car trunk, to seeking legitimate visas, to entering into a sham marriage that will gain them access to either a visa waiver, or, better yet, a U.S. passport. These terrorists do not just represent Al Qaeda; Hamas and Hizballah and lesser-known terrorist organization operatives also engage in all varieties of immigration fraud.

Once in the United States, they seek legal status and resist removal through sham marriages, claims of political asylum, and applications for naturalization. They seek U.S. and state issued identifications to establish themselves in the community and travel more easily. They take advantage of amnesty and temporary worker programs, and in one case even managed to stay in the United States when a spouse won the visa lottery.

Terrorists move through our border system in a continuum. However, our current border system is even less reflective of that continuum than it was prior to 9/11.

To understand where we are today and why, we need to look back at our border system prior to 9/11 and the creation of DHS. We must understand why our border system failed prior to 9/11, and why it is still struggling today. We must first take a look at the variety of operational border missions that will likely always make up the U.S. immigration system.

The U.S. immigration system prior to the creation of DHS

Even prior to 9/11, our immigration system was failing to provide the basic requirement of good government—value. The result was a constant chorus that our immigration system was “broken” and “laughable”. Value was measured in the level of security we perceived the immigration system to provide. However, security was defined as one of economic, not national, security. The debate raged over the economic value of illegal workers to our system while it was widely recognized the Citizenship USA program put in place to facilitate legal immigration was an embarrassing failure. There was also increasing concern that illegal populations worsened drug and crime problems. The inability of the government as a whole to address these issues resulted in a freezing of resources to address the problem. A mere 2,000 interior enforcement agents had the impossible job of dealing with an estimated 6 million illegal aliens. Our immigration system was failing to provide even economic security.

No role in counterterrorism prior to 9/11. I know from personal experience as a counsel to the Senate Judiciary Committee in the late 1990s that before 9/11 INS employees considered their agency to have no role in counterterrorism. When posed the question, I was simply told, “That’s the FBI’s job.” I responded: “Well then who is to keep terrorists from entering the country?” I was given no answer.

Only after public hearings on foreign terrorist activity in the United States on the five year anniversary of the first World Trade Center bombing and insisting that the INS take part in those hearings, did the INS set up a National Security Unit. That unit never had more than a half dozen full time employees. They worked in a virtual information vacuum, seeking information from the FBI and field where they could. The INS’ intelligence unit was considered of so little value that the INS Commissioner had decided years prior that daily briefings were a waste of time. This failure was just one manifestation of a woefully inadequate border system.

Overly complex immigration laws. Another way in which our immigration system was failing to provide value was that immigration rules were immensely complex, hard to understand, and even harder to apply. Inspectors at ports of entry, border patrol agents, immigration agents, immigration benefits adjudicators, and immigration attorneys and judges were all stymied by rules that were fuzzy and time-consuming to implement. Why? For decades, immigration rules were constantly built upon the latest crisis. Wholesale review of the efficiency, fairness, and functionality of these laws never took place. Concern over reprisal often led to more lax enforcement- both for those inspecting visitors coming into the country and in our immigration courts. All of this contributed to poor morale and a burgeoning immigration problem: those seeking to come here and stay knew there were plenty of legal and illegal loopholes to facilitate remaining in the United States indefinitely. Those working in immigration were demoralized. The problem worsened.

Lack of effective policies. We also failed to be holistic and proactive in our immigration policies. Where policies existed, they were divergent: at the ports of entry and in immigration benefits, it was all about customer service. However, interior enforcement was about rounding up illegal aliens, sanctioning employers not playing by the rules, and issuing removal orders to criminal aliens. The conflict between enforcement and customer service once more resulted in a constant push me-pull you policy-making. No real forward momentum was created. There was another problem as well: a lack of efficiency in supervision at ports of entry, where duplicative hierarchies existed for both customs and immigration inspectors. Many sought a combined force.

