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Recommended Citation
7 Berkeley La Raza L. J. 1 (1994).

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Keeping an Eye on the I.N.S.: A Case for Civilian Review of Uncivil Conduct* †

Stephen A. Rosenbaum‡

In a free and democratic society . . . the history of American policing has been the history of various attempts and models for imposing and maintaining civilian oversight on this vital task.¹

He's in uniform, he's performing his job . . . and he got into a situation where he thought it was necessary to fire his gun. I don't see any criminal complaint; there may be some procedural problems.²

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† This article is a revised version of a paper presented at the symposium “American Dream — Immigrant Reality,” University of California, Berkeley, School of Law (Boalt Hall), April 2-3, 1993.
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1. Prof. Hubert G. Locke, Address to the First Annual Conference on Civilian Oversight of the American Police, Univ. of Illinois at Chicago (Sept. 13, 1984).

2. Patrick McDonnell, Questions Remain in Border Agent's Shooting at Van, L. A. TIMES, May 31, 1990 at B1 (Lieutenant Dean Girdner, Chula Vista, California Police Department, speaking to a reporter six days after his department investigated the shooting of two undocumented immigrants by a Border Patrol agent).
I.

INTRODUCTION

"Procedural problems" does not begin to describe the deficiencies in the investigation of alleged misconduct by officers of the United States Immigration and Naturalization Service (INS).3

According to one monitoring group, 116 administrative complaints of immigration-related abuse were lodged against immigration officers over a two-year period.4 During the same time, 20 reports were made to Congress and 27 lawsuits were filed in federal court.5 The allegations ranged from a beating in Florida and an assault in Texas to a shooting in Arizona and a hit-and-run in California.6 The complaints included seven deaths.7

As the highest funded unit8 of an increasingly militarized9 INS, the United States Border Patrol warrants heightened public scrutiny. To many Americans — and would-be Americans — the Border Patrol is the very symbol of immigration law enforcement.10 Yet, enforcement is not the sole

3. The INS or "Service" is the national agency charged with implementing immigration and citizenship laws, including procedures for admitting and expelling aliens. It has 36 district offices worldwide and 20 Border Patrol sectors in the United States. CHARLES GORDON AND STANLEY MAILMAN, 1 IMMIGRATION LAW AND PROCEDURE, § 3.03 [6], (rev. ed. 1993). The Border Patrol is the police arm of the INS. For a summary of INS statutory responsibilities and organization, see HOUSE COMM. ON GOVERNMENT OPERATIONS, THE IMMIGRATION AND NATURALIZATION SERVICE: OVERWHELMED AND UNPREPARED FOR THE FUTURE, H.R. REP. NO. 216, 6-10 (1993)[hereinafter, OVERWHELMED AND UNPREPARED].


5. Id.

6. Id. at 22-24.

7. Id.

8. The Border Patrol received the most money and staff of all INS enforcement units between 1986 and 1990. JASON JUFFRAS, IMPACT OF THE IMMIGRATION REFORM AND CONTROL ACT ON THE IMMIGRATION AND NATURALIZATION SERVICE 38 (1991). In the words of a congressional immigration policy staffer, "Funding for the Border patrol is politically valuable for Congressmen [sic] from the Southwest because it gives the appearance that they are doing something about illegal aliens." Id. at 33. For a more detailed summary of Border patrol allocations, see F. D. BEAN, ET. AL., OPENING AND CLOSING THE DOORS: EVALUATING IMMIGRATION REFORM AND CONTROL 44 (The RAND Corporation - The Urban Institute, 1989).

9. See Comments by Roberto Martínez, 7 LA RAZA L.J. 84 (1994); AMERICAS WATCH, BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO 5 (1992)(noting the recent arming of agents with high-powered weapons to combat narcotics trafficking and to "strengthen enforcement against illegal immigration and violent crime by illegal aliens.").[hereinafter, BRUTALITY UNCHECKED].

10. The Border Patrol "commands public attention because it performs a visible and demanding task." JUFFRAS, IMPACT OF THE IMMIGRATION AND REFORM ACT, supra note 8, at 32. According to one congressional staffer, "When people think of INS, they think of the men in green at the border." Id. at 33. One recent indicator of the Patrol's visibility is the President's proposal to increase its ranks by 600. Fact Sheet: Initiatives to Curb Illegal Immigration (July 27, 1993)(on file with the author). This proposal was included in "The Immigration Law Enforcement Act of 1993," S. 1571, 103d Cong., 1st Sess. (1993), introduced by California Senator Dianne Feinstein. The bill also incorporates a suggestion by California's other senator, Barbara Boxer, that an additional 300 positions be filled by members of the
province of the INS police force, the Border Patrol. Agents, such as those of the Customs Service and other units within the INS, also have a role in the application of immigration laws. The need for civilian oversight is similarly applicable to these other actors.

A decade has passed since the U.S. Commission on Civil Rights identified serious problems in the INS complaint review procedures and recommended changes in a report to the President and Congress. Those problems include delays in investigation, lack of public awareness of the process, no acknowledgment of receipt of complaints, deficiencies in the selection of investigators and investigative procedures and an inadequate statistical record of complaints and disposition. The same problems plague the system today, and almost none of the recommendations have been implemented.

The issue of gratuitous violence by INS officers has continued to capture the attention of the INS leadership, although its response remains equivocal and erratic. In 1990, the Commissioner acknowledged that “[e]scalating violence on the southern border has resulted in injuries and even deaths” and vowed that his agency would “begin immediately to determine what steps the INS can take to eliminate or dramatically reduce these incidents.” But, a 1992 communiqué from the Commissioner’s office strikes a defensive tone in responding to a congressional inquiry about the Border Patrol: “Those who allege these agents are wild and reckless are badly mistaken.”


11. These include examiners, investigators, detention and deportation officers, intelligence and anti-smuggling agents, special agents, inspectors and other field personnel of the INS. See 8 C.F.R. § 100.2(b); GORDON AND MAILMAN, supra note 3, at §§ 3.18, 8.05-8.09. The Customs officers include special agents, inspectors, fines, penalties and forfeiture officers, customs aides and other officers under the Commissioner of Customs. See 19 U.S.C. §§ 482, 507, 2082. Some policy makers have suggested that the Border Patrol and Customs Service be consolidated into one “Border Enforcement Agency.” California Latino Legislative Caucus, Making Immigration Policy Work in the United States 10 (1993). For an overview of the Customs Service complaint procedures, see Frontier Injustice: Human Rights Abuses Along the U.S. Border with Mexico Persist Amid Climate of Impunity, NEWS FROM AMERICAS WATCH, May 13, 1993, Vol. V, No. 4, 1, 42-43 [hereinafter, Frontier Injustice].


13. Id. at 120-27.

14. SEALING OUR BORDERS, supra note 4, at 3.


In 1993, the then Acting Commissioner wrote that she was "seriously concerned" about a human rights organization's allegations of continuing abuse and inadequate mechanisms to curtail it. She pledged to "aggressively pursue[ ]" claims of misconduct and "strictly adhere" to investigative and disciplinary procedures. However, the INS stopped short of endorsing changes in those criticized procedures. To call for civilian oversight of this national police force is to address "one of the oldest, most time-honoured issues of public policy in America."

There are a variety of emotions, social forces, reasoning and judgment that may affect the decision of a law enforcement officer to use excessive force. Police behaviorist Javier Valenzuela Malagón, in his comments appearing at page 92, *infra* of this issue, asserts that it is the very function of the Border Patrol "to persecute" migrants with "insults which express the intolerance and frustration" of the unit. Another expert, anthropologist Victor Clark Alfaro, in his comments published *infra* at page 90, notes that the circumstances surrounding migration from Mexico to the United States, when taken in toto, are tantamount to "an act of violence." Whatever the root causes, border violence must be curtailed.

...
In this article, I first document examples of misconduct by the Border Patrol and other immigration and customs agents and examine the current INS internal complaint system. Next, I set out some of the necessary features of a civilian or external review process, many of which are embodied in legislation recently introduced in the U.S. House of Representatives, with an emphasis on those features unique to immigrants or immigration enforcement. Finally, I lay out some of the alternatives, or complements, to external review and how they are useful or limited in mitigating abusive behavior.

II. ABUSES ARE WELL DOCUMENTED

Two prominent non-governmental organizations, Americas Watch\textsuperscript{24} and the American Friends Service Committee (AFSC) Immigration Law Enforcement Monitoring Project,\textsuperscript{25} each issued recent reports which chronicle "pervasive"\textsuperscript{26} INS misconduct in California, Arizona, New Mexico and Texas during the arrest and detention of undocumented immigrants.\textsuperscript{27} An


24. Brutality Unchecked, supra note 9. Americas Watch, a division of Human Rights Watch, released a follow-up report one year later in May 1993, Frontier Injustice, supra note 11, with almost the same conclusions.


26. Id. at 1.

27. The term "immigrant" is not necessarily used here as a term of art, \textit{i.e.} a person who intends to immigrate to another country or adjust her status to that of permanent resident. See 8 U.S.C. § 1101(a)(15), (20). It is interchanged with the word "alien," defined under the Immigration and Nationality Act as "any person not a citizen or national of the United States." Id. § 1101(a)(3). Many foreign-born and others find the latter term offensive. See, \textit{e.g.}, Webster's Ninth New Collegiate Dictionary (1986)(defining \textit{alien} as "belonging or relating to another person, place or thing: STRANGE... differing in nature or character typically to the point of incompatibility ...")]; Webster's Third New International Dictionary (1986)("... repugnant in nature: HOSTILE, OPPOSED..."). It is nonetheless an accepted and much used term. Michael J. Núñez, Note, Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the United States and Mexico, 43 Hastings L.J. 1573, 1575 n. 9 (1992). See Comments by Valenzuela Malagón, supra note 22, (criminalization and negative ideological classification inherent in the term "illegal alien.") The day may not be far off when members of the immigrants' rights community promote the use of "alien" or "illegal alien" as a way of reclaiming an offensive term. On the importance of group names and preferred terms of reference, see David Hayes-Bautista and Jorge Chapa, Latino Terminology: Conceptual Bases for Standardized Terminology, 77 Am. J. of Public Health 61, 66-67 (1986); Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Litigation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1332, n. 2 (1988).
earlier report by Mexico’s National Commission for Human Rights similarly documents cases of “mistreatment or abuse” by various U.S. law enforcement officers, mainly immigration service or customs agents.\(^{28}\)

Americas Watch characterized these human rights abuses as “similar in kind and severity” to those occurring in other countries and labeled the United States’ response as “defensive and unyielding.”\(^{29}\) The renowned human rights monitoring organization also reported that the procedures for investigation of the alleged abuse are ill-defined and ineffective.\(^{30}\)

According to AFSC, 1,274 cases of abuse in immigration law enforcement were reported from May 1989 to May 1991.\(^{31}\) While complaints of verbal and psychological abuse make up the largest segment of reported instances, physical abuse and illegal or inappropriate searches, the second most numerous category, produce the greatest consequences.\(^{32}\) Typical of the misconduct are the following shootings, beatings, sexual assaults and other abusive acts:

- Francisco Ruíz Chávez, a Mexican national, was shot at close range in the stomach and buttocks in 1989 while attempting to stop Border Patrol Agent Walter Davenport from dragging his pregnant wife and placing his foot on her stomach. No charges were ever filed against Agent Davenport, who remained on active duty in the same locale near the California-Mexico border. Ruíz Chávez was charged with assaulting the agent in the incident.\(^{33}\)

- Ismael Ramírez, a minor, was thrown to the pavement during a 1988 neighborhood sweep in central California by Border Patrol Agent Michael Lewis, landing on the back of his head and neck. Agent Lewis and his partner brought the young Mexican to an emergency room, saying he had fallen, thus misleading the hospital personnel about the possible severity of the injuries. Ramírez lapsed into a coma and died of a skull fracture and brain hemorrhage.\(^{34}\)

\(^{28}\) Mexican Human Rights Commission, supra note 23, at 52-65. The Commission’s findings are based largely on information from consular officials, with most abuse being found in Texas and California. The report also includes incidents of immigrant mistreatment by Mexican law enforcement officials inside Mexico and by private individuals inside the United States. Id. at 36-46, 49-51. For possible redress of nongovernmental acts of violence, see Nuñez, supra note 27, at 1592-97.

