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## Memorandum

February 3, 2006

**TO:** House Subcommittee on Immigration, Border Security, and Claims  
Attention: Nolan Rappaport

**FROM:** Stephen R. Viña  
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**SUBJECT:** Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service

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Pursuant to your request, this memorandum addresses the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices. At the outset, it is important to note that many of the issues discussed herein involve the applicability of the Administrative Procedure Act (APA).<sup>1</sup> Section 553 of the APA establishes the general procedures (i.e., notice and comment) that an agency must follow when promulgating a legislative rule. These procedural requirements, however, do not apply to interpretive rules, general statements of policy, or rules of agency organization, procedures, or practice. There are publication and public access requirements under the Freedom of Information Act (FOIA), nonetheless, that may still be applicable. The following analysis discusses the applicability of these provisions to INS policy memoranda. Your questions are presented in **bold** and are followed by a response.

**1. Per the Homeland Security Act of 2002, were all Immigration and Naturalization Service policy memoranda interpreting and providing guidance regarding authorities and provisions under the Immigration and Nationality Act and regulations issued by the Immigration and Naturalization Service transferred to its successor agency Department of Homeland Security (DHS)?**

For decades, the administrative authority to interpret, implement, enforce, and adjudicate immigration law within the U.S. lay almost exclusively with one officer: the Attorney General. The most general statement of this power was found in §103(a)(1) of the Immigration and Nationality Act of 1952 (INA),<sup>2</sup> the fundamental statute regulating the entry and stay of aliens:

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<sup>1</sup> 5 U.S.C. §§551 *et seq.*

<sup>2</sup> 8 U.S.C. §§1101 *et seq.*

The Attorney General shall be charged with the administration and enforcement of the Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such other laws relate to the power, functions, and duties conferred upon the President, the Secretary of State, or diplomatic or consular officers; Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

Operationally, most of this authority was delegated to, and carried out by, the Commissioner of INS and the INS, though the Attorney General still retained ultimate authority.

In the Homeland Security Act of 2002 (HSA; P.L. 107-296), Congress reallocated administrative authority over immigration law from the Department of Justice (DOJ) to the DHS. The HSA amended §103(a)(1) of the INA to place the Secretary of DHS in charge of the administration and enforcement of immigration laws.<sup>3</sup> Moreover, the enforcement functions and the service functions, respectively, that were being conducted through the Commissioner of INS were transferred to two separate entities within the DHS. The HSA makes clear that the term “functions” includes *authorities*, powers, rights, privileges, immunities, programs, projects, activities, duties, and responsibilities.<sup>4</sup> The HSA effectuated the transfer of immigration authority in statutory language that is separate and apart from the INA itself, in §441 for INS enforcement-related programs and §451 for INS service-related programs.<sup>5</sup> Because the HSA did not amend the INA to transfer these authorities, many forms of authority, including Executive Orders, rules, regulations, directives, and the INA, still refer to the Attorney General or other DOJ components. The HSA remedies this situation in §456, §1512(d), and §1517 by making all references in the above-mentioned forms of authority relating to an agency that was transferred “deemed to refer” to the appropriate agency or employee in DHS.

The HSA, however, kept most adjudication functions at the Department of Justice, even though there is sometimes much overlap between the enforcement/service and adjudication functions of the INA. For example, under §103(a)(1), the AG is still responsible for determining and ruling on all questions of law. Relatedly, the HSA retained the Executive Office of Immigration Review (EOIR) — the immigration court system — at the DOJ. These retained powers and complicated issues of overlap were reflected in regulations promulgated by DOJ on February 28, 2002 (the day before most operational functions transferred to DHS), which duplicated many of the INS regulations in a separate chapter solely under the authority of the Attorney General for purposes of “convenience” and “continuity.”<sup>6</sup> As “shared provisions” the Attorney General and the Secretary of DHS “can

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<sup>3</sup> See P.L. 107-296, §1102, as amended by P.L. 108-7, Div. L, §105(a)(1). DHS regulation 8 C.F.R. §2.1 further makes clear that all authorities and functions of DHS to administer and enforce immigration laws are vested in the Secretary.

<sup>4</sup> P.L. 107-296, §2(8) (Definitions).