Poor use of funding. The immigration system also failed to provide value in its use of appropriated funds. Congress became so frustrated with ad hoc technologies and no real movement towards completion of new immigration benefits technologies that in the late 1990s Congress chastised the INS in its conference reports, denying needed resources until the INS could show accountability for monies previously provided. During this time, the student tracking and entry-exit systems were started and, for different reasons, never came to fruition. Any money that was appropriated went disproportionately to the Border Patrol, but the problems of illegal immigration seemed to ebb and flow depending upon where resources were physically allocated on the border. Meanwhile, the State Department's Consular Affairs was suffering near annual cutbacks. Immigration agent resources remained level despite a growing illegal population, and the immigration inspector workforce grew slightly, but not in proportion to the burgeoning number of foreign visitors.

Throughout the 1990s, hearings were held constantly on Capitol Hill. Topics included the porous southwest border, the slow processing of naturalization applications, and the inadequacy of immigration law enforcement. The debate raged: *maybe the structure isn't right*. For years, two sets of solutions were proposed: (1) break up INS into its enforcement functions and benefits functions and/or (2) merge Customs and INS together.

In testimony before the 9/11 Commission in January 2003, former INS Commissioner Jim Ziglar told us in lengthy testimony about the severe challenges he faced when he was asked by newly elected President Bush to restructure the INS and reduce immigration benefits backlogs. In early August 2001, Commissioner Ziglar took office. On September 10, 2001, he had a business plan for restructuring the INS ready for review, in part based on the work of the prior INS Commissioner, Doris Meissner. In early 2002, as Commissioner Ziglar still attempted to move forward with restructuring, *especially* in light of the events of 9/11 (as he told me during interviews), he undertook to determine what it would take for the INS to actually fulfill its mandate. He provided the following testimony:

We concluded that the INS annual budget would have to grow from \$6.2 billion in FY 2002 to approximately \$46 billion by FY 2010 ...assuming Congress and the administration actually desired that the mandates be fulfilled. It was also assumed immigration laws would remain static. ... It was concluded that in order

to carry out the enforcement mandates of the Congress and administration, past and present, the INS would need approximately the following:

- 27,960 Investigators/Special Agents (compared to the 2,000 employed at the time of the study), a 14-fold increase
- 31,700 Border Patrol Agents (compared to 10,000)
- 21,500 Immigration Inspectors (compared to 5,000)
- 15,600 Deportation Officers (compared 650)
- 1,440 Attorneys (compared to 770)
- 110,000 detention beds (compared to 21,107)
- and a vast increase in office space, support staff, vehicles, computer equipment, etc.

These numbers speak for themselves.

The immigration system moves to DHS

Prior to 9/11 and the creation of DHS, the seven elements of our immigration system were buried in bureaucracy at two main locations: the INS at DOJ and Consular Affairs at the State Department. The U.S. Coast Guard supported the INS at sea. After 9/11, the dismantlement of the INS became inevitable—the years of discussion about its break-up finally seemed to be grounded in something real, as if the wholesale splitting up of functions into completely separate bureaus would have increased our national security prior to 9/11. Of course it would not have, as the INS was not considered to have a role in national security prior to 9/11.

Today, we have severe fragmentation, with those seven elements split between three departments (DOJ, State, and DHS) and within DHS, in four different agencies: CBP, ICE, USCIS, and the Coast Guard. There is no policy shop under the Secretary to pull disjointed elements together. If Secretary Chertoff creates such a policy shop, that alone will significantly upgrade policy cohesion throughout DHS border functions.

The current DHS structure has combined pre 9/11 solutions to a post 9/11 world. Border functions now at DHS represent acceptance of pre 9/11 views: that enforcement and customer service missions require wholesale bifurcation, and government efficiency requires the combined forces of the INS and Customs Service.

These presumptions are inaccurate; they fail to reflect current national security realities.

