

Immigration Policy Before and After 9/11: From the INS to DHS – Where Did We Go Wrong?

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Immigration policy, like so many other facets of American life, has been indelibly altered since the 9/11 terror attacks, forever linking how the United States approaches migration to homeland security. The chain of events set into motion that day led to a fundamental shift in the immigration narrative – re-framing it as both a risk to and a tool of U.S. national security efforts. Using the legislative momentum provoked by the attacks, and the newly created Department of Homeland Security as a way to achieve long-standing immigration reform goals, policymakers have made choices over the last 20 years that have forever transformed the national dialogue on how the United States welcomes – or not – those who choose to come to its shores. But by ignoring lessons of the past 80 years of immigration processes, the United States is right where it started – with an overburdened, unwieldy immigration system that runs counter to its economic needs, cultural growth and, ultimately, its national values.

The Pre-9/11 World of Immigration Policy

For decades, the Immigration and Naturalization Service (INS) – the precursor to the Department of Homeland Security (DHS) – was the black sheep of the executive branch. A small agency tasked with administering and enforcing the nation's immigration laws, it had been jostled around – from the Department of Labor to, eventually, the Department of Justice – with no clear idea of where it best fit. Chronically underfunded and under-resourced, INS was, much like the topic of immigration itself, perplexing to numerous sessions of Congress and White House administrations, none of which knew exactly where it belonged or what to do with it.

In the 1990s, the contours of the immigration debate began sharpening. In line with the decade's "War on Drugs" and "tough on crime" policies, immigration became increasingly punitive and criminalized. The broad mandate of INS – which served as both adjudicator and enforcer of immigration laws – got in the way of the increasing fixation on criminal enforcement.

The Post-9/11 World of Immigration Policy

After the terror attacks of Sept. 11, 2001 – perpetrated by non-citizens who used the immigration system for their terrible purposes – U.S. government structures underwent a seismic change, ultimately leading to the creation of a brand new agency: DHS. This massive overhaul of the executive branch provided the Bush administration with another solution to fix the chronic lack of funding and support that had plagued INS for far too long – problems that were blamed in large part for the 9/11 attacks. By restructuring government agencies, the Bush administration was also able to refocus U.S. immigration policy. The Department of Justice retained the immigration court system. All other immigration functions were brought into the newly created DHS, including not only the role INS had played, but also the Customs component, which was relocated from the Treasury Department.

The creation of DHS irrevocably set the country on a path that made immigration enforcement a matter of national security and justified treating migrants as dangers to the homeland. Although the blurring of lines between immigration and criminal law had begun years before DHS opened its doors – when President Bill Clinton signed the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) – the establishment of DHS after 9/11 escalated this adversarial approach to immigration. IIRIRA transformed the immigration system into the punitive, quasi-criminal system it is today. But it was the post-9/11 creation of DHS that opened the door to the dark policies of the recent past – mass detention of asylum seekers, deportations that tear communities apart, and large investments in private detention complexes.

I have been an immigration attorney and advocate for over fifteen years. But in 2003, I was just starting that journey. I began law school the same year DHS opened its doors, and got my first job in immigration law less than a year later. As I learned and grew as an immigration lawyer, I saw the slow erosion of the previous approaches to immigration adjudication in favor of more punitive philosophies. Government prosecutors, now employees of DHS, slowly stopped offering immigration benefits

to those who clearly qualified, in favor of attempting to deport as many individuals as possible. Interpretation of immigration law, which had always favored the government, now included new obstacles to obtaining legal status. Bureaucratic processes became more convoluted and opaque.

At the same time, DHS grew in influence and size. It now includes 24 sub-agencies, such as U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), the Transportation Safety Administration (TSA), the Federal Emergency Management Agency (FEMA), and the Coast Guard. More importantly, its law enforcement budget has at times dwarfed the budgets of all other federal law enforcement agencies combined.

What Went Wrong: Insights from Former Government Employees

Over the last three years, as the Trump Administration pushed the immigration enforcement purview of the DHS to previously unseen levels, I've interviewed immigration advocates and current DHS employees – all of whom had started their careers in the legacy agencies including Customs and INS – to get their perspectives on where the United States went wrong in attempting to reform INS and creating DHS. Many of them still work in, or have returned to, government service and shared their observations on condition of anonymity. As a result, I have aggregated and summarized their points for this article.

Overall, the former agency employees of the precursors to DHS all agreed on a few key points: the system, as it is currently set up, is not functional and must be streamlined.

Everyone generally agreed that INS was an underfunded and under-resourced agency that was never fully empowered to fulfill its mission. In their view, that mission itself seemed fundamentally conflicted, with the agency being in charge of simultaneously granting immigration status, prosecuting violators of immigration law, and effectuating deportation orders. The leadership of the field offices could be filled by individuals performing any of those disparate and at times conflicting functions. This meant that various local offices may have different policies depending on whether they were led by someone who rose through adjudications and had spent their career granting immigration status, or someone coming from enforcement who had spent their career seeking out those who had violated the laws.