\(^{29}\) Brutality Unchecked, supra note 9, at 1. But see Sale Letter, supra note 17.

\(^{30}\) Brutality Unchecked, supra note 9, at 2 (noting the overlapping jurisdiction of the Office of Inspector General and the Office of Professional Responsibility).

\(^{31}\) Sealing Our Borders, supra note 4, at 19-20.

\(^{32}\) Id. at 17. In 1990, AFSC’s Immigration Law Enforcement Monitoring Project (ILEMP) inaugurated a computerized system for tracking and categorizing rights violations in the border areas. Id.

\(^{33}\) Brutality Unchecked, supra note 9, at 16-17. Ruíz had raised his arm to throw a rock before he was shot.

\(^{34}\) Id. at 22-25. Agent Lewis’ record shows allegations of misconduct even before this incident. In 1983 he was involved in two incidents in which the vehicle he was driving struck pedestrians, killing one immigrant. The California Highway Patrol investigation found that there was probable cause to believe that he had committed misdemeanor vehicular manslaughter, but Lewis was never prosecuted.
In 1991, José Gilbardo Valdez Ortega was assaulted by agents at the Falfurrias, Texas Border Patrol Station. While he was handcuffed, an officer beat him on the chest. Valdez Ortega was thrown to the ground, dragged behind a wall and choked and further beaten. The Guatemalan was then taken inside a trailer and told to remove his pants. There, an agent, uttering vulgarities, approached Valdez Ortega with an 18-inch vibrating instrument which he used to shock him on the buttocks and neck.

In 1990, Sabina Rocha, a young domestic worker in San Diego County, was stopped by a Border patrol agent while walking with a friend. The agent asked the women if they were prostitutes. He later took Rocha aside, reached into her clothes and fondled her breasts and genitals while claiming to search for drugs. Rocha filed a $1 million claim for damages. The matter was referred by the Office of Inspector General to the FBI.

In 1992, unarmed Dario Miranda Valenzuela was shot twice in the back by Patrol Agent Michael Elmer as he tried to run back across the Arizona border into Mexico. After the killing, Elmer dragged the victim's body approximately fifty yards through the Mariposa Canyon and attempted to bury it. Five agents were present when the shooting took place, but it was not reported until 15 hours later. Although charged with murder, Elmer was later acquitted on all counts.

In 1978, toward the end of her pregnancy, María Juana Contreras was a passenger in a car stopped by U.S. Customs officers at the U.S.-
Mexico border for a vehicle inspection. While being interrogated, she had difficulty breathing and began spitting up, losing vision, sweating profusely and losing consciousness for brief periods. The officers failed to administer first aid, but, eventually, at the request of Contreras’ daughter, they called an ambulance. She died before arriving at the hospital from an apparent heart attack brought on by severe emotional distress. Contreras’ husband and children sued the officers and the U.S. government for negligence. No damages were awarded; the decision was affirmed on appeal.  

- Miguel, a minor from Guatemala, was stopped by the Border Patrol in 1992 after entering the United States near Nogales, Arizona in the company of several Mexicans. The Mexicans were returned to Mexico, but Miguel was taken for a ride by two agents in their patrol car. During the ride, one of the agents slammed Miguel’s hand in the door, breaking his wrist. After releasing the young man’s hand several minutes later, one of the agents struck Miguel on the face with a gun and threatened to “string him up by his hands and feet and shoot him” if he reported the incident to anyone. He was told to say he injured his hand in a fall.

There have been other acts of recklessness by immigration officials, such as the misuse of firearms and the “high-speed chase.” This latter tactic has come under increasing fire since the 1992 incident which resulted in the death of six persons in San Diego County, California.

Verbal threats and harassment are also the subject of many complaints. Border Patrol agents have routinely called undocumented immi-
grants "tonks" or "wets" as well as other vulgar and racist epithets. Yet other allegations concern illegal arrests or detentions.

Not all complaints are lodged by undocumented aliens. One immigrants' rights advocate estimates that of the abuses reported to AFSC and Americas Watch, almost half involved U.S. citizens, lawful residents or holders of passports or visas. These complaints of misconduct range from physical brutality to unprofessional conduct in interactions with the public.

THE CURRENT INTERNAL COMPLAINT PROCESS IS INEFFECTUAL

The current internal complaint process is plagued by numerous deficiencies. Jurisdiction among the various agencies responsible for investigation is uncertain and often overlapping. Additionally, complainants are not apprised of investigative progress, investigations are often conducted by

43. SEALING OUR BORDERS, supra note 4, at 13. "Tonk" refers to the sound of a flashlight striking the head of an apprehended alien. "Wet" is short for "wetback" or mojado, a reference to a Mexican who has illegally crossed the Rio Grande to enter the United States.

44. See, e.g., BRUTALITY UNCHECKED, supra note 9, at 37. For an account of why police engage in "blue humor" or offensive speech, see Josephine Chow, Note, Sticks and Stones Will Break My Bones, But Will Racist Humor?: A Look Around the World at Whether Police Officers Have a Free Speech Right to Engage in Racist Humor, 14 LOY. L.A. INT'L & COMP. L.J. 851, 856-57 (1992).


46. See, e.g., Eric Adams, Migrant Workers Claim Intimidation by INS Agents, BASIN REPUBLICAN RUSTLER, June 17, 1993 at 1; Letter from Mark J. Murphy, Attorney, to Ted Denning, Deputy Chief Agent, United States Border Patrol (June 25, 1993)(on file with the author)(account of late-night, warrantless entry into bedroom of United States citizens by Border Patrol agents and others, with guns drawn, in search of "wetbacks").

47. OVERWHELMED AND UNPREPARED, supra note 3, at 14 (quoting Cecilia Muñoz, National Council of La Raza, prepared statement before the Subcommittee on Information, Justice, Transportation and Agriculture, Committee on Government Operations, Mar. 30, 1992). Muñoz also testified that at a recent conference in El Paso, Texas, when the audience of U.S. citizens and residents was asked if they felt they had been abused by the Border Patrol, "[e]very hand in that room went up." Id. See also Frontier Injustice, supra note 11, at 23-26; Murillo v. Musegades, 809 F. Supp. 487 (W.D. Tex. 1992)(involving physical and verbal harassment by Patrol agents of U.S. citizens and permanent residents of Mexican ancestry on and near Texas high school campus).

48. The President of the American Immigration Lawyers Association (AILA) told a congressional subcommittee that many INS personnel "lack civility" and "have no sense of courtesy." OVERWHELMED AND UNPREPARED, supra note 3, at 15 (Statement of Theodore Ruthizer, AILA President). See also Letter from Ignatius Bau, Chair, Coalition for Immigrant and Refugee Rights and Services, to Ralph Paige, Regional Director, Office of Professional Responsibility, INS (Mar. 31, 1988)(alleging "Category II" violations against Oakland, California legalization officer for verbal, psychological and sexual harassment of applicants for temporary residency)(on file with the author).
"insiders," and the process is hampered by other factors such as insufficient resources and the lack of community outreach.

Complaints of misconduct against INS and Border Patrol agents are currently handled by the Justice Department's Office of Professional Responsibility (OPR) and Office of Inspector General (OIG), with monitoring more recently by the Office of Internal Audit (OIA). According to INS oversight groups, the internal complaint system is underfunded, understaffed and "undermined by near total secrecy."

The OIG is generally the entity which receives initial complaints from the field offices. The Inspector General either retains the matters or routes them to the OPR or OIA for investigation. The amendment to the Inspector General Act specifically provides that the OPR is to investigate allegations of misconduct by attorneys, criminal investigators, and law enforcement officers. According to the INS Operations Instructions, there

49. Former Acting Commissioner Sale stated that the OIA has only been processing allegations since February, 1993. *Hearings on H.R. 2119 Before the Subcomm. on International Law, Immigration and Refugees of the House Judiciary Comm.*, 103d Cong., 1st Sess. 11 (1993)(prepared testimony of Chris Sale, Acting Commissioner, INS)(on file with the author). However, its creation was anticipated as early as the settlement of *Pearl Meadows* and Velasquez, almost one year earlier. See *Pearl Meadows Settlement Agreement*, supra note 42, at 11. Settlement Agreement, Velasquez v. Ackerman, Civ. No. C-84-20723, (N.D. Cal., Mar 6. 1992) at 10-12 [hereinafter, *Velasquez settlement agreement*]. Sale asserts that the OIA is independent of INS operational offices and reports directly to the Commissioner. When asked for written authority clarifying his jurisdiction and duties, the current OIA Director commented, "the OIA is new and its responsibilities have yet to be defined. I don't know of any written source for finding out what the function of this office is at this point. I guess you should call the other offices to find out what they do." Telephone interview with John Chase, Director of the Office of Internal Audit (Aug. 4, 1993).

50. *Frontier Injustice*, supra note 11, at 3, 39. For criticism as to understaffing and underfunding, see Testimony of Marfa Jiménez, supra note 25, at 9 (observing that INS never requests budget increases for complaint processing proportional to those it asks for enforcement).

51. See 5 U.S.C. App. 3 § 8D(b)(3). In May 1989, the OPR became part of the Office of Inspector General as part of a departmental reorganization. One of the criticisms of the OPR was that, like the Justice Department's other internal audit and investigative units, it was not organizationally independent, and thereby jeopardized the impartiality of its reviews. *Hearings on H.R. 4054 Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 100th Cong., 2d Sess. (1988)(statement of Milton J. Socolar, Special Asst. to the Comptroller General). The OIG's emphasis appears to be on fraud, waste and embezzlement. See, e.g., *OFF. OF THE INSPECTOR GEN., SEMIANNUAL REP. TO CONGRESS* (Mar. 1990).

52. INS Operating Instruction § 287.10g(3). The duties of the OPR director, including receiving, recording and investigating all allegations of misconduct, are set out in INS Operations Instructions [hereinafter, *OI*]. These subregulatory instructions contain substantive and procedural material which generally correspond to the statute. They are not binding on the public. *Gordon and Mailman*, supra note 3, at § 1.02[3][d][i]. The OIs are reprinted in *id.*, vol. 9.

53. *Id.* In a recent annual report, the OPR notes that this role was formerly the responsibility of an internal investigative unit within the INS, as opposed to a department-wide OPR now "subsumed" into the OIG. 1990 OFF. OF PROF. RESP., ANN. REP. TO THE ATT'Y GEN. at 3, n. 3. Nonetheless, the INS regulations indicate that the OPR is headed by the Director of Professional Responsibility, who is subject to the general supervision and direction of the INS Commissioner. 8 USC § 100.2(a)(3). See also 1991 OFF. OF PROF. RESP., ANN. REP. TO THE ATT'Y GEN. at 2 (indicating that misconduct allegations against INS law enforcement personnel are usually referred to the OIG, which investigates such matters "on behalf of" OPR, pursuant to a memorandum of understanding).
are two categories of allegations. "Category I" involves allegations of felony or misdemeanor violations of state or federal law, violations of federal civil rights statutes, and administrative misconduct.\textsuperscript{54} "Category II" concerns allegations of non-criminal violations of INS or Department of Justice standards of conduct, and certain administrative offenses set out in the Administrative Manual.\textsuperscript{55} In general, Category I complaints are directed to the nearest OPR office or the central office, and Category II complaints are handled by the regional sub-offices.\textsuperscript{56} However, the investigators themselves do not seem to have a clear idea about which offices have which duties and responsibilities.\textsuperscript{57} An employee answering the telephone at the Office of Inspector General hotline said, "I don't know who really handles INS complaints. Maybe just the OPR, not the IG. Call the INS."\textsuperscript{58}

An allegation of misconduct is defined as information from any source that an INS employee has violated federal, state, or local law, regulations, or any applicable standards of conduct.\textsuperscript{59} While the instructions outline complaint procedures, these may be interpreted differently by individual investigators.