Mission Elements of the U.S. Immigration System

	Prior to DHS	Since DHS
Visa issuance	Consular Affairs at DOS	Consular Affairs at DOS with policy at BTS at DHS
Inspections at 400 plus air, sea and land ports of entry	INS at DOJ, with support from Customs at Treasury	CBP under BTS at DHS
Patrol of U.S physical land borders	INS at DOJ	CBP under BTS at DHS
Patrol of U.S. maritime borders	Coast Guard at DOD	Coast Guard at DHS
Interior enforcement of immigration laws	INS at DOJ	ICE under BTS at DHS
Immigration benefits	INS at DOJ	USCIS at DHS
Immigration courts	INS at DOJ	EOIR at DOJ

First, in a post 9/11 world, all immigration functions have at their foundation national security. The top priority of the immigration system therefore must be enforcement of the law and assuring adequate but efficient security vetting of applicants throughout all facets of our immigration system. Until we accept that all elements of our immigration system have a significant role to play in the war on terror, our immigration system will not optimize the value- that of security- it must provide to Americans.

Second, while a good argument remains that ports of entry have both an immigration and customs mission, it does not necessarily translate that interior enforcement of immigration and customs laws achieves maximum effectiveness by a joining of those law enforcement functions. While there is limited and justified overlap of some immigration and customs enforcement operations, especially where aliens are committing crimes over which customs personnel would traditionally have jurisdiction (and vice versa). However, there is nothing preventing joint task forces for such operations from being equally efficient. Moreover, traditional immigration investigations against employers violating immigration law, immigration benefits fraud, SEVIS and, eventually, U.S. VISIT violators, need to remain a priority. They should find equal weight with traditional Customs investigations, and not be subsumed.

Perhaps most importantly, what seems to be lacking in our analyses of providing a border system with value is *new thinking*. We must consider that immigration activities— whether enforcing the law or providing a benefit at or within our borders- all require overarching cohesive policies, resources and interconnected information resources to make it work. However, that does not mean that we should wait to shore up our immigration system while we tackle the complex and difficult policy, budgetary and legal questions that have traditionally burdened our immigration system. We can, and should, begin redressing some of its severe deficiencies in interior enforcement now. I believe

we can do so without negatively impacting long range planning of our immigration system.

Strengthening immigration enforcement

To rebuild public confidence, our nation must create a strong and intelligent border screening system that is effective both at keeping terrorists out of the United States and in facilitating legitimate travel and immigration services. The system will never provide a perfect result. Some terrorists will get through, despite our best national effort. In that case, the public needs to know that border authorities investigate the reasons for the infiltration and make necessary changes to further strengthen the system.

In pursuit of this objective, the rule of law matters. The process of intercepting terrorists and detecting them through their violations of immigration law is properly a domain of national security and demands highly focused law enforcement efforts by trained, dedicated professionals. Terrorists represent a lethal threat. But a border and immigration system with consistent and systematic enforcement is much harder for terrorists to penetrate. A United States whose borders and immigration system are governed by the rule of law, moreover, sends a message of justice that is itself a deterrent to terrorists.

To promote public confidence in the rule of law, it is critical to reform our immigration system. We cannot afford the vulnerability of the borders, the lack of internal regulation, the gaps in our enforcement system, and the continued corrosion of the rule of law caused by the presence of 10 million illegal aliens. The underlying condition of our immigration system is that there is a dearth of predictable and consistent enforcement.

We must insist upon people entering lawfully and abiding by the terms of their admission as a fundamental basis of our immigration system, and desist from viewing immigration violations as mere technicalities. On the other hand, demands for “catch-up” enforcement of immigration law, while appealing to some, threaten the availability of resources to develop and sustain a significant, dedicated, and targeted counterterrorism effort at the borders. Quite simply, there will not be a sound and secure border security system or an optimal deterrent policy against terrorists until we have an immigration policy and system that operates more realistically, efficiently, and according to the rule of law.

First, reform should include simplifying the law and standardizing its application in the field. Our 9/11 investigation showed that mistakes by inspectors at the ports of entry resulted in part from the inordinate complexity of immigration laws. While the standard of decision-making at the ports of entry, in enforcement, and in immigration benefits proceedings can be enhanced by national standard operating procedures and specialization, Congress and the President also hold responsibility for simplifying the laws.

