

Statement of
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Before the
Committee on Governmental Affairs
Permanent Subcommittee on Investigations
United States Senate
Regarding

Processing Persons Arrested for Illegal Entry
into the United States Between Ports of Entry
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Mr. Chairman, Senator Collins, and Members of the Subcommittee, I am pleased to have the opportunity to talk to you today about the Immigration and Naturalization Service's (INS) role in processing aliens arrested for illegal entry into the United States between ports of entry. I am also pleased to be accompanied today by Gus De La ViZa, Chief of the United States Border Patrol.

The INS is charged with both facilitating legal immigration and enforcing the nation's laws to prevent illegal immigration. The horrific events of September 11 have underscored the far-reaching implications of this mission and the challenges the agency faces in carrying it out. Nowhere are the challenges greater than along our land borders.

Our border management strategy aims to facilitate the flow of legal immigration while preventing the illegal entry of people and contraband. Responsibility for carrying out this strategy is shared by the Border Patrol and the Inspections program. Immigration Inspectors are assigned to the ports of entry and are charged with preventing the unlawful entry of aliens. Border Patrol Agents are charged primarily with detecting and preventing the unlawful entry across our land borders between ports of entry.

The Border Patrol is responsible for patrolling 8,000 miles of border, which includes 2,000 miles of Southwest border, 4,000 miles of Northern border, and 2,000 miles of coastal border. In 1994, as threat and activity levels grew along the Southwest border, the Border Patrol implemented a four-phased strategy to deter, detect and apprehend illegal entrants, smugglers and contraband. The strategy involves forward deployment of personnel, equipment and technology along the Southwest Border (Phases I – III) and then along the Northern Border, Pacific and Gulf Coasts (Phase IV). The strategy is currently in Phase II, concentrating resources primarily in the areas of highest illegal activity, the Southwest border.

The effectiveness of the strategy is seen through a 25% drop in apprehensions in FY 2001 in the Southwest border corridors targeted by the strategy. In addition to the drop in apprehensions, other measures of success along the Southwest border over the last fiscal year include the:

Arrest of 1.2 million aliens, almost 11,000 of whom were identified as criminal aliens;
Seizure of 1.1 million pounds of marijuana; and
Seizure of over 16,000 pounds of cocaine.

Along the Northern Border in FY 2000, the Border Patrol arrested 12,108 undocumented aliens, and seized over 4,900 pounds of marijuana. Fifty-seven percent of those arrested initially entered through the Southwest Border. In FY 2001, 12,338 undocumented aliens were arrested; 7,444 were Mexican nationals, 2,505 were Canadian nationals. Most of those were voluntarily returned to their country of origin. Sixty-one percent of Northern Border apprehensions entered initially through the Southwest Border. Additionally, 13,000 aliens were arrested along the coastal areas in FY 2001.

The majority of illegal alien crossings and narcotic trafficking continues to occur along the Southwest Border. However, we recognize that there is a threat along the Northern Border and coastal areas as well, and we are reevaluating our current enforcement strategies to address any gaps identified. In addition, we are committed to deploying additional staff to the Northern Border now.

Expedited Removal

Before I discuss the procedures followed by Border Patrol Agents when arresting and processing aliens, I would like to discuss one of the key differences in the options used for the processing of inadmissible aliens at ports of entry and the processing of aliens who have entered the United States illegally by crossing at a place other than a port of entry—expedited removal. In April 1997, the INS implemented the expedited removal program as required by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Aliens placed in expedited removal are required by statute to be detained until their removal unless they are able to establish to an asylum officer that they have a credible fear of persecution or torture. Once an alien is found to have a credible fear, continued detention is discretionary. IIRIRA authorizes immigration officers without a further hearing or review to order the removal of certain aliens who attempt entry without proper documents or by fraud or misrepresentation. Those aliens subject to expedited removal are described in the legislation as “arriving aliens.” IIRIRA does not define the term “arriving alien,” but it makes clear that arriving aliens are a subset of the broader category of applicants for admission. This broader category consists of all aliens

within the borders of the United States who have not been admitted. Several sections of IIRIRA, such as those amending sections 212(a)(9), 240B, and 241 of the Immigration and Nationality Act (INA), refer to arriving aliens, even though this term is not defined in the statute. After carefully considering these references, the Department determined that the statute seemed to differentiate between applicants for admission at ports of entry and those encountered elsewhere in the United States. Accordingly, the Department's implementing regulations specifically defined "arriving alien" as an alien coming or attempting to come into the United States at a designated port of entry, or an alien interdicted at sea and brought into the United States.