Investigators follow general guidelines, but have broad discretion in the way they conduct the investigation. They have authority to require an INS employee to appear and respond to work-related questions under oath, as well as to limit participation of any person in such an interview.\textsuperscript{60} They may also examine, copy, or remove documents, files and other materials held by the INS.\textsuperscript{61}

\begin{itemize}
  \item 54. 01 § 287.10(d)(1). Complaints may be referred to the Attorney General for prosecution. 5 U.S.C. App. 3 § 4 (d).
  \item 55. 01 § 287.10(d)(1).
  \item 56. Id.
  \item 57. An OPR Assistant General Counsel told an interviewer that "the question of jurisdiction is very confusing. I'm not sure if I understand myself." Telephone interview with Keith Thomas, OPR Assistant General Counsel (Aug. 6, 1993). The Deputy Attorney General recently recommended that the two offices be merged. Daniel Kleidman, \textit{Top Deputy's Exit not Likely to Cure What Ails Reno}, THE RECORDER, Jan. 13, 1994 at 1.
  \item 58. Telephone interview with unidentified employee, OIG Hotline (July 8, 1993). Anyone who has attempted to "call the INS" knows this is no simple matter. A voice mail recording reels off a litany of informational options, promising that after the completion of one message, a human employee will offer assistance. After listening to several messages and trying various options, this author found that the words "complaint" and "misconduct" were never mentioned, nor were any of the various investigative agencies. Moreover, no human voice ever came on the phone line. \textit{See also} Jim Belshaw, \textit{To Lose Your Mind Completely}, \textit{Press 1}, ALBUQUERQUE J., July 15, 1993; Jim Belshaw, \textit{Press 57, Press 58, Fall Back and Punt}, ALBUQUERQUE J., July 22, 1993 at 13. \textit{See also}, \textit{Frontier Injustice}, supra note 11, at 36 (noting that when Americas Watch investigators tested the complaint hotline, they either encountered telephone operators who could not speak Spanish or were put on hold indefinitely).
  \item 59. There are eleven sources of laws, regulations, and standards, including the INS Administrative Manual, the INS Officer's Handbook and 28 C.F.R. § 45 (Departmental Standards of Conduct). Of § 287.10, App. 1.
  \item 60. 01 § 287.10(j)(1).
  \item 61. 01 § 287.10(j)(2).
\end{itemize}
As former agents or employee holdovers from the internal investigative units, investigators are also likely to be biased and not inspire the confidence of complainants.62

Under the present system, complainants are unduly separated from the investigation. Complainants are not apprised of an investigation’s status, the ultimate disposition,63 or of available appellate channels.64 The attorney for a minor held in custody at the Florence, Arizona detention center reports that it took nearly a year to learn the status of her client’s OIG complaint.65

Furthermore, complainants are not even required to be interviewed by investigators. There is no average length of time allotted to an investigation. In the case of one Guatemalan who, in 1990, complained of beatings while held at the El Centro detention center in California, had been deported by the time the detainee’s attorney reported the matter.66 No attempt was made to locate him or to interview the officers allegedly involved.67 Similarly, a detainee from Nicaragua who had participated in a hunger strike, claimed that three officers entered his cell on August 3, 1990 and

62. The comments of one Araceli Molina, who, in 1989 went to the newly created OIG in El Paso, Texas to file a complaint regarding the physical abuse of her brother, are instructive: “It appeared to me that [the investigator] was well known to all the officials here since everybody was greeting him very nicely and joking around with him. I thought to myself how can this guy who works with all these officers and is so friendly with them do a good, honest investigation?” *Hearings Before the Subcomm. on Human Rights and Int’l Organizations, H.R. Comm. on Foreign Affairs* (testimony of Marfa Jiménez, AFSC)(Apr. 18, 1990)(quoting affidavit of Araceli Molina, July 31, 1989). *See also Testimony of Richard Gonzales, supra note 45, at Exhibit 1 (anonymous letter from a Nogales, Arizona patrol agent commenting on lack of partiality in OIG investigation by former agent and asserting that most agents in the Tucson Sector “feel that the Patrol and their sidekick OIG are professional cover-up artists . . .”).

63. *See, e.g.*, Letter from Stephen Rosenbaum, CRLA to Ralph Paige, OPR (Mar. 31, 1988)(on file with the author); Letter from Ralph Paige, OPR, to Stephen Rosenbaum, CRLA (July 22, 1988)(on file with the author)(regarding verbal, psychological and sexual harassment by an INS legalization adjudicator in San Francisco); Letter from Claire Schwartz, to the OIG (July 12, 1993)(regarding an illegal detention of a lawful permanent resident)(on file with the author). *But see OFF. OF INSPECTOR GEN., SEMIANNUAL REP. TO CONGRESS, supra note 51, at 20 (reporting on (a) the sentencing of an unnamed special agent who pled guilty to filing false documents regarding a fabricated assault upon him by an alien and to deprivation of rights of the alien and (b) the suspension without pay of three unnamed patrol agents who had broadcasted taunts, obscenities and racial slurs and threw a firecracker at Mexican nationals).

64. *See Testimony of Marfa Jiménez, supra note 62, at 4 (quoting Affidavit of Araceli Molina). Complainants are not the only ones who have been kept in the dark. *See Statement of Milton J. Socolar, Special Asst. to the Comptroller General, supra note 51, at 4 (“there was no assurance that the Attorney General or Congress were advised of the results of the work of these many units.”).*

65. At his attorney’s request, the young man was interviewed by an OIG investigator some time in October 1992. The matter was transferred to the Civil Rights Division, which declined prosecution on October 29, 1992, about a month after the incident. From that date until June 24, 1993, the case was referred from one INS office to another. The attorney who had helped to file the claim was constantly told the case was “under investigation” and, despite promises, was never apprised of the result until she phoned her local OIG office on September 2, 1993. *Testimony of Lynn Marcus, supra note 40, at 3-4; Telephone interview with Lynn Marcus, Attorney, Southwest Refugee Rights Project, (Sept. 2, 1993).*


67. *Id.*
that one of them pummeled him repeatedly in the shoulder, eventually dislocating it.\textsuperscript{68} He filed a written complaint with the OIG the next day. On August 9, the Office of Civil Rights declined prosecution and the regional OIG closed the case the next day.\textsuperscript{69} Neither the complainant nor the suspect officer was ever interviewed.\textsuperscript{70}

The current system also lacks outreach and publicity about the complaint process.\textsuperscript{71} Furthermore, there is not an adequate number of investigators and no time limit on investigation duration.\textsuperscript{72} As a result of these system failings and inadequacies, the credibility of the complaint process is undermined.

\textbf{Tinkering With the Status Quo}

As a reaction to the above mentioned, and other problems, attempts have been made to clarify and expedite the internal review process. However, these attempts constitute little more than a "band-aid" approach to a fundamentally flawed process. Two recent settlements of civil suits have shed some light on the internal complaint review process.

The first, \textit{Velasquez v. Ackerman},\textsuperscript{73} requires that specific allegations of misconduct involving certain joint INS-local law enforcement operations be submitted by plaintiffs' attorneys directly to the Office of Internal Audit.\textsuperscript{74} The OIA Director must then acknowledge receipt of an allegation by sending a letter to plaintiffs' counsel, and must refer all allegations of civil rights violations to the OPR or OIG.\textsuperscript{75} If the OIA Director does not investigate, plaintiffs are to be informed in a letter of the reasons why and given

\begin{itemize}
\item \textsuperscript{68} \textit{Id.}
\item \textsuperscript{69} \textit{Id.}
\item \textsuperscript{70} \textit{Id.}
\item \textsuperscript{71} A national survey of review boards also noted, "\textit{[p]ublicity is problematic for an internal police department review system, since a successful publicity campaign will invariably increase the number of civilian complaints filed.}" \textit{N.Y. CITY POLICE DEPT. CIVILIAN COMPLAINT REVIEW BD., NATIONWIDE SURVEY OF CIVILIAN COMPLAINT SYSTEMS 31} (1986)\textit{[hereinafter NATIONWIDE SURVEY]. See also Frontier Injustice, supra note 11, at 30-31 (regarding ignorance and fear on the part of prospective complainants).}
\item \textsuperscript{72} \textit{But see OFF. OF THE INSPECTOR GEN., SEMIANNUAL REP. TO CONGRESS 6} (Mar. 1993)\textit{(OIG developed a "90-day initiative" in the El Paso area to provide "a more immediate response" to allegations of civil rights violations by the Border Patrol.)}
\item \textsuperscript{73} \textit{Velasquez Settlement Agreement, supra note 49, at 10-12. For background on this suit involving INS-police raids of public businesses and communities, see Brutality Unchecked, supra note 9, at 47-48.}
\item \textsuperscript{74} The \textit{Velasquez} settlement is in effect through September 6, 1994 and affects only the Livermore Border Patrol Sector and the INS San Francisco District in Northern California. \textit{See Velasquez Settlement Agreement, supra note 49. The settlement is operative if at least five law enforcement officers are present and one of the joint operations exceptions does not apply, e.g., situations where local officers are providing support to INS for safety, crowd or traffic control, taking custody or for operations involving the INS Anti-Smuggling Unit or Organized Crime Drug Enforcement Task Force. \textit{Id.} at 6.}
\item \textsuperscript{75} \textit{Id.} at 10.
\end{itemize}
an opportunity to present a case for investigation. If an investigation is undertaken, it is to be completed within a fixed time period and the OIA Director is to inform the plaintiffs of the general findings and conclusions. Plaintiffs may then submit a letter to the OIA recommending disciplinary or corrective action and the INS is to advise plaintiffs of its final determination regarding the action.

The *Pearl Meadows Mushroom Farm v. Nelson* settlement is substantially like *Velasquez* in many respects. The two are similar in terms of geographic and time limitations, reporting of violations to the OIA, and opportunities for plaintiff input. However, there is one principal difference in that the *Pearl Meadows* settlement involves only misconduct related to INS workplace raids or "surveys." While the two settlements do provide some encouragement, they remain relatively isolated occurrences; a window into the heretofore obscured review process. The threshold requirements for investigation are high. Outside the specific instances which form the basis of the *Velasquez* and *Pearl Meadows* settlements, abuse investigation remains largely discretionary. These settlement arrangements may be a step in the right direction, but their limitations and the hesitancy of the INS to take them seriously have shown that a more expansive, nationwide adjustment of the complaint process is needed.

A further attempt to mend the present review process can be found in recently proposed INS regulations. The INS published proposed rules in 1992, pursuant to an amendment in the Immigration Act of 1990, which *inter alia* purport to establish "an expedited internal review process" for

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76. *Id.*
77. *Id.* at 11.
78. *Id.* at 11-12.
79. *Pearl Meadows Settlement Agreement,* supra note 42.
80. The *Pearl Meadows* settlement agreement expires on June 17, 1995. The suit affects the Livermore Border Patrol Sector in Northern California and the INS San Francisco District. *Id.*
81. *Id.* Plaintiffs alleged a number of incidents of misconduct during raids for which Category I complaints were filed with the OPR against agents of the San Francisco District, Livermore Sector. These complaints resulted in no disciplinary action against any agent. *See Plaintiffs' Brief Opposing Defendants' Motion to Dismiss,* Pearl Meadows Mushroom Farm v. Nelson, Civ. No. C-82-1869, at 165-170 (N.D. Cal., May 26, 1989). For background on the case, see *Int'l Molders' and Allied Workers' Local Union No. 164 v. Nelson,* 643 F. Supp. 884 (N.D. Cal. 1986), remanded with modifications, 799 F.2d 547 (9th Cir. 1986); *Brutality Unchecked,* supra note 9, at 44-46. A paucity of workplace raids since the suit was filed explains why virtually no complaints have been submitted in accordance with the terms under the agreement.
82. *See,* e.g., correspondence between Stephen Rosenbaum and John P. Chase, May 28, 1993 through Dec. 1, 1993 (concerning allegations of joint INS-local law enforcement raids on public businesses and detentions of lawful residents and OIA determination that insufficient specific, factual allegations raised to warrant further investigation under *Velasquez* or that character of operation falls within settlement exception)(on file with the author).
investigation of agent misconduct. Despite recommendations for change, the Service has done little more than to state that it will investigate "expeditiously" and refer complaints and reports "promptly." These regulations fall short of the needed overhaul as they simply summarize what is publicly known about current Department of Justice policy and procedures for investigating complaints, and just meet the minimal requirements of Congress' mandate to expedite the process.

A third attempted modification of the review process was the congressional adoption of an appropriations bill calling for a citizens' advisory panel. The legislative initiative for an immigration review commission first surfaced in a House appropriations bill for FY 1993, H.R. 5678. A congressional conference committee adopted a report which accompanied the bill requiring the Attorney General to appoint a citizens' advisory panel to accept and review individual complaints of abuse by the Border Patrol. The panel, to be composed of representatives from INS, the Border Patrol, community service and human rights organizations, local governments and the Mexican consulate, is to make recommendations to the Attorney General and Congress on how to "reduce the incidence of abuse" along the southwest border. Since this panel arose out of the report accompanying the actual bill, its authority remains unclear. There is no mention of staff, budget or frequency of meetings. More than one year later, the members had yet to be named, much less conduct a meeting.