Second, the U.S. government should adopt a counterterrorism immigration enforcement strategy that brings all relevant federal, state and local entities to the table. All of our law enforcement agencies have a role to play in denying terrorists the ability to enter and remain in the United States. These efforts need to be coordinated, robust and matched to

the expertise of each agency. To be successful, such a strategy should include comprehensive training in the nuances of immigration law and the resources to implement the law equitably and fully. It also requires intelligence (and training) on terrorist travel methods and watchlisting that is available to our border officials in a timely manner.

Specifically, DHS should invest in the ability of state and local law enforcement to detect terrorists among immigrant communities by providing training, real-time access to federal expertise, the necessary security clearances, and other resources as needed. Currently, only two states, Alabama and Florida, have or are receiving training from federal immigration authorities on immigration enforcement relevant to their jurisdictions. I welcome the news that more states and communities are recognizing the value they can provide to this effort. They can help find terrorists and criminals in the United States when they examine travel documents in the normal course of their duties. State and local law enforcement should be encouraged to use the DHS Law Enforcement Support Center (LESC) to access databases and experts on travel documents.

Third, *DHS and the Justice Department should propose adoption of tougher anti-fraud laws in the United States*, where document and other forms of illicit travel facilitation are linked to terrorists and punishments and sentences do not fit the crimes.

Fourth, *special consideration must also be given to the consular officers and immigration inspectors, agents, and benefits adjudicators who have the opportunities to detect and intercept terrorists as discussed above*. Up to now, they have not been considered critical assets in the war against terrorism even though they are responsible for determining who enters and who remains in the United States. They need to be given an enhanced role in any counterterrorism immigration strategy. This includes *providing appropriate security clearances for certain personnel at ports of entry and elsewhere as needed*.

Fifth, *all these reforms must be adopted under an overarching policy that encourages legal immigration and discourages illegal immigration*. We are capable of maximizing security and efficiency throughout the immigration system while minimizing privacy intrusions. As we build efficient security at the perimeter of our borders by facilitating entry of those we deem legitimate and denying entry to those we do not, pressure on interior enforcement will eventually become more manageable.

Creating a Department of Immigration and Border Protection

One potential way to provide the immigration system with the political backbone it deserves is to consider a long-term plan of providing the immigration system with its own structure. By creating a Department of Immigration and Border Protection, fragmentation is minimized and enforcement and benefits operations act to support each other. If we consider that we, as a country, can adopt policies and laws that encourage legal immigration and discourage illegal immigration all upon a foundation of biometrically based travel histories and secure background checks, then we divest ourselves of the notion that we have to fragment our operations into boxes that only incite

unnecessary turf and resource allocation wars. CBP and ICE are remnants of old thinking. We need immigration enforcement functions to stay together where it makes sense, and that is the case where detention and removal, anti-smuggling, and overall immigration enforcement is merely an extension of border inspection and patrol functions.

The bureaucracy that houses the U.S. border system should be the Department of Immigration and Border Protection. Right now, immigration services, (CIS) immigration enforcement (CBP and ICE), and border policy (BTS) are all co-located at DHS. Visa issuance remains at the State Department. It is not the fragmentation of these agencies that is the entire problem, however. Instead, the main problem is one of accountability and access to information. There is no one who answers directly to the President solely on border issues, nor has direct access to the top tiers of intelligence.

Instead, the creation of DHS has replicated one of the problems of legacy INS: too many layers of bureaucracy between the president and those on the front lines of immigration policy-making and information gathering. This problem is documented in 9/11 and Terrorist Travel.