While *requiring* the INS to apply the expedited removal provisions to "arriving aliens" who are inadmissible for certain grounds, the statute also *permits* the Attorney General to apply the expedited removal provisions to other applicants for admission who do not arrive at a port of entry, unless the applicant for admission can demonstrate that he or she has been in the United States for at least two years. In its implementing regulations, the Department of Justice announced that it would apply the provisions only to "arriving aliens," recognizing that application of the expedited removal provisions to aliens already in the United States would involve more complex determinations of fact and would be more difficult to manage, and that the Department wished to gain insight and experience by initially applying these new provisions on a more limited and controlled basis. In the regulation published in the *Federal Register* about arriving aliens the Department reserved the right to apply the expedited removal procedures to additional classes of aliens within the limits set by the statute, if, in the Commissioner's discretion, such action were warranted operationally. The Department emphasized that a proposed expansion of the expedited removal procedures may occur at any time and may be driven either by specific situations such as a sudden influx of illegal aliens motivated by political or economic unrest, or by other events.

The INS has gained a great deal of experience in the application of expedited removal over the past 4 ½ years. Last year, the INS removed 69,309 persons under the program. INS headquarters closely monitors the program through its Expedited Removal Working Group. This working group reviews expedited removal files on a regular basis, conducts site visits and training at ports of entry, and reviews and makes recommendations on policy and procedural issues that periodically arise. This internal monitoring has enabled the INS to gain valuable insight to help ensure the operation of a fair process. The INS values the insight gained from the comments and observations of outside organizations such as the General Accounting Office, the United Nations High Commissioner for Refugees, and various non-governmental organizations. The INS has implemented the expedited removal program in a careful manner, taking steps beyond required by statute, to ensure that persons seeking asylum protection have a fair and meaningful opportunity

to have their claim heard. These steps include mandatory supervisory review of all expedited removal orders and the development of a sworn statement that includes mandatory questions concerning any fear of harm the applicant may have upon return to his or her home country.

In considering whether to expand the scope of expedited removal, the INS would have to take account of several practical considerations. First, it is not clear whether the application of expedited removal to persons apprehended between the ports of entry, especially on the Southwest Border, would create a meaningful deterrent to illegal entry attempts. Second, expedited removal procedures would actually create burdensome administrative procedures in those cases where the apprehended aliens would otherwise be allowed voluntarily to depart immediately from the United States. Third, as noted in the implementing regulations, expedited removal between the ports of entry involves more complex factual questions, since it requires a determination that the alien has been in the United States for less than two years. Finally, an expansion of expedited removal to other programs within the INS, such as the Border Patrol, would require a massive training and monitoring effort in order to ensure a fair process. In short, the costs of expanding expedited removal must be carefully weighed against any potential benefit.

Border Patrol Procedures

Now, I would like to discuss the process used by Border Patrol agents for the arrest of aliens who enter the United States illegally. Upon determining alienage and arresting an alien, the alien is charged under either Section 212 or Section 237 of the INA. Aliens who have entered the United States without inspection and arriving aliens are charged under Section 212, which describes the grounds of inadmissibility, while others may be subject to Section 237, which describes the grounds for deportability. The alien is either placed in removal proceedings or is allowed to voluntarily return to his or her own country.

Border Patrol Agents use the ENFORCE and IDENT computer systems for processing of aliens. ENFORCE is a case management system and IDENT is a biometric (fingerprint) recidivist and lookout database. ENFORCE and IDENT are INS-wide programs that standardize the collection of data and generate INS forms used in the administrative or criminal processing of aliens for immigration-related violations. Within the Border Patrol, IDENT is deployed to all sectors. With the exception of two sectors, it is integrated with the ENFORCE system. ENFORCE will be deployed to the Houlton, Maine and Swanton, Vermont sectors this fiscal year.

Prior to determining the disposition of the alien, the alien's name and other identifying information are checked through various systems in addition to ENFORCE and IDENT, which may include, but are not limited to the Central Index System (CIS), the National Crime Information Center (NCIC), and the Deportable Alien Control System (DACs).