In the end, the internal complaint process cannot command public confidence or respect because its impartiality will always be questioned and access by complainants and non-agency authorities will be limited.

84. Proposed 8 C.F.R. 287; 57 Fed. Reg. 47,011 et seq. (Oct 14, 1992). The rule is also intended to define reasonable and unreasonable use of force, to restrict the authority to carry firearms, and establish other standards with respect to enforcement activities.
85. Id.
86. See OVERWHELMED AND UNPREPARED, supra note 3, at 14 (Statement of Cecilia Muñoz that the proposed regulations simply reiterate the status quo).
89. Acting Commissioner Sale told Congress in September, 1993 that INS had submitted a proposal to the Justice Department to implement such a Citizens' Advisory Panel. Sale Letter, supra note 17, at 13. See also 59 Fed. Reg. 6,658 (Feb. 11, 1994)(notice of establishment of advisory panel to recommend ways to reduce complaints and improve training).
III. KEY FEATURES OF A CIVILIAN REVIEW BOARD

Both the public and the immigration authorities would be well-served by restructuring the process for receiving, investigating and resolving allegations of misconduct.91 Civilian oversight by an independent review board creates a perception that the process is fair and builds confidence in the board. This, in turn, encourages the filing of bona fide complaints and a just and open resolution for complainant and officer alike.92

The concept of external review of law enforcement officials is not a new one.93 There are three main purposes: 1) to identify and punish the officer who mistreats; 2) to give the aggrieved individual and the public a means of redress; and 3) to prevent future misconduct.94 When a paramilitary force is ultimately responsible only to itself, there is room for concern that it will not work to curb its own excesses. Ultimately, the review process must gain the acceptance of both the public and the law enforcement officers, while not playing an advocacy role for either. Only through impartiality will a review process attain the requisite legitimacy for successful implementation.95

One example of an attempt to strike just this balance can be found in a bill introduced by United States Representative Xavier Becerra of California in May, 1993, calling for the creation of an “Immigration Enforcement

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91. Many of the suggested elements of the review process are taken from comments submitted to the INS by an ad hoc working group convened by the American Friends Service Committee and National Lawyers Guild Immigration Project, of which the author was a member. See “Preliminary Comments on Section 503(a)(5)(B)(iv) of the Immigration Act of 1990 (Aug. 1991)” (on file with the author). The author is indebted to the working group members for their insight, debate and ideas. For a summary of the recommendations, see SEALING OUR BORDERS, supra note 11, at 58-59. Attached as an appendix to this article are proposed regulations for a civilian review board.

92. See, e.g., Brown, supra note 90, at 2, 7; Terrill, Complaint Procedures: Variations on the Theme of Civilian Participation, supra note 20, at 398 (inability of the police to police themselves); Edward J. Littlejohn, The Civilian Police Commission: A Deterrent of Police Misconduct, 59 U. Det. J. Urb. L. 5, 6, 11 (1981) (importance of citizens, especially minorities, airing grievances). The body which oversees the conduct of the Royal Canadian Mounted Police has been so conscious about the public’s perception of its independent status that it has more than once lamented that its very name in English — RCMP Public Complaints Commission—implies it is an internal complaint unit. For its French-speaking constituents, there is not the same problem, as it is known as the Commission des Plaintes du Public Contre la [RCMP]. (“Commission of Public Complaints Against the RCMP”). See ROYAL CANADIAN MOUNTED POLICE PUBLIC COMPLAINTS COMMISSION, 1989-90 ANNUAL REPORT at 90 (1990)[hereinafter, 1989-90 RCMP ANN. REP.].


94. NATIONWIDE SURVEY, supra note 70, at 32.

Review Commission."  

Under the Becerra legislation, H.R. 2119, a bipartisan commission made up of Presidential appointees would be responsible for investigating individual complaints of civil rights violations by immigration officials or customs agents and making disciplinary and policy recommendations.

While a number of models exist for local civilian review boards, there are no sufficient nationally-based models. Certain features of an oversight board are particularly important in the immigration and immigrant context. The following features should be included in any nationally-based model.

CONDUCT: A DEFINITION

To this point, the discussion has been about particular abusive practices by immigration agents or more generally, about "misconduct." The review board must very quickly face the definitional question of proper conduct, particularly if the statute is broad. This is perhaps one of the few areas where H.R. 2119 is too restrictive: it limits the review commission to complaints of "civil rights abuses."

A better model to draw from would be that of the body which oversees the Canadian national police, the Royal Canadian Mounted Police (RCMP). The RCMP Act, creating a Public Complaints Commission, allows the public to make complaints "concerning the conduct, in the performance of any duty or function under th[e] Act," of any RCMP employee or appointee. Even this broad definition has led to debates about its interpretation between the Commission and the RCMP. However, an advantage is that it


97. H.R. 2119, supra note 96. Many of the suggested components of the review process are taken from "Preliminary Comments on Section 503(a)(5)(B)(iv) of the Immigration Act of 1990", supra note 91.


100. Royal Canadian Mounted Police Act, R.S., c. R-9, § 45.35(1).

101. See, 1989-90 RCMP ANN. REP., supra note 92, at 68-74.; 1991-92 RCMP ANN. REP., supra note 95, at 114-15. The police have argued for a definition of conduct that is closely tied to the RCMP disciplinary standards and code of conduct which are set out in the Act. The Commission had obtained a legal opinion which defines conduct as an act or the omission of an act which can be attributed to an RCMP on-duty agent and "results in a member of the public being concerned . . ." Id. at 114.
allows for an evolving definition that goes beyond "civil rights" as that term is interpreted under U.S. federal and state statutes.  

"TAKING IT TO THE STREETS": THE NEED FOR OUTREACH

Conventional wisdom among activists is that people will not file complaints where there is no publicity about the procedure. In other words, the public must know of its right to complain. Establishment of a "community outreach office" would be an important first step in assuring effective communication with immigrants and other prospective complainants about the investigative and deliberative procedures of the review body.

Past experience underlines the importance of outreach in the affected immigrant communities. Most recently, the Immigration Reform & Control Act of 1986 (IRCA) provides both positive and negative lessons for future programs of community outreach. Under IRCA, the Attorney General was obliged to "broadly disseminate information" about the benefits of legalization or "amnesty" and details of the application process. He was also required to designate voluntary organizations known as "qualified designated entities" ("QDEs") to assist in the legalization process.

One study of IRCA reported that the INS publicity budget was small and not always channeled to the appropriate ethnic and immigrant media.

102. Interestingly, one commentator has suggested that a civilian review board oversee allegations of abuse on the part of private individuals as well as public immigration enforcement officers. See Núñez, supra note 27, at 1603. While the occurrence of individual acts of harassment and physical and psychological brutality is alarming and worthy of serious attention, the review board is best suited to assure the accountability of public officials.

103. See, e.g., Hispanics Seek Voice in Claims of Border Abuse, The Phoenix Gazette, Nov. 7, 1992 at A1. See also Petterson, Police Accountability, supra note 93, at 277 (the agency "must woo and maintain" public participation — as well as that of the law enforcement officers). Extending the period for the lodging of all or certain types of complaints could also serve to maximize use of the process. For an example of the use of such a technique, see Official University Announcement, University of California at Berkeley Police Review Board, The Daily Californian, Jan. 18, 1994 at 6. (complaints must be filed within thirty days, except for complaints of sexual harassment, which are granted an additional 60 day filing grace period.).

104. H.R. 2119, § 5(b), supra note 96. See also H.R. 2119, § 6(c) (calling for public education and development and dissemination of multilingual materials about the Commission's complaint procedures.)


107. SUSAN GONZÁLEZ BAKER, THE CAUTIOUS WELCOME: THE LEGALIZATION PROGRAMS OF THE IMMIGRATION REFORM AND CONTROL ACT 121-31 (The RAND Corporation-The Urban Institute, 1990). Public Media, a public interest advertising firm, called the government's publicity campaign "unresponsive, dull and uninformative" and charged the INS with failing "to create awareness and a climate of information about the amnesty program" or to address the "powerful mistrust and skepticism" of applicants. See California Legislative Joint Comm. on Refugee Resettlement, Int'l Migration and Cooperative Development, Hearings on Immigration Reform & Control Act: Implementation and Impact in California 132-33 (Statement of Attorney Stephen Rosenbaum, California Rural Legal Assistance, July 23, 1987)[hereinafter, California Legislative Joint Hearings].
A sequel to the study noted INS’ difficulties in obtaining outreach funds at the district level, recruiting and training case-handling staff, and working with local advocates.\textsuperscript{108} Other analysts observed that a large portion of the agency budget went to conventional print media and only later did the campaign include special counseling, canvassing, brochures, talk shows, and telephone hotlines targeted to reach certain communities.\textsuperscript{109} Still, concluded immigration scholar Bill Ong Hing, when all was said and done, the INS’ media contractor did less to promote public awareness than the advocacy groups and community-based organizations.\textsuperscript{110}

Generally, the INS has been criticized for neglecting its “service” mandate in favor of its enforcement role.\textsuperscript{111} Thus, prospective complainants may be unwilling to approach INS offices in fear of their being deported.

The creation of a community outreach office may help to lessen these fears. In addition to the aforementioned INS outreach office, human rights and community-based organizations could play a role in the outreach process by providing educative material and distributing complaint forms.\textsuperscript{112} Under IRCA, and based on previous experience,\textsuperscript{113} Congress had concluded that the use of voluntary agencies would encourage immigrants who feared

\textsuperscript{108} JUFFRAS, supra note 8, at 61-69. See also Bill Ong Hing, The Immigration and Naturalization Service, Community-Based Organizations, and the Legalization Experience: Lessons for the Self-Help Immigration Phenomenon, 6 GEO. IMMIGR. L.J. 413, 424-32 (1992)(description of outreach conducted by INS).

\textsuperscript{109} D. M. MEISSNER AND D. G. PAPADEMETRIOU, THE LEGALIZATION COUNCIL: A THIRD QUARTER ASSESSMENT at 13-15, 18-20 (1988). Doris Meissner, who is now the INS Commissioner, and her colleague at the Carnegie Endowment for International Peace wrote in detail about the financing of publicity and other problems with the legalization program. Id. at 10-21. See also Hing, supra note 108, at 438-43. (Professor Hing’s detailed analysis of legalization outreach noted that INS’ publicity campaign met with mixed results: For example, it was more effective in some ethnic communities than others, and while its broad message of “amnesty” was conveyed, details about eligibility or the application process were not necessarily understood.) But see JUFFRAS, supra note 8, at 63 (notwithstanding shortcomings in outreach and QDE relations, “the INS emerges from legalization with greater capacity to communicate with immigrants and stronger roots in local communities.”)

\textsuperscript{110} Hing, supra note 108, at 444.

\textsuperscript{111} See, e.g., OVERWHELMED AND UNPREPARED, supra note 3, at 15, 23 (comments of Former Commissioner Leonardo Castillo, AILA President Theodore Ruthizer and Harvard Immigration Law Clinic Instructor Linda Yañez); JUFFRAS, supra note 8 at 86, 92. See also 66 INTERPRETER RELEASES 1403 (Dec. 18, 1989)(remarks of Ex-commissioner McNary declaring that INS should emphasize service as much as enforcement); 70 INTERPRETER RELEASES 1334 (Nov. 22, 1993)(open letter to incoming Commissioner Meissner from outgoing General Counsel Grover J. Rees advocating that the institutional culture of of the “Anti-Immigration and Naturalization Service” be changed). Id.