Today's DHS Secretary not only has to deal with an overly complex set of border, immigration and customs enforcement, and immigration benefit issues, but wholly new arenas for the government such as information assurance and infrastructure protection. This inevitably means that the DHS Secretary (like all previous parent organizations of immigration agencies) has a multitude of responsibilities, only a handful of which are critical to border security. No one thoroughly knowledgeable or directly responsible for the border system is available to answer questions at a cabinet meeting or listen to critical intelligence briefings. Consider the following factors:

- Accountability and access to the President are keys to having the right information from the right people to make border security effective. Border security never has been effective in this country.
- U.S. immigration policies inform our foreign policy and affect the world's view of the United States. Immigration has always been central to shaping our identity as a nation. A Department of Immigration and Border Protection would reflect that importance.
- Immigration issues and laws are immensely complex, politically and legally, and require a tremendous amount of expertise to deal with them effectively.
- Well-honed border policies have become a top priority for national security.
- About 40 percent of DHS employees, or about 40,000 personnel, are in a border-related agency or directorate. That is more than the year 2000 Congressional Budget Office numbers for the Department of State (27,000); the Department of

Labor (16,000); Department of Education (5,000); Department of Energy (16,000); and the Department of Housing and Urban Development (10,000).¹

As described in 9/11 and Terrorist Travel, ever since their inception, immigration services have been treated poorly in the hierarchy of government bureaucracies:

Although the nation's growth depended on successive waves of immigrants, the Bureau of Immigration never seemed quite important enough to become its own department, with its own secretary reporting directly to the president of the United States. In fact the bureau was something of an administrative orphan. Over the century its name and bureaucratic home changed repeatedly, and increasing numbers of confusing statutes created conflicting jurisdictions in both immigration services and enforcement.²

The endnote to that paragraph reads:

In 1895, the Bureau of Immigration was created and placed under the Secretary of the Treasury. In 1903, the bureau moved to the newly created Department of Commerce and Labor, taking the name the Bureau of Immigration and Naturalization in 1906. When the Department of Labor was created in 1913, the bureau moved with it. In 1933, these functions were consolidated to form the Immigration and Naturalization Service under a commissioner. In 1940, the Service was transferred to the Department of Justice where it remained until March 2003. See "History of Immigration and Naturalization Agencies," 8 U.S.C. § 1551. In addition, there are at least 150 statutes providing the legislative history of immigration.³

With rumors that CBP seeks to absorb ICE, interest in shifting the BTS policy shop into the office of the DHS Secretary, and infighting between CIS and ICE, and ICE and CBP, many bureaucratic issues remain to be resolved. Perhaps placing these border functions in a standalone department would allow desperately needed reforms to be put in place, including strategic planning for budgets and resources that could finally make the U.S. border system enforceable and effective.

Conclusion

Terrorists are creative and adaptable enemies. The 9/11 hijackers probed our defenses, found our weakest points, and ruthlessly exploited them. To counter the threat, we must be aware of new trends in terrorist travel. We must be more flexible in our efforts to counter them.

¹ Congressional Budget Office. "A CBO Paper: Changes in Federal Civilian Employment: An Update." May 2001.

² 9/11 and Terrorist Travel, p. 90.

³ 9/11 and Terrorist Travel, Chapter 4, endnote 126, at pp. 238-239.

We must upgrade our border system now. Our current system sets the bar far too low for terrorists trying to enter the United States. Fortunately, our frontline officers are extremely dedicated, talented, and eager to do everything they can to protect this country. Now they need the tools and the authority to do their job. Better training, government-wide integrated databases, standardized procedures, biometrics, the latest technology, and the authority to trust their hard-earned instincts, will empower these dedicated officers to keep our country safe.

The thousands of dedicated officers responsible for visa issuance, entry, and immigration adjudications have an overwhelming task: to identify, out of the millions who seek entry into this country each year, the few who represent a danger to the United States. Keeping our borders open to well-meaning legal immigrants, who contribute to our economy and society, while keeping out and removing terrorists and others seeking to harm us, should be a top priority. The recommendations in this testimony can make our borders more secure by ensuring that policy decisions have the support from the President and key issues of enforcement are not mired in unnecessary turf and resource battles.