According to these former government employees, Deportation Officers at INS, or DOs for short, were jokingly referred to as “Desk Officers” because their division’s work was largely administrative paperwork, a stark contrast to the militant law enforcement culture that permeates that division’s successor – Immigration and Customs Enforcement (ICE). Those sub-agencies with the more overt law-enforcement mandates complained that the culture was set by the Border Patrol, with everything from priorities to weapons being determined by agents whose jobs were, and still is, to patrol land borders. Border Patrol, more than any other agency with purview over immigration issues, has had a long and problematic history that is tied more closely to some of the worst aspects of law enforcement. The agency purchases military-grade (and sometimes military-used) equipment that seems excessive at best, including M-4 guns with silencers, night vision goggles, and armored vehicles. Its agents also have a well-established track record of abuse and neglect of those in their custody. Yet its leadership is reported to have a large influence in decision-making spaces, within both legacy INS and, more recently, DHS.

The former government employees also observed that in the effort to reform these deficiencies in the wake of the 9/11 terror attacks, immigration policy became overtaken by a law enforcement and exclusionary mentality. While the creation of DHS ultimately addressed the breakdowns in communication between various parts of government that contributed to the intelligence failures that led to the attacks, it also generated other challenges. Congress fueled the growth of immigration enforcement mechanisms by allowing enforcement and detention budgets to balloon in size, which contributed to DHS’s dysfunction. The various congressional committees that previously had jurisdiction over the different predecessor agencies would not give up their control, resulting in fractured oversight of DHS, which continues to this day. This promotes distrust and rivalry among the various sub-agencies of DHS. At the same time, the work of sub-agencies that had up until that point been mainly administrative became ultra-politicized in the wake of the intensified focus on counterterrorism and under the glare of the growing 24-hour news cycle.

No DHS sub-agency exemplifies this dramatic shift more than CBP, which blended legacy Customs, an agency with no immigration function housed within the Treasury Department; Inspections, a sub-agency of INS which had been tasked with confirming that individuals entering the United States had the appropriate paperwork; and Border Patrol, which had operated, and still operates, in a quasi-military manner patrolling land borders. CBP’s mission today is ostensibly to

protect the homeland from threats from abroad, but it has had an outsized focus on individual travelers, at the expense of efforts to intercept narcotics, criminal organizations, and terrorist groups as a whole. Both the impetus and the result of this singular focus on individuals are a political narrative that portrays immigrants as an inherent danger to the United States. This narrative permeates both news coverage and, increasingly, internal agency culture. More and more DHS employees, including CBP agents and ICE prosecutors, are viewing their role as keeping immigrants out, instead of offering an impartial assessment of whether the law permits them to stay.

While CBP exemplifies the politicization and ultimate subversion of its core mission for immigration policy purposes, other sub-agencies of DHS have been subject to the same whims. Under the previous administration, a focus on Latin American gangs, notoriously MS-13, transformed ICE into a criminal law enforcement agency and helped further anti-immigrant rhetoric by closely aligning border policy with the fearsome gang. Ultimately, all of the other immigration-related sub-agencies in DHS suffer from the same fundamental flaw – they operate with missions that are too broad, too ill-defined and too vulnerable to political whims.

The Path Forward

As the United States marks the 20th anniversary of the terror attacks, and rapidly moves toward the 20th anniversary of the Department of Homeland Security, the time seems right for an evaluation and course correction. The United States must learn from the mistakes made in creating DHS by restructuring it and its accountability mechanisms as follows:

- First and foremost, Congress should streamline oversight of the various sub-agencies within DHS and bring DHS under the jurisdiction of one congressional committee.
- Second, as Congress exercises its authority over DHS, it should divide various functions of DHS to better separate immigration and national security. Border Patrol and ICE should perform their administrative law enforcement functions separately from CBP's and Homeland Security Investigations' broader criminal law enforcement activities. For example, investigations of individuals traveling to the United States from abroad who are potentially part of larger criminal networks should be kept separate from the daily processing of travelers to the United States.

- Finally, the Biden administration should work with Congress to clearly define the missions of each sub-agency within DHS to avoid making them vulnerable to political whims. For example, national security efforts should include immigration law and procedures as tools, but not make their enforcement the end goal. Migrants arriving at the border in search of help should be met by USCIS officers to adjudicate their asylum claims and agencies better trained in working with vulnerable populations, such as the Office for Refugee Resettlement (ORR) and FEMA.

Over the past 20 years, we have seen the harmful trajectory U.S. immigration policy has taken as DHS has blurred the lines between immigration enforcement and national security. But a close examination of previous policies shows that the reforms that were already long overdue on Sept. 11, 2001, have yet to happen. It's not too late to set DHS on the right path to ensure that it embodies the nation's values and protects the country.