\textsuperscript{113} See GORDON AND MAILMAN, supra note 3, at § 5.01 et seq. Reliance on these community-based organizations is not new. Particularly since World War II, there has been cooperation between the immigration service and private organizations. These voluntary agencies have performed services at all stages of immigration, including document preparation, disseminating information, giving legal advice to immigrants and sponsors, advocating before federal and international policy-making bodies and representing immigrants before administrative branches of the INS and Board of Immigration Appeals. Id.
and distrusted authority to come forward and apply for amnesty.114 The QDEs' "very function was to provide a buffer — a confidential intermediary — between the INS and the alien..."115 The border monitoring projects of the American Friends Service Committee have de facto served in this capacity for a number of years.116 More recently, groups like the Urgent Response Network in Oakland, California have adopted techniques made successful by Amnesty International for activating a grassroots mailgram campaign following incidents of alleged abuse.117

¿Qué Pasó?: A User-Friendly Intake

A revised review process should be sure to provide for multilingual outreach materials describing the citizen review board, its duties, and complaint procedures. H.R. 2119, for example, includes a provision for a 24-hour, toll-free, multilingual hotline to receive complaints, permits complaints to be filed in any form and prescribes complaint forms in languages reflecting the immigrant populations.118 The bill requires that the complaint form be available at all INS and Customs facilities and upon request from the Review Commission.119

Considering the intimidation many immigrants experience when dealing with the INS, a revised review process should also provide for distribution of forms through community-based organizations.120 Professor Hing suggests that the past experiences with community-based organizations

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114. H.R. Rep. No. 682(I), 99th Cong., 2d Sess. (1986) reprinted in 1986 U.S.C.C.A.N. 5649, 5677. See also Perales v. Thornburgh, 967 F.2d 798, 813 (2d Cir. 1992), judgment vacated on other grounds sub nom. Reno v. Perales, —U.S.—, 113 S.Ct. 3027 (1993)(the court of appeals recognized that Congress provided for QDEs "to mediate" between the applicants and INS, and for the broad dissemination of information, funded outreach services and a lengthy application period). A study by the RAND Corporation-Urban Institute found that about 70% of the applicants filed directly with the immigration service, bypassing the QDEs. F.D. BEAN, OPENING AND CLOSING THE DOORS, supra note 8, at 70. But see GONZÁLEZ BAKER, supra note 107, at 126 (explaining the discrepancy through the observation that applicants often went first to trusted QDEs and then filed their applications with the INS).

115. Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1339 (D.C. Cir. 1989). See also MEISSNER AND PAPADEMTRIOU, supra note 109, at 20 (discussing the INS' "image transformation" and break down of the "circle of fear" surrounding the agency).

116. See Martínez, supra note 9, at 86.


118. H.R. 2119, supra note 96, § 6(c)(2). This includes facsimile, mail, in person, or anonymous complaints. Canada's RCMP Public Complaints Commission also permits complaints to be made by toll-free telephone or mail. ROYAL CANADIAN MOUNTED POLICE PUBLIC COMPLAINTS COMMISSION, 1988-89 ANNUAL REPORT at 83 (1989)[hereinafter, 1988-89 RCMP ANN. REP.].

119. H.R. 2119, supra note 96, § 6(c)(2). During the legalization program, a prominent labor union criticized the Service for not having multilingual brochures and application forms available. California Legislative Joint Hearings, supra note 107, at 48-49 (Testimony of Jeff Stansbury, Int'l Ladies Garment Workers Union, May 15, 1987). See also JEFFRAS, supra note 8, at 58-65.

120. In his evaluation of the legalization program, Professor Hing observes that the "community based organization" is more suited to reaching the grassroots immigrant population than the traditional immigration assistance agency. Hing, supra note 108, at 444-53.
(CBOs) under IRCA provide lessons as to their future utilization. While INS would still play a prominent role, it may actually allot space in its offices to CBO staff. Illustrative of the utility of CBOs is the Albuquerque Border City Project, in New Mexico, which was created in part to monitor human rights abuses by immigration enforcement agencies, and to provide individual pro bono legal assistance. The partnership of the comfort provided by a CBO and the legitimacy of the INS could prove a strong tool for future citizen review boards.

Anonymous and in Confidence: Fear of Retaliation

In addition to the usual limitations affecting marginalized members of society who choose to challenge authority, the immigrant complainant also faces the threat of deportation. Given the largely unbridled power of the INS in this area of law, some provisions need to be made to safeguard the confidentiality of complainants and witnesses, and to protect them from retaliation. Under the current scheme for filing an administrative complaint with INS, deportation may follow based on the information provided in the complaint unless the immigrant requests, and is granted, a stay of deportation. Under a revised review process, information gathered during investigation should not be admissible against complainants and their witnesses in deportation or exclusion proceedings. A current example can be found in Congressman Becerra’s proposed legislation. Section 8 of H.R. 2119 prohibits testimony and information gathered as part of a complaint, investigation, or hearing to be used in any proceeding under the Immigration and Nationality Act.

The Immigration Act of 1990 recognizes the need for confidentiality in internal investigations, but provides no concrete measure for witness and

121. Id.
122. Id. at 462-63. Such a partnership may require a change of mindset for the INS and CBOs alike. Whereas the former will need to rely on the “residual impact” of the legalization experience to encourage a philosophy of responsiveness, the latter will need to become more efficient and innovative in their self-help techniques. Id. Although Hing does not explicitly address the function of complaint outreach or intake, this author finds his analysis applicable to the review process addressed here.
123. Proyecto ABC/Albuquerque Border City Project (n.d. 1993) (on file with the author). The project intends to provide intake services in a safe environment and refer individual complaints to the AFSC Immigration Law Enforcement Project. Telephone interview with Mimi López, Albuquerque Border City Project (Aug. 4, 1993).
124. Retaliation has been defined under the Becerra bill (H.R. 2119, supra note 96) as any action or threat of action against a person, including an immigration agent, because such person filed a complaint, testified, assisted, or participated in any manner in an investigation or hearing. H.R. 2119, supra note 96, § 7.
125. 8 C.F.R. § 243.4 (1992). But see INS instruction OI § 287.10(k)(no action taken to enforce departure of any witness or complainant or beneficiary of complainant in deportation proceedings).
126. Although H.R. 2119 § 8 allows for complaints to be filed anonymously, it is not clear whether testimony could also be provided anonymously or confidentially.
complainant protection. Precedent for such provisions is found in IRCA, which prohibited INS officials from releasing information furnished as part of the legalization application.

In the drafting of IRCA, Congress recognized that the legalization program could succeed only if "the fear of prosecution or deportation [that] would cause many undocumented aliens to be reluctant to come forward and disclose their illegal status..." could be overcome. The confidentiality was "meant to assure applicants that the legalization process is serious, and not a ruse to invite undocumented aliens to come forward only to be snared by the INS."

Under IRCA, the cloak of confidentiality was intended to cover all files and records kept by the INS, Qualified Designated Entities, and any other organizations involved in the application process. Applicants for legalization had to consent to the forwarding of their applications to INS for processing. This approach was largely successful, with violators subject to fine and/or imprisonment.

An additional enforcement mechanism can be provided through third party complaints. Canada accommodated immigrants afraid to come forward to seek that country's amnesty several years ago by allowing third parties to initiate an application for those persons. Complaints made by

128. 8 U.S.C. § 1160(b)(5), § 1255a(c)(5). "Whistleblower" laws presently exist to protect Justice Department employees. 5 U.S.C. §§ 2301(b)(9), 2302(b)(8); 28 C.F.R. § 0.39a(b). Federal prisoners have also been protected against retribution for making complaints against correctional officers. 28 C.F.R. § 40.9 (1988).
130. H.R. Rep. No. 682(I), supra note 114, at 73. See also Rosenbaum, The Alien Cloak of Confidentiality, supra note 112, at nn. 56-67, and accompanying text.
132. 8 U.S.C. § 1160(b)(5); 8 U.S.C. § 1255a(c)(5). For an account of the INS' strict interpretation of the confidentiality proviso, see generally, Rosenbaum, The Alien Cloak of Confidentiality, supra note 112.
133. H.R. 2119 § 6(b)(1) states that complaints "may be filed by any person, including anonymously and may be filed on behalf of third parties." Id. The concept of broad and liberal standing is consistent with state practice (e.g., California's consumer protection statutes for injunctive relief on behalf of the general public) and international practice (e.g., the individual petition procedures of the Inter-American Commission on Human Rights, UNESCO and the United Nations' Sub-Commission on Prevention of Discrimination and Protection of Minorities). See, e.g., CAL. BUS. & PROF. CODE §§ 17200, 22446; American Convention on Human Rights, O.A.S. Doc. OEA/ser.L/V/II.49, doc. 6, rev. 4 (1985); UNESCO (United Nations Educational, Scientific and Cultural Organization) Doc. 104/EX/ Dec. 3.3 (creating an Executive Board Committee on Conventions and Recommendations) (1978); Sub-Commission Res. 1(XXXIV) (1971) on Procedures for Admissibility Under Res. 1503, ¶1, 48 U.N. ESCOR, Supp. (No. 1A), 8 U.N. Doc. E/4832/Add. 1 (1970).
public officials, other third parties, or anonymously, are also permitted under the Royal Canadian Mounted Police Act.\textsuperscript{135}

\textbf{Regionalization is Essential to Oversight Objective}

A question that must be addressed in the creation of a citizen review board is whether a single centralized body can adequately review the activities of a national police force. The sheer size and geographic scope of the INS and Customs Service distinguish them from local police and sheriffs' departments. Possible criticism of a nationwide review body may be that a centralized enforcement board would be too large, while a decentralized board would be difficult to administer due to the problems of coordination among the individual branches.

The ability to conduct local investigations and hearings is essential to the manageability of a revised review process. Public participation could be enhanced by holding hearings at different sites throughout the country or by establishing local or regional adjunct commissions.\textsuperscript{136}

The current Royal Canadian Mounted Police scheme provides a useful model for the regionalization of a citizen review board. As in the Canadian scheme, intake and hearings should be held in locales that are convenient to complainants, witnesses and Service employees alike.\textsuperscript{137} It would also be useful to have a permanent regional presence. The RCMP has one headquarters and two regional offices. In addition to receiving and reviewing complaints, these regional offices maintain contacts with the media and provide public information.\textsuperscript{138}

\textsuperscript{135} See RCMP Act, supra note 100, Pt. VII, § 45.35(1) ("Any member of the public . . . whether or not . . . affected by the subject-matter of the complaint, [may] make the complaint . . . "). See also 1988-89 RCMP Ann. Rep., supra note 118, at 78-79 (noting that judges, Members of Parliament, Cabinet ministers or other public officials may wish to make complaints in that capacity and that anonymous members of the public may also complain); SKOLNICK AND FYFE, ABOVE THE LAW, supra note 90, at 231 (civilian complaints against police should be encouraged as a source of management information and should be accepted by whatever means they are lodged, including anonymously).

\textsuperscript{136} See, e.g., Testimony of Marfa Jiménez, supra note 25, at 9-10.

\textsuperscript{137} The RCMP commission is to hold hearings where the incident giving rise to the complaint occurred. 1988-89 RCMP Ann. Rep., supra note 118, at 95. The Act allows the Commission to sit where it chooses, while "having regard to the convenience of the parties." RCMP Act, supra note 100, at Pt. VII, § 45.45(3). This format is also common in the international human rights forums. See, e.g., Regulations of the Inter-American Commission on Human Rights at Art. 13(2), in OAS General Secretariat, Handbook of Existing Rules Pertaining to Human Rights in the Interamerican System (1983), OAS Doc. No. OEA/ser.L/V/11.60 Doc. 28 (July 26,1983).

\textsuperscript{138} See 1991-92 RCMP Ann. Rep., supra note 95, at 15 (importance of local presence in a large country), 6 (commission has one central and two regional offices). Similarly, H.R. 2119, supra note 96, 5(b) calls for the establishment of regional offices to conduct public outreach.
INVESTIGATION MUST BE PROMPT AND INDIVIDUALIZED

Time frames are necessary for prompt investigation of complaints in order for the review system to retain credibility with the public. This is especially important in the immigration enforcement context. Complainants and witnesses tend to be transient because of migration patterns within the United States and the tendency to return to their native countries, thus necessitating rapid investigative response in order to secure the presence of complainants and witnesses.

Unavailability of complainants and witnesses also results from "involuntary," or forced, migration. For example, individuals may be deported or issued so-called "voluntary departure" following an apprehension, notwithstanding INS instructions permitting deferred departure.

An example of the use of a time frame can be found in the Becerra bill. H.R. 2119 requires that an investigation and written report be completed within 60 days of assignment unless the board authorizes an extension. Once an investigation is completed, a three-member panel of the board is to review the report, and hold a hearing if warranted by the serious nature of the alleged abuse or by a majority vote of the panel. Among local police review commissions, time limits for completing investigations may range from thirty to ninety days.