Based on the results of the criminal and administrative record checks I just described, the Border Patrol agent will determine the most effective and appropriate course of action. Generally, there

are three possible courses of action: Voluntary Departure, Voluntary Return, Issuing a Warrant of Arrest/Notice to Appear.

Voluntary Departure – Voluntary Departure allows an alien to make his or her own arrangements to return to his or her country of origin within a specified time frame. It can be granted by a District Director or an Immigration Judge. Immigration Judges are part of the Executive Office for Immigration Review (EOIR) a separate administrative agency of the Department of Justice. Voluntary Departure can be granted pre-hearing or post-hearing, failure to comply with departure may result in initiation of removal proceedings, or an alternate order of removal coming into effect (in the case of Voluntary Departure ordered by an Immigration Judge).

Voluntary Return - Voluntary Return allows the alien to return to his or her country of origin under safeguard without criminal or administrative charges. On the Southwest Border if the alien is a Mexican citizen, return is immediate, as is the case on the Northern Border if the alien is a Canadian citizen. The INS can also voluntarily return a Mexican national from the Northern Border.

Warrant of Arrest/Notice to Appear - A Warrant of Arrest/Notice to Appear (WA/NTA) formally charges an alien with a violation of immigration law. Aliens issued a WA/NTA are placed in removal proceedings and may be detained by INS or released on bond or an Order of Recognizance. This release may be authorized by District Directors, Chief Patrol Agents or an Immigration Judge.

Detention & Removal

Once the Border Patrol has decided to proceed with the administrative or criminal processing of an alien, the detention process begins. There are three reasons INS detains an alien: risk of flight, risk of danger to the community, and requirement of law (such as mandatory detention of certain aliens). Once charged, those aliens detained by the INS are either in proceedings before an Immigration Judge to determine whether or not they are eligible to remain in the United States or they have final removal orders and are awaiting removal from the United States.

Once detention is ordered, an alien must be transported from the point of arrest to a processing center or District Office to be processed into custody. If there is no significant risk of flight or danger to the community, an alien can also be released on his or her own recognizance, bonded out, or paroled into the community. Aliens who are eligible for a bond are also eligible for a bond redetermination hearing before an Immigration Judge. It must be emphasized that availability of detention space plays an important role in deciding whether or not to detain an alien.

Immigration Hearings and Removal

When an apprehended alien decides to exercise his or her right to a hearing, the alien must await proceedings before an Immigration Judge. This process takes place under the auspices of the EOIR. There are a number of potential outcomes to these hearings. If the alien is eligible for a

bond redetermination hearing, that will be held first. Once a decision on the bond is made, another hearing is typically held to consider the removal charge. The most common outcome of the removal proceeding is a final order of removal. In such instances, the Immigration Judge determines that an individual is ineligible for legal admission into the United States and must face removal.

During the removal hearing process, an alien may also be granted relief and/or asylum as a result of the facts presented at his or her hearing, may be permitted to withdraw his or her application for admission, or the case may be terminated outright if it is determined that the removal charge is not sustainable or evidence comes to light that the alien is lawfully present.

An alien who has been ordered removed may pursue an appeal of the Immigration Judge's decision. Appeals of immigration hearings are the jurisdiction of the EOIR Board of Immigration Appeals (BIA). BIA decisions may be appealed by the aliens to the United States Courts of Appeals; thus moving from the administrative law process in the Executive Branch to the United States Courts for a final decision. The final authority for immigration appeals is the United States Supreme Court. The time it takes to proceed through the appellate process can be significant and often places a burden on INS to provide long-term detention.

Another avenue for effecting an alien's removal is by reinstating a prior final order of removal. When an alien previously removed from the United States re-enters illegally, Sec. 241(a)(5) provides for reinstatement of the removal order.

Conclusion

As you can see, the INS has established standardized procedures for processing persons arrested for illegal entry into the United States. We believe that these procedures allow us to remove these individuals as rapidly as possible within available resources, while meeting our statutory requirements and protecting the legal rights of those arrested. We are willing to work with Members of Congress on any proposal you may have for improving these procedures.

This concludes my formal statement. I would like to thank the Subcommittee for the opportunity to appear. I look forward to your questions.