<sup>5</sup> See, e.g., P.L. 107-296, §441 (“there shall be transferred from the Commissioner of Immigration and Naturalization to the Under Secretary of Border and Transportation Security all functions performed under the following [immigration enforcement-related] programs, and all personnel, assets, and liabilities pertinent to such programs. . .”).

<sup>6</sup> Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9824 (Feb. 28, 2003) (codified at 8 C.F.R pts. I, V).

consult each other when contemplating changes in those rules that affect both EOIR and INS.”<sup>7</sup>

As described above, policy memoranda that affected the enforcement and service functions of the INS should have been transferred to their successor agencies within DHS pursuant to §441, §451, and §1102 of the HSA. Policy memoranda, while generally not legally binding (see later discussion) are still a type of *authority* and can explain *duties* and *responsibilities* for programs, so they are likely to fall within a transferred “function” under §2(8) of the HSA. References in such policy memoranda that refer to an agency or officer transferred to DHS should now be deemed to refer to the corresponding unit or officer within DHS pursuant to §456, §1512(d), and §1517. To the extent that a policy memorandum addresses an adjudication issue, however, the DOJ may still be the primary authority or, as the February 28, 2002, regulations demonstrate, share jurisdiction with DHS.

**2. If transferred to DHS, can DHS selectively not follow, disregard and ignore certain INS policy memoranda claiming that the policy was issued by INS and therefore is not binding on DHS?**

Policy memoranda fall under the general category of *nonlegislative rules* and are, by definition, legally nonbinding because they are designed “to inform rather than to control.”<sup>8</sup> The Attorney General’s Manual on the APA defines a policy statement as a “statement issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”<sup>9</sup> Policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power,<sup>10</sup> and often take the form of an agency regulation that is published in the Code of Federal Regulations. Unless exempted, legislative rules must be promulgated in accordance with the APA (i.e., notice and comment rule making). Courts and scholars have described the distinction between legislative rules and policy statements (or interpretative rules) as “tenuous,” “fuzzy,” and “blurred.”<sup>11</sup> The distinction, however, is important because an agency or the public can be bound by legislative rules so long as they remain operative, while policy statements generally do not confer substantive legal rights.<sup>12</sup>

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<sup>7</sup> *Id.* at 9824-25.

<sup>8</sup> *American Trucking Ass’n v. ICC*, 659 F.2d 452, 462 (5<sup>th</sup> Cir. 1981).

<sup>9</sup> ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, at 30 n.3 (1947). See also JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING at 69-70 (3d 1998).

<sup>10</sup> Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 DUKE L. J. 1311 (1992).

<sup>11</sup> *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (citations omitted).

<sup>12</sup> JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING at 69-70 (3d 1998) *citing* *Pacific Gas & Electric Co. v. Federal Power Comm’n*, 506 F.2d 33 (D.C. Cir. 1974) (“A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy.”).

The Supreme Court has stated that “where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.”<sup>13</sup> However, not all agency publications are of binding precedent. Policy memoranda issued by the INS would likely fall within the category of nonlegislative rules and, thus, would apparently not be legally binding on DHS personnel or the public. For example, in *Noel v. Chapman*, the Second Circuit found policy memoranda to INS district directors regarding voluntary extended departure determinations to be “general statements of policy.”<sup>14</sup> The Eighth Circuit, in *Prokopenko v. Ashcroft*, described an INS Operating Policies and Procedures Memorandum (OPPM) as an “internal agency memorandum,” “doubtful” of conferring substantive legal benefits upon aliens or binding the INS.<sup>15</sup> Similarly, the Ninth Circuit, in *Romeiro de Silva v. Smith*, described an INS Operations Instruction (OI) as an “internal directive not having the force and effect of law.”<sup>16</sup> The Fifth Circuit, on several occasions, has also concluded that OIs do not have the force of law.<sup>17</sup> In *Ponce-Gonzalez v. INS*, for example, the court held that OIs are “only internal guidelines” for INS personnel, and that an apparent INS violation of an OI requiring investigation of an alien’s eligibility for statutory relief from deportation was at worst “inaction not misconduct.”<sup>18</sup>