The authority of and methods available to investigators vary among existing police review bodies. Some commissions have subpoena powers and are able to mandate cooperation from the police officers; others depend on voluntary cooperation. H.R. 2119 provides subpoena powers and requires Service employees to fully cooperate with investigations. Finally, special investigative techniques must be generated with an eye towards sensitivity to the language, culture and customs of the particular ethnic community to which complainants and witnesses belong.

139. See THE TARNISHED GOLDEN DOOR, supra note 12, at 141.
141. Id.
143. See 8127.10(k), supra note 52.
144. H.R. 2119, supra note 96, at § 6(e)-(f)(1). Compare the time allotted in the settlements agreed to by INS for internal investigation and referral of raids-related complaints. See Velasquez Settlement Agreement, supra note 49, at 11 (within 60 days of acknowledgment of complaint); Pearl Meadows Settlement Agreement, supra note 42, at 8, 11 (ranging from within 45 days of acknowledgment to unspecified).
145. NATIONWIDE SURVEY, supra note 71, at 16.
146. H.R. 2119, supra note 96, § 6(e).
Not all complaints will necessarily proceed to the stage of investigation. For example, under the system used by the Royal Canadian Mounted Police Public Complaints Commission, complaints are first investigated by the Mounties' internal review process. The internal process allows for the rejection of complaints which are trivial, frivolous, vexatious, or made in bad faith. Rejected complaints may be subsequently investigated by the Commission where an internal procedural error is identified.

COMPLAINANTS SHOULD HAVE THE RIGHT TO REPRESENTATION

In some police review systems, complainants generally have a right to representation at both initial hearings and in the appeal process. H.R. 2119 provides that both the complainant and the Service employee have the right to be represented by counsel at hearings, to present witnesses, and to cross-examine witnesses. It also requires that findings be established by a preponderance of the evidence.

The importance of counsel is particularly great for aliens. As with many members of disenfranchised segments of society, immigrants are often undereducated and unsophisticated in legal procedures. However, immigrants face additional barriers since many lack proficiency in English and have no inherent familiarity with the distinctly American concept of due process.

FURTHER FEATURES OF CITIZEN REVIEW BOARD

In addition to the aforementioned review procedures, the following features are essential to the proper functioning of a citizen review board. These features include provision of adequate and up-to-date information to complainants regarding the status of their complaints, publication of statistical information regarding complaints and their ultimate disposition, the establishment of a mechanism for monitoring patterns of abusive behavior by

149. *RCMP Act*, supra note 100, at § 45.36(5)(b). The Commission has further defined these terms and has declared that only in the clearest cases should the police refuse to investigate on these grounds. *Royal Canadian Mounted Police Public Complaints Commission, 1990-91 Annual Report* at 39-40 (1991)[hereinafter, 1990-91 *RCMP Ann. Rep.*].
150. Id. at 38.
151. Id. at 16.
particular agents, and the ability to make disciplinary recommendations. Additionally, any meetings of the review board should be publicly accessible unless valid reason is shown for confidentiality.

A first factor in retaining public credibility is for the complainant to be informed of the receipt of the complaint, the investigation process, and the ultimate disposition of the complaint. H.R. 2119 does not now explicitly provide for any such notification. A viable review process must adopt notification procedures and should provide for communication throughout the complaint process.

A second feature aiding in the proper functioning of a citizen review board is the collection and dissemination of statistical information as to complaints received and their final disposition. Currently, the offices which investigate complaints do not have accessible statistical information. Under H.R. 2119, the review commission would be required to compile and publish, at least annually, a statistical summary of all complaints received and the dispositions of such complaints. Most existing police review boards publish such statistics both monthly and annually. To be effective, a future citizen review board should be required to publish its statistical information monthly, and the publications must be available to the public.

The third essential feature is the establishment of a mechanism for the monitoring of patterns of abusive behavior by particular agents. By keeping track of complaints against individual agents, even if unsubstantiated, an agency can pinpoint and take steps necessary to prevent potential problems. When an agent accumulates repeated allegations of misconduct in his or her file, a manager should consider adequate disciplinary measures.

Several police departments monitor repeat complaints and some rely on such “recidivist lists” for progressive discipline. One department


154. “In response to repeated requests under the Freedom of Information Act, immigration officials said they do not keep track of abuse complaints and have no comprehensive data on internal discipline of agents.” McDonnell, Crossing the Line, supra note 22. On the other hand, the statistics that are publicly reported by the Inspector General are so general as to be meaningless. The reports include merely the number of cases opened, closed and pending and investigations and prosecutions referred. See, e.g., Sept. 1989, Off. of the Inspector Gen., Semiannual Rep. to Congress at 22-23.

155. H.R. 2119, supra note 96, at § 6(j). Some proponents of the bill suggest that the names of officers should be kept confidential at least until there is a final finding of a violation.


157. For example, the Seattle and San Jose (Calif.) Police Departments monitor and the Boston department maintains a progressive discipline file. Nationwide Survey, supra note 71, at 33.
tracks any encounter where the officer reports resisted arrest or battery of the officer. In another, commanding officers are sent a copy of each complaint against one of their subordinates, and are held accountable for the conduct of officers under their command.

H.R. 2119's version of a recidivist list is the "Early Warning Program." Under this program, the commission would conduct a periodic review of all complaints in order to determine whether particular Service employees have been the subject of repeated complaints or have otherwise demonstrated they may be having difficulty dealing appropriately with members of the public. The results of the review would be presented to the particular service, and the commission would make recommendations regarding training or counseling. The program outlined under H.R. 2119 serves as an acceptable model.

The ability to recommend discipline to the INS or Customs Service could be essential to any review board's effectiveness. The disciplinary recommendation portion of H.R. 2119, for example, provides that when a finding may constitute a criminal offense, the board must notify federal or state authorities. In all substantiated complaints, the board will recommend disciplinary action based on a schedule of sanctions determined by the commission. If the Service does not adopt the board's recommendations, it must submit a written explanation within thirty days. The recommendations and Service refusals are to be made public.

In the experience of police review commissions, the more authority a board holds, the more resistance it meets from the police departments and officers. However, over time, even authoritative boards can become accepted as part of the system. Initial restraint may be advisable in the creation of the INS review commission, and further powers, such as binding recommendations, could be granted as the board becomes established.

A final feature that should be mentioned is the need for openness in the review board's hearing process. Meetings of the board, as well as all decis-

158. Id. at 47 (Gainesville, Florida).
159. Id. at 26 (New York City).
160. H.R. 2119, supra note 96, at § 6(i).
161. Id.
162. Id.
163. One commentator notes that the corrective action can take the form of instruction, counseling, and supervision, as well as punishment. See Petterson, Police Accountability and Civilian Oversight of Policing, supra note 93, at 282. Petterson also encourages conciliation of complaints and agreement between the police executives and oversight body on the actual discipline. Id. at 281-82. See also Terrill, Complaint Procedures: Variations on the Theme of Civilian Participation, supra note 20, at 402.
164. H.R. 2119, supra note 96, at § 6(b)(2). The Becerra bill does not make the disciplinary recommendations binding, and does not contemplate a meeting or re-assessment by the board after the Service has issued its refusal to comply with the suggested discipline. Id.
165. See e.g. Brown, Civilian review of Complaints Against the Police, supra note 90 at 9; Nationalwide Survey, supra note 71 at 29; discussion infra, notes 163-181 and accompanying text.
sions reached at such meetings, should be accessible to the public. However, it must be recognized that accessibility may be curtailed when faced with valid concern of confidentiality on the part of complainants, witnesses, or other involved parties.\textsuperscript{166} Hearings and transcripts should be open to the public, unless there is good cause for keeping them closed.

**The "Green Wall" of Silence: Avoiding Uniform(Ed) Resistance**

A new review board may have an excellent structure, good administration, and be widely accepted by the public but, unless it also has the cooperation of the agency over which it is to keep watch, it will be fairly ineffectual. The 'Green Wall'\textsuperscript{167} of silence could so obstruct investigations as to make them practically useless. Therefore, a new review board must take steps and institute policies designed to be fair while not sparking resistance on the part of the agencies that it must review.

Many communities have implemented police review commissions with varied functions and authority. Common commission functions include overseeing police activities, providing an accessible forum for complaints, undertaking investigations, acting as liaisons between police forces and their communities, and making policy recommendations.\textsuperscript{168} The commissions initially met with resistance by police forces, but after a time have been accepted as a necessary part of the system.\textsuperscript{169}

There are indications that the INS and its employees will resist review from an independent body. The resistance at the top echelons may be couched in polite terms. For example, the former Acting INS Commissioner recently told Congress that "it is neither necessary nor desirable to create a new bureaucracy of this size. . . ."\textsuperscript{170} However, in a less guarded statement, the Director of Internal Audit called H.R. 2119 "duplicative" and "from out in left field."\textsuperscript{171}

The response from the rank-and-file may be more angry or cynical.\textsuperscript{172} The proposed review board may not be denounced by INS agents as "a page

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\textsuperscript{166} See, e.g., 1988-89 RCMP ANN. REP., supra note 118, at 78.

\textsuperscript{167} The "Green Wall" is in reference to the green uniforms worn by Border Patrol agents.

\textsuperscript{168} See NATIONWIDE SURVEY, supra note 71, at 18-27.

\textsuperscript{169} See Brown, Civilian Review of Complaints Against the Police, supra note 90.

\textsuperscript{170} See, e.g., Hearings on H.R. 2119 Before the Subcomm. on Int'l Law, Immigration & Refugees of the House Judiciary Comm., 103d Cong., 1st Sess., 15 (1993)(testimony of Acting INS Commissioner Chris Sale). Of course, internal review systems are not completely ineffectual, particularly where supported by the agency chief. See also NATIONWIDE SURVEY, supra note 71, at 29; SULNICK, supra note 90 at 39-40.


\textsuperscript{172} Frustration and demoralization are nothing new to the INS field staff, nor is cynicism toward decisions made in the nation's capital. Commenting on another policy matter in the mid-1980s, one San
right out of the Communist handbook... to weaken [police] work, to incapacitate them or make them a subject of ridicule,” but, the men in uniform are sure to fight change. Law enforcement officers have long subscribed to the doctrine of the “blue wall of reluctance.” On the question of agency morale, the president of the INS employees’ union had a few years earlier testified before Congress: “So they find themselves damned if they do and damned if they don’t. The frustration levels are very high...[there is] a very severe...morale crisis within the INS work force.”

Although some degree of internal resistance is certain, it should not be allowed to derail the process. Many means exist to ensure law enforcement compliance with the board. To implement an acceptable review process, experts recommend that there be fairness, access and openness.

Ysidro, California Patrol agent told his Central Office superior: “You know we’re down here playing a game. They [in Washington] don’t want us to do our job...” quoted in KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE INS 164 (1992). Officers will also attempt to minimize the acts of violence by their own members, contending that most of the violence is caused by immigrant “thieves and smugglers” in the border zone. See, e.g., McDonnell, Oversight Panel for Border Patrol Urged, supra note 171, at B1 (comments of Border Patrol Agent Ted Swofford); McDonnell, Crossing the Line, supra note 22 (comments of the frontline agents).

A publication from the National Fraternal Order of Police, circa 1960s, quoted in SKOLNICK AND FYFE, supra note 90, at 228, reacting to the creation of police review boards. According to the police organization, the party line is that “police are the enemies of communism.” Id. One study of the use of deadly force by police captures the same sentiment in less strident terms: “Any effort to disarm (or even control) an armed police force violates the public (and police) conception of the essence of policing - even though this conception may have little foundation in reality.” SCHARF AND BINDER, BADGE AND THE BULLET, supra note 21, at 228 [emphasis added].

The word “men” is used advisedly as it is too early to speak of a long history of women in law enforcement. But interestingly, in one of the rare instances when one officer alleged that abuses were committed by another, a female Border Patrol agent appeared as a witness against her fellow officer from the Imperial Beach, California station at the latter’s criminal trial for assault. She testified that, “There is a code that we are not supposed to tell on other agents.” Frontier Injustice, supra note 11, at 33.