Although INS policy memoranda would seem to fall within the parameters of the cases mentioned above, each could be challenged to determine whether it is, in fact, a nonbinding general statement of policy conferring no substantive rights. Courts have observed, for example, that an administrative agency’s own label is indicative but not dispositive of its function.<sup>19</sup> Some also believe that nonlegislative rules often have the purpose or effect of binding the public as a practical matter and, thus, should also be issued under the guidelines of the APA.<sup>20</sup> It has been argued, for example, that agency enforcement action based upon nonobservance of a policy document or the use of mandatory language in a policy document presents a *practical* binding effect.<sup>21</sup> If INS policy memoranda are truly legally nonbinding, then it would appear that DHS personnel would likely have the discretion to comply with

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<sup>13</sup> *Morton v. Ruiz*, 415 U.S. 199 (1974). In *Morton*, the Court found that an eligibility requirement that would cut off the rights of Indians otherwise within a class of beneficiaries of a general assistance program, and which was contained only in an agency’s internal affairs manual, had to be published in the Federal Register pursuant to 5 U.S.C. §552(a)(1)(D) to be effective.

<sup>14</sup> 508 F.2d 1023 (2<sup>nd</sup> Cir. 1975).

<sup>15</sup> 372 F.3d 941, 944 (2004). The OPPM in question (OPPM 961, superceded by OPPM 00-01) stated an internal INS policy that documents containing references to an asylum officer’s credibility findings should not be filed with the immigration court, and if filed the Court Administrator should promptly notify the INS to discontinue any such filings and return those documents to INS. *See also* *Krasnopivtsev v. Ashcroft*, 382 F.3d 832, 837 (8<sup>th</sup> Cir. 2004) (noting that OPPM No. 96-1 is a nonbinding internal memorandum).

<sup>16</sup> 773 F.2d 1021, 1025 (9<sup>th</sup> Cir. 1985).

<sup>17</sup> *See* *Fano v. O’Neill*, 806 F.2d 1262, 1264 (5<sup>th</sup> Cir. 1987); *Ponce-Gonzalez v. INS*, 775 F.2d 1342, 1346 (5<sup>th</sup> Cir. 1985); *Dong Sik Kwon v. INS*, 646 F.2d 909, 918-19 (5<sup>th</sup> Cir. 1981).

<sup>18</sup> *Ponce-Gonzalez v. INS*, 775 F.2d 1342, 1346-47 (5<sup>th</sup> Cir. 1985).

<sup>19</sup> *Chamber of Commerce v. Occupational Safety and Health Admin.*, 636 F.2d 464 (D.C. Cir. 1980).

<sup>20</sup> *See generally* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 DUKE L. J. 1311 (1992) (citing numerous examples of the practical binding effect of nonlegislative rules).

<sup>21</sup> *Id.*

such memoranda. Noncompliance, however, could lead to administrative repercussions for agency personnel or, possibly, the granting of equitable relief by a court. In *Fano v. O’Neill*, for instance, the Fifth Circuit granted equitable relief to an alien who alleged the INS willfully violated internal OI procedures in failing to expeditiously process a derivative application for permanent resident status before the alien turned twenty-one.<sup>22</sup>

**3. What is the legal authority and requirements for DHS to modify policy memoranda issued by INS? For example, do they have to publicly rescind in writing an INS policy and issue a substitute new policy by DHS?**

Policy memoranda, like legislative rules, must be written within the confines of their authorizing statutes and the Constitution. Similarly, modifications to policy memoranda must also be written within the parameters of their underlying law. Agencies are generally given “ample latitude to adapt their rules and policies to the demands of changing circumstances.”<sup>23</sup> Whether an agency is bound by law to make public a new rule seems to depend largely on whether the rule is legislative or nonlegislative. If a rule is determined to be a type of legislative rule, then it must be promulgated under the notice and comment rulemaking procedures set forth in §553 of the APA. But, if a rule is more akin to a general statement of policy, then it would be exempt from such requirements under §553(b)(A).

Here, INS policy memoranda, at least on their face, appear to be nonbinding general statements of policy that DHS arguably has the discretion to implement or modify. As such, it could be argued that a public or written modification may not be *legally* necessary to change a policy under the APA. Internal agency guidance on the issuance of such general statements of policy would likely define the rules of formulation. It is not clear what the legal repercussions would be if an agency does not follow its own internal guidance for nonbinding policy formulation, though, as mentioned above, equitable remedies may be available. Independent of any obligation to employ notice and comment procedures, federal agencies are obligated to publish or grant public access to certain materials under the Freedom of Information Act. These provisions may, in effect, require DHS to make public a new policy or modification to, or rescission of, an existing policy.

Under 5 U.S.C. §552(a)(1)(D), an agency must publish in the Federal Register “substantive rules of general applicability” and “statements of general policy or interpretations of general applicability.” An amendment, revision or repeal of the abovementioned must also be published pursuant to this section. As a general rule, courts will not require publication where only clarification or explanation of existing laws or regulations are expressed, and no significant impact upon the public results.<sup>24</sup> Section

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<sup>22</sup> *Fano v. O’Neill*, 806 F.2d 1262 (5<sup>th</sup> Cir. 1987). In *Fano*, plaintiff sought derivative permanent residency status and expeditious processing due to his imminent twenty-first birthday. The INS failed to process his visa application expeditiously (a 14-month delay without explanation) and denied it, as derivative visas were not available to those over twenty-one. The Fifth Circuit found that a question of material fact existed regarding whether the INS could be estopped from finding that Fano had aged out because it was the INS’s delay which prevented Fano’s application from being processed prior to his twenty-first birthday. *But see Ponce-Gonzalez*, 775 F.2d at 1349; *Dong Sik Kwon*, 646 F.2d at 919 (both denying equitable relief).

<sup>23</sup> *Motor Vehicle Mfr. Ass’n v. State Farm*, 463 U.S. 29, 42 (1983).

<sup>24</sup> Colleen R. Courtade, Annotation, *What Rules, Statements, and Interpretations Adopted by Federal* (continued...)

552(a)(2) provides for what is commonly referred to as “reading room” access. It requires agencies to make available for public inspection “those statements of policy and interpretations which have been adopted by an agency and are not published in the Federal Register” and “administrative staff manuals and instructions to staff that affect a member of the public,” among others. Finally, §552(a)(3) allows a person to request an agency record that has not otherwise been made available under the previous two subsections. The question of precisely what agency actions and materials are covered by these provision varies considerably and is highly case specific.

Under the standards mentioned above for §552(a)(1)(D) “publication,” it would appear that DHS would need to publish a modification that does more than merely clarify or explain existing law and impacts the public significantly. In *Parco v. Morris*, for example, the court determined that a repeal of an OI that addressed the discretion afforded district directors to extend indefinitely the voluntary departure of “third preference” visa petitioners (i.e., alien professionals and those with exceptional ability in the sciences or arts) was required to be published in the Federal Register under §552(a)(1)(D).<sup>25</sup> The memorandum was, in effect, a flat rule of eligibility, the court observed, which repealed an OI that was characterized by the INS as a “general statement of policy.”<sup>26</sup> As such, the court held that because the policy was not published, and the alien had no notice of the change, she could not be adversely affected by the repeal.

Relatedly, publication in the Federal Register might also be important if DHS is articulating a significant departure from prior practice.<sup>27</sup> In *Ramirez v. Poulos*, for instance, the court determined that INS did not provide a valid explanation for its change in “recapture” policy (i.e., a formula for including time spent outside the country to H-1B tolling status).<sup>28</sup> The INS argued that it provided a reasonable rationale for its departure from prior practice in a “policy memorandum” promulgated in 1994. The court, however, determined that the memorandum was only a “correspondence” memorandum that was not “promulgated” (presumably using APA rulemaking standards), and in any case, the INS never issued a policy statement regarding the change in “recapture” policy as required by §552(a)(1)(D).<sup>29</sup> A review of the Federal Register disclosed only *references* to INS policy memoranda — i.e., there were no full publications.<sup>30</sup>

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<sup>24</sup> (...continued)

*Agencies Must be Published*, 77 A.L.R. FED. 572 (2004).

<sup>25</sup> 426 F. Supp. 976 (E.D. Pa. 1977).

<sup>26</sup> *Id.* at 985-986.

<sup>27</sup> See generally *Seldovia Native Ass’n v. Lujan*, 904 F.2d 1335 (9<sup>th</sup> Cir. 1990) (analyzing Department of Interior, Secretarial Orders interpreting the Alaska Native Claims Settlement Act).

<sup>28</sup> 2002 U.S. Dist. LEXIS 27811 (C.D. Cal. 2002). In this case, the District Court was examining plaintiff’s motion for attorney’s fees under the Equal Access to Justice Act, and thus, had to determine whether the position of the United States was substantially justified.

<sup>29</sup> *Id.* at \*5-\*9.