Remark of Retired Sgt. James Dowd of the New York Police Department, testifying before the mayoral “Mollen Commission” investigating police corruption and abuse. Dowd and other former officers were referring to the unwillingness of the department’s internal affairs bureau to confront corruption. Steven Lee Myers, Officers Describe Police Watchdog Agency as Ineffectual, N.Y. TIMES, Oct. 2, 1993, at A27. But see, comments of New York police officers’ association president: “If we find dirty cops...we don’t protect them.” Selwyn Raab, New York City’s Police Allow Corruption, a Panel Reports, N.Y. TIMES, Dec. 29, 1993 at A1, B12. One commentator notes the contention that “the ‘blue code’ will never permit the close scrutiny of an officer’s behaviour,” Petterson, Police Accountability and Civilian Oversight of Policing, supra note 93, at 272. This assertion has been corroborated through litigation and commission investigations. Id. Those who do break ranks may be shunned, or harassed. Id. See also Testimony of Richard Gonzales, supra note 45, at Exhibit 1, 3 (Arizona patrolman writes in anonymous letter that “some agents who have been truthful and walk a straight line, that have complained about certain abuses...have been subjected to a pattern of harassment by Border Patrol management and their co-workers.”).

K. CALAVITA, supra note 172, at 165 [emphasis, brackets and ellipses in original]. See also Dunn, Official’s Exit Blamed, supra note 22.

See 1989-90 RCMP ANN. REP., supra note 92, at 87-89 (citing A. ALAN BOROVvoy, WHEN FREEDOMS COLLIDE 254-55 (1988)) on the officers’ concern about self-incrimination. One way this has
particular, investigators must be "hardnosed" and experienced, and the hearing officers should be fair and qualified.\textsuperscript{179}

Because the agents are apt to ignore requests for records and thus delay the work of the review board, the board must be given access to documents and witnesses through legal mandate or subpoena power. The process must also allow for the accused — and the accuser — to know the outcome and reasoning of the hearing. For the exonerated officer, disclosure will restore public confidence in the process and in the individual. For the guilty agent, disclosure will hopefully deter the misconduct and inform fellow officers that such conduct will not be tolerated.\textsuperscript{180}

One of law enforcement's greatest fears of civilian review is that "responsible" persons will yield influence or power to a board "captured" by "a minority community's most outrageous representatives."\textsuperscript{181} Therefore, in the interest of effectiveness, professors Skolnick and Fyfe counsel the selection of review board members who are distinguished by their expertise and impartiality, but who may not be "representative" of the community at large.\textsuperscript{182} At first blush, this view would appear to be at odds with the symbolic value of a review commission "opening up" the police force by directly involving citizens in the process.\textsuperscript{183} In the end, the heads of immigration law enforcement branches and their subordinates must recognize that in order to gain public support they ultimately need to be scrutinized about what they do, how they do it, and why.\textsuperscript{184}

\begin{itemize}
  \item \textsuperscript{178} Professors Skolnick and Fyfe write that "[c]ops won't ever like civilian review . . . ," Skolnick and Fyfe, supra note 90, at 228. But, a fair and open process run by experienced and qualified people can make it more acceptable.
  \item \textsuperscript{179} Id. at 131.
  \item \textsuperscript{180} Id. One researcher, however, found that police officers may respond more positively to a complaint registered with the chief of police than with criminal courts, the city council or the press. Sulnick, supra note 90, at 40.
  \item \textsuperscript{181} Locke, supra note 1, at 6. Professor Terrill also notes the role of "powerful interest groups" in influencing policy outside the traditional checks-and-balances model of government. Terrill, Alternative Perceptions, supra note 98, at 82. He adds, however, that the civilian oversight movement has not in fact attained that status. Id. See also 1990-91 RCMP ANN. REP., supra note 149, at 151; Brown, Civilian Review of Complaints Against the Police, supra note 90 at 6 (on capture).
  \item \textsuperscript{182} Skolnick and Fyfe, supra note 90, at 228-29. "In this setting, diversity has to defer to expertise." Id. One police investigator recommends, in classic public administration terms, that civilian panels be composed of members with backgrounds in judicial, legal, investigative and educational expertise, with "[m]erit, not race, religion or membership in any group" as a selection criterion. Terry Hensley, Civilian Review Boards and Police Accountability, 36 TEX. POLICE J. 11, 12 (Dec. 1988).
  \item \textsuperscript{183} Id., supra note 1, at 13.
  \item \textsuperscript{184} Id. at 10, commenting on the same phenomenon among police administrators and officers. See also 1991-92 RCMP ANN. REP., supra note 95, at v. (citing Andrew Goldsmith, who posits that "induced compliance" by the officers "is almost always preferable to exacted deterrence.").
\end{itemize}
IV.
ALTERNATIVE REDRESS BEYOND CIVILIAN REVIEW BOARD

In recommending an external review process for disciplining immigration officers and promoting good conduct, one should not overlook alternative means of redress.

CONCILIATION

City councils in some border cities have attempted to set up municipal advisory commissions to improve relations between the Border Patrol and local communities.185 In Albuquerque, an INS Community Relations Board was established in 1991. Organized with the help of a New Mexico senator and the Albuquerque Border City Project, the Board meets regularly with INS officials to "air grievances and to raise issues" regarding Border Patrol policies and practices.186 However, the board members' role is restricted to asking questions of a general nature.187

A further example of a community advisory commission designed to improve relations can be found in El Paso, Texas. The "Border Patrol Local Accountability Commission," created in 1992 by the El Paso City Council,188 is authorized to conduct independent investigations, hold hearings, and to report at least quarterly to the City Council.189 Its mandate is to monitor Border Patrol adherence to the principle of "common regard for human dignity and conduct toward one another."190 The El Paso commission has no power of subpoena, and generally lacks the means to force its recognition.191 The head of the local Border Patrol has refused to recognize the body, claiming his federal agency is not required to follow the advice of a local entity.192

185. For example, in San Diego, California, in 1992 the City Manager and Chief of Police established a task force on border violence pursuant to the authority of the Immigration Reform and Control Act of 1986 (IRCA). Testimony of Marfa Jiménez, supra note 25, at 9. Former California Congress Member Leon Panetta established a task force on immigration for his central coast constituents, partly in response to allegations of INS misconduct. See, e.g., Minutes of the Joint Task Force on Immigration & Naturalization Service Activity for Santa Cruz and Monterey Counties, Oct. 31, 1990 (on file with the author).

186. Proyecto ABC, supra note 123.
187. Id.
188. Ordinance Creating the Border Patrol Local Accountability Commission (July 28, 1992)[hereinafter, El Paso Ordinance].
189. Id. at § 3. However, the commission does not have subpoena power. Interestingly, the ordinance guarantees the commissioners' legal defense and indemnification for lawsuits and judgments arising from discharge of their duties. Id. at § 5.
190. Id. at § 2.
191. Id.
192. According to Americas Watch, the El Paso commission was created by the El Paso City Council as a grassroots response to "the unwillingness of immigration law enforcement authorities to rein in abusive agents . . ." Frontier Injustice, supra note 11, at 3.
As if to underscore his refusal to recognize the authority of the city of El Paso and in order to maintain control of the complaint process, this same patrol chief created a "Border Patrol Community Relations Board" in February 1993.\textsuperscript{193} The board is composed of ten civilian members and serves mainly as a "liaison and avenue of communications between the U.S. Border Patrol and the general public."\textsuperscript{194} The board has virtually no authority to take action on complaints, enforce recommendations, or influence policy.\textsuperscript{195} Its intended role is to "route inquiries and other information through proper channels."\textsuperscript{196}

Although a community relations board has the potential to improve the Border Patrol's image and perhaps win some public confidence,\textsuperscript{197} it does little to address the fundamental weaknesses of the complaint process itself. This is not to say that all efforts to deter misconduct must be found exclusively in the external oversight process.\textsuperscript{198} Local efforts should be continued. However, it must be recognized that they can only supplement a national, external review commission.\textsuperscript{199}

**BETTER OFFICER SELECTION AND TRAINING**

A second alternative mechanism to increase INS accountability is through the production of better officers. A promise to improve training has long been the INS response to critics of the incidents of violence.\textsuperscript{200} In 1991, the OIG had concluded that "[t]here are no INS policies or proce-


\textsuperscript{194.} Id.

\textsuperscript{195.} Id.

\textsuperscript{196.} Telephone interview with Richard Bowen, Chair, Border Patrol Community Relations Board (July 6, 1993). The only complaints the board, composed of both "men and ladies," had received involved traffic and other minor matters. Id.

\textsuperscript{197.} Testimony of Acting Commissioner Chris Sale, supra note 49, at 6. See also Immigration Reform and Control Act of 1986, P.L. 99-603, 99th Cong., 2d Sess., 100 Stat. 3359, 3381 (congressional appropriations language in IRCA requiring that some INS funds be used "for enhanced community outreach," including the establishment of "local community task forces to improve the working relationship" between the Service and local groups.).

\textsuperscript{198.} See Comments by Valenzuela Malagón, supra note 22, at 94-96 (Valenzuela's experience with the Operativo BETA forces in Mexico regarding cooperation of different groups including law enforcement). See also supra note 163 and accompanying text.

\textsuperscript{199.} But see Petterson, supra note 98, at 270 (asserting that advisory committees intended as forums for community-police dialogue are often established by police executives and associations hoping to ward off civilian oversight). "[I]n too many cases, these committees are made up of persons who are already friendly, if not infatuated, with the police." Id.

\textsuperscript{200.} Americas Watch has called attention to the irony of the "Officer Integrity Course for Border Patrol Agents" training materials: "The business of the United States Border Patrol is 'people.'... How these people are treated will leave a lasting impression of, not only the Border Patrol, but the United States in general." \textit{Brutality Unchecked}, supra note 9, at 1. \textit{But see Sealing Our Borders}, supra note 4, at 13-14 (describing racist text and instructor's remarks from training course); \textit{Brutality Unchecked}, supra note 9, at 1-2 (noting comments by INS officials and the Office of Inspector General on inadequate training and supervision of agents).
dures accurately reflecting recent statutory changes affecting the use of firearms. . .INS management has not updated its firearms policy to reflect the terms of the new legislation. This may lead to violations of authority on the part of uniformed service employees.201 Responding to the report, the then-INS Commissioner wrote that new regulations were currently being developed,202 yet none of the recommendations were included in the proposed rule.203 In July 1993, the Acting Commissioner announced the “imminent approval” of a policy on the use of non-deadly force and the revision of the INS Firearms Policy.204 She also stated in her letter to all district directors and chief patrol agents that “all managers are accountable for the actions of their subordinates” and must provide them with training, education and on-site supervision.205

Currently, the Border Patrol’s screening and hiring policies fall below acceptable minimum standards for an enforcement agency. In its haste to get agents in the field, the Border Patrol has hired individuals with criminal records and past problems with other law enforcement agencies.206 An enforcement agency needs top employees in the field. The Border Patrol and other agencies charged with enforcement of the immigration laws should strive to recruit only individuals of high moral character and to keep their pay scale commensurate with other law enforcement agencies.207

**ALIEN ACCESS TO THE COURTS**

Opponents of civilian review often point to civil litigation and criminal prosecution as alternatives.208 Perhaps the principle alternative of redress presently available for INS abuse is through the courts. In theory, suits for

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201. **OFF. OF INSPECTOR GEN., AUDIT REPORT: IMMIGRATION AND NATURALIZATION SERVICE FIREARMS POLICY** (1991). The OIG made 27 recommendations that the INS should incorporate to update its policy. **Id.** at 11-18. Interestingly, INS is not the only federal law enforcement agency under fire for its weapons policy. A coalition of organizations ranging from the American Civil Liberties Union to the National Rifle Association has urged the President to form a commission to study abuses including improper use of deadly force, physical and verbal abuse and the use of paramilitary units by the FBI, Drug Enforcement Agency, and other agencies. **See Coalition Assails U.S. Law Agencies, N.Y. TIMES,** Jan. 11, 1994, at A8.

202. **See Testimony of Chris Sale, supra note 49, at 21.**


204. **Sale Letter, supra note 17, at 1.** The firearms policy, still not finalized when the letter was written, is located at Admin. Manual 4210.

205. **Sale Letter, supra note 17, at 2.** **See Sebastian Rotella, Costs, Risks of Halting Illegal Immigrants Debated, L.A. TIMES,** Nov. 20, 1993, at A27 (remarks of Border Patrol Union President T. J. Bonner citing a lack of training and experience in response to the suggestion that the National Guard help police the border). **See McDonnell, Crossing The Line, supra note 22.**

206. **For the recommendations of the Mexican Human Rights Commission for a more humanitarian approach for enforcement, see infra note 275. See also 70 Interpreter Releases, supra note 111, at 1334.**

207. **See Terrill, Alternative Perceptions, supra note 98, at 78. Accord, Hensley, Civilian Review Boards and Police Accountability, supra note 182, at 12.**
declaratory relief and damages under state or federal law may be brought against the U.S. Government or the INS, or against Border Patrol agents named individually or in their official capacity. However, attempts to discourage Service misconduct through litigation have been only partially successful.

One theory often used in litigation against the INS is that of the Fourth Amendment prohibition on illegal search and seizure. Use of this technique to suppress evidence can be found in INS v. Lopez-Mendoza. In Lopez-Mendoza, the Supreme Court held that given the degree of training received by INS agents, the probability of conducting an unreasonable search and seizure is remote. However, the Court left the door open to protecting aliens against egregious violations by the INS or in instances where arrests were not peacefully effectuated.

Even the minimal guarantees provided under Lopez-Mendoza, however, may not be available to immigrants who lack "sufficient connections" to be considered part of the "community" worthy of protection under the test set out by the high court in United States v. Verdugo-Urquidez. The Verdugo-Urquidez Court explained that under the Fourth Amendment, "the people" refers to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." Noncitizens in border areas could easily find themselves beyond the reach of the Fourth Amendment.

In contrast, aliens are on firmer ground when it comes to protection under the Fifth Amendment. The federal government is prohibited from depriving "all persons," including undocumented immigrants, of life, liberty or property without due process of law. Nonetheless, as a practical matter, the right of an alien to petition for redress of grievances is limited by the fact that courts tend to defer to INS officials and to immigration policy

211. According to the majority, there was no "good reason to believe" that such violations were "widespread." Id. at 1050. Lopez-Mendoza can be read as the Court's concern for the unfettered implementation of U.S. immigration policy at the expense of the rights of undocumented immigrants. In the end, no exclusionary rule in the immigration hearing process means there is no deterrent to illegal arrests and detentions. See Nuñez, supra note 27, at 1580-81.
212. INS v. Lopez-Mendoza, supra note 210, at 1051.
213. 494 U.S. 259 (1990) (Search and seizure by U.S. drug enforcement agents of property of nonresident alien located outside the United States held beyond the scope of Fourth Amendment protections).
214. Id. at 265.
215. For a comparison of a "universalist" versus "exclusive" approach to safeguarding rights for persons located within a nation's borders, see Nuñez, supra note 27, at 1582-84.
generally,²¹⁷ and that aliens may still be deported even if a civil suit has been filed.²¹⁸

One commentator has observed that it is one matter to describe the constitutional rights of immigrants and another to protect them "in a meaningful way."²¹⁹ Three commonly applied theories for recovering damages arising from constitutional violations are the so called *Bivens*²²⁰ suit, actions filed under the Federal Tort Claims Act (FTCA)²²¹ and actions filed under the Federal Civil Rights statutes.²²² These alternative means of recovery, in some combination, are frequently found in one lawsuit against the individual immigration officer and the United States government.²²³

The *Bivens* suit is essentially a complaint directed at an individual federal agent.²²⁴ Such a suit is available as a common law damage remedy for plaintiffs whose constitutional rights have been violated by federal officials, but for whom Congress had not provided a specific remedy.²²⁵ However, given their tenuous constitutional status discussed above, undocumented plaintiffs cannot be certain of the court's protection.²²⁶

Under the Federal Tort Claims Act, persons whose rights have been violated by INS or Border Patrol agents may pursue a money damage action against the U.S. Government, as opposed to the individual officers. The FTCA waives sovereign immunity for the tortious conduct of federal employees while acting within the scope of their employment. Liability for injury is based on the law of the state where the negligent or wrongful act or omission occurred, and will only be imposed if the officer involved would have been liable as a private individual.²²⁷

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²¹⁸. See Núñez, *supra* note 27, at 1586-87. On the phenomenon of post-filing deportation, see *supra* note 141-143 and accompanying text.


²²⁵. See *Bivens, supra* note 220, at 396 (*quoting* Bell v. Hood, 327 U.S. 678, 684 (1946)). Elements of a *Bivens* action that the plaintiff must prove are: 1) a constitutional right has been intentionally violated by a federal officer, 2) a damage action is not precluded by any action taken by Congress and public policy would not warrant against the court awarding damages in the case and, 3) the violation was committed by a federal officer who is not immune from personal liability. The suits are against officers in their individual capacity, which means they must be financially solvent. *See also INS MISCONDUCT, supra* note 147, at §§ 6.2-6.5.

²²⁶. See Núñez, *supra* note 27, at 1588-92, discussing court's discretion in application of constitutional protection.

The Federal Civil Rights statutes,228 which have proven so successful in combating race-based and national origin-based discrimination, may also be used as a remedy by aliens for abuse by law enforcement officials. However, the circuits disagree about the ability of undocumented aliens to sue under Section 1981.229

One legal obstacle in all of these litigation options is the defense of qualified immunity, which shields federal officials from liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.230 Additionally, the main difficulty in succeeding in FTCA suits is proving that the agent’s act or omission was negligent, wrongful, or both.231 Also, under the FTCA, an agent may be viewed as acting outside the scope of his or her employment when depriving immigrants of their constitutional rights. Thus, the more extreme the misconduct, the less likely a FTCA suit will be successful. Finally, discretionary exemptions under 28 U.S.C. Section 2680(a) may shield officers from liability.232

Civil suits for both monetary damages and equitable relief have been filed under the above theories against immigration enforcement officers who allegedly engaged in misconduct. In Pearl Meadows Mushroom Farms v. Nelson and Velasquez v. Ackerman, for example, agents of the immigration service were sued for Fourth Amendment violations resulting

228. 42 U.S.C. § 1981 provides that all persons within the United States have the same right “to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.” Section 1983 creates a liability against state officials for “deprivation of any rights, privileges or immunities secured by the Constitution . . . .” Only the latter is applicable to federal immigration officers, absent proof of conspiracy with state officials. See Peck v. United States, 470 F. Supp. 1003 (S.D.N.Y. 1978). See also 42 U.S.C. § 1985(3) (recovery for conspiracy to deprive individual of equal protection or equal privileges and immunities); 42 U.S.C. § 1986 (liability for failure to prevent civil rights conspiracy if within power).

229. Nuñez, supra note 27, at 1595, argues that section 1981 should be applicable to undocumented aliens as they are “a distinct, identifiable group . . . subject [to] prejudice and mistreatment by individuals and state action . . . .” See id. at 1592-98 for a discussion of reliance on civil rights statutes.

230. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The test of the reasonable person’s knowledge was in essence an objective one: Was the law clearly established at the time of the incident? If so, can the officer prove either that s/he did not know — or should have known — the relevant legal standard? This objective test was completely modified in Anderson v. Creighton, 483 U.S. 635 (1987), to permit a defense that an officer had a reasonable, albeit mistaken, belief in the lawfulness of his or her actions.

231. This assessment is based primarily on questions of fact, in which the testimony of the immigrant is pitted against the testimony of the officer. The immigrant is often at a disadvantage in terms of language ability and knowledge of the law.

232. 28 U.S.C. § 2680(h)(1993) provides: “... with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising ... out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, ‘investigative or law enforcement officer’ means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violation of Federal law.” Id.
from raids on workplaces and in public businesses and residences.\textsuperscript{233} Most of the relief was equitable, including long-term injunctions against raids in most of northern California. Eventually, the parties settled with the hope that future misconduct could be deterred by a better-monitored complaint and discipline process.\textsuperscript{234}

In \textit{Casarez v. Reidinger}\textsuperscript{235} and \textit{Centeno v. United States},\textsuperscript{236} individual INS officers were sued for damages under \textit{Bivens} and FTCA theories. In the former suit, agents had unlawfully detained and physically abused two permanent residents in the same incident that gave rise to the companion raids suit for equitable relief.\textsuperscript{237} The case eventually settled.\textsuperscript{238} In \textit{Centeno}, several Central American detainees sued the United States, individual INS detention officers and other employees for physical injuries and inattentive care that arose from incidents during their detention at the INS Processing Center in El Centro, California.\textsuperscript{239} The defendants failed in motions for qualified immunity and the case eventually settled for money damages on confidential terms\textsuperscript{240}.

More recently, two suits were filed following early morning warrantless raids on the homes of immigrants conducted in two small California communities by Border Patrol agents together with local law enforcement officers. In \textit{Mendoza v. City of Farmersville}\textsuperscript{241} and \textit{De Haro v. City of St. Helena},\textsuperscript{242} Border Patrol agents and local police officers allegedly entered the homes of noncitizens, on two different occasions, in the early morning without warrants or consent.\textsuperscript{243} The plaintiffs are suing in part on a theory

\begin{itemize}
\item \textsuperscript{233} See supra notes 42-49 and accompanying text.
\item \textsuperscript{234} \textit{Pearl Meadows Settlement Agreement}, supra note 42; \textit{Velasquez Settlement Agreement}, supra note 49.
\item \textsuperscript{235} First Amended Complaint, \textit{Casarez v. Reidinger}, supra note 34.
\item \textsuperscript{237} First Amended Complaint, \textit{Casarez v. Reidinger}, supra note 34, at 6-10.
\item \textsuperscript{238} Stipulation and Order Approving Compromise Settlement, \textit{Casarez v. Reidinger}, Civ. No. C-87-20267 (N.D. Cal., Feb. 23, 1990). Plaintiffs were to be paid $18,000.
\item \textsuperscript{239} First Amended Complaint, \textit{Centeno}, supra note 236, at 10-26.
\item \textsuperscript{240} Telephone Interview with Linton Joaquin, attorney for plaintiffs (Oct. 11, 1993). Joaquin could not disclose the terms of the June 1993 settlement. He cautions that only suits for egregious conduct are really financially feasible and that the plaintiffs must be prepared to face motions and discovery requests from every named defendant. \textit{Id}.
\item \textsuperscript{241} First Amended Complaint, \textit{Mendoza v. City of Farmersville}, Civ. No. CVF 93- 5789 (E.D. Cal., Jan. 3, 1994).
\item \textsuperscript{242} First Amended Complaint, \textit{De Haro v. City of St. Helena}, Civ. No. C93-3457 (N.D. Cal., Nov. 30, 1993). Only the local police and sheriff deputies are named as defendants. No FTCA pre-litigation claim has been filed to date against the United States.
\item \textsuperscript{243} For background on these suits, see Espinosa \textit{Farm Workers Sue Border Patrol}, supra note 45. See also discussion of \textit{Velasquez v. Ackerman} and \textit{Pearl Meadows Mushroom Farms v. Nelson}, supra notes 73-82 and accompanying text.
\end{itemize}
of constitutional violations, and their burden in support of declaratory and injunctive relief is a heavy one.244

Viable legal theories notwithstanding, it is perhaps the financial and psychological conditions of would-be plaintiffs and the preservation of evidence that create the greatest disincentives to litigate. Some of these deterrents to litigation are the same ones that thwart individual administrative complaints: the deportation or disappearing of witnesses or plaintiffs,245 the difficulty of discovery,246 linguistic or cultural difficulties in communicating and credibility problems.247

Moreover, putative litigants are often indigent and lack an understanding of the availability of judicial remedies.248 Even when plaintiffs can win a case, the damages awarded are often insufficient or may be reversed on appeal.249 Fear of reprisal against a key witness has prevented litigation in some cases.250

Another insufficiency of litigation is that alleged misconduct may not be unconstitutional or a violation of criminal law, but is nonetheless perceived to be improper behavior or a procedural abuse of agency regulations or policies.251

Criminal prosecutions of Border Patrol agents or other immigration officers for abusive practices provide another means of seeking relief. For example, eleven officers were indicted between 1979 and 1991 on charges of aggression against noncitizens, ranging from physical abuse, threats and assault to sexual assault.252

245. See, e.g., Comments by Marco López, supra note 140, at 104-5, discussing cooperation by U.S. Border Patrol and Baja California state police in Mexico. These authorities apprehended witnesses to a 1989 shooting by a U.S. border patrolman, detained them in a private compound in Mexico and told them not to cooperate in any investigation of the shooting. Id.
246. Id. (inability to obtain the name of the offending agent).
247. See Núñez, supra note 27, at n. 151.
248. See Núñez, supra note 27, at 1580