<sup>30</sup> See, e.g., 61 Fed. Reg. 37673 (referring to INS policy memorandum HQ 70/28-P/HQ 70/11.1-P, dated March 19, 1996, which provided termination deadlines for the validity of the Form I-151 and transitional procedures for the processing of returning lawful permanent residents in possession of Form I-151).

If INS policy memoranda and their modifications are not published in the Federal Register, then it might be argued that they should be made available for public inspection under §552(a)(2). Policy memoranda could arguably fit in subsection (a)(2)(B)— i.e., those statements of policy not published in the Federal Register.<sup>31</sup> This argument seems buttressed by the fact that DHS has made available many policy memoranda on its website.<sup>32</sup> The website also reinforces the argument that DHS should similarly make available any modifications to, or rescissions of, currently listed policy memoranda. It is unclear, however, whether the policy memoranda currently listed on the website are made available pursuant to §552(a)(2). Nonetheless, DHS’s prior practice of public access would seem to favor publication of any new policy being implemented that modifies or rescinds already public policy memoranda.

Should a policy memorandum not be made available to the public or published in the Federal Register, a person may still request it pursuant to §552(a)(3) of the FOIA. DHS, however, may seek to withhold the information from the public based on one of several exemptions listed in §552(b). In particular, DHS may argue that a policy memorandum relates “solely to the internal personnel rules and practices of an agency,” and seek to withhold its disclosure.<sup>33</sup> In light of the war on terrorism and heightened security awareness, this exemption has been viewed as of fundamental importance to homeland security and to the needs of law enforcement, in particular, by the DOJ and the Bush Administration.<sup>34</sup> Exemption two covers (1) internal matters of a relatively trivial nature (e.g., rule governing employee lunch hours) and (2) predominately internal matters, the disclosure of which would significantly risk circumvention of a legal requirement.<sup>35</sup> With respect to category (2), courts have observed that a FOIA disclosure should not “benefit those attempting to violate the law and avoid detection.”<sup>36</sup> While policy memoranda may certainly contain information valuable to circumventing the law, DHS may find it difficult to argue that a new policy memorandum

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<sup>31</sup> See, e.g., *Tax Analysts v. IRS*, No. 94-923, 1996 U.S. LEXIS 3259, at \*9 (D.D.C. Mar. 15, 1996) (holding the IRS Field Service Advice Memoranda, even though not binding on IRS personnel, were “statements of policy”).

<sup>32</sup> U.S. Citizenship and Immigration Services, Immigration Policy and Procedural Memoranda, available at: [<http://uscis.gov/graphics/lawsregs/handbook/polpromem.htm>].

<sup>33</sup> The exemption provided by §552(b)(7), which exempts information compiled for law enforcement purposes, might also be applicable, but only to the extent disclosure would “(E) disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.”

<sup>34</sup> See Attorney General’s Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post*, (Oct. 15, 2001) available at: [<http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>]; see also White House Homeland Security Memorandum (Mar. 19, 2002), reprinted in *FOIA Post* (Mar. 21, 2002) (calling upon agencies to identify and then safeguard “information that could be misused to harm the security of our nation and the safety of our people”) available at: [<http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm>].

<sup>35</sup> See U.S. Dep’t of Justice, *Freedom of Information Act Guide & Privacy Act Overview*, at 126 (May 2002 ed.).

<sup>36</sup> *Crooker v. ATF*, 670 F.2d 1051, 1054 (D.C. Cir. 1981) (en banc).

is of a “predominately internal matter,” particularly if it supercedes or modifies a currently public memorandum or affects the public.<sup>37</sup>

In sum, it appears the APA does not necessarily require the publication of a modification to an existing nonbinding policy memorandum. Better arguments for the publication of such a modification may be found in the FOIA. If the modification creates a policy that provides substantive rights to an alien, significantly affects the public, or does more than explain existing law, then it might be argued that publication is especially important and possibly required by law.<sup>38</sup> DHS may contend that such disclosures are still exempted from the FOIA.

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<sup>37</sup> *Cox v. U.S. Dep’t of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (per curiam) (holding “predominately internal” and protectable, information that “does not purport to regulate activities among members of the public” and “does not set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public”).

<sup>38</sup> *See Morton*, 415 U.S. at 232 (stating that “the Administrative Procedure Act was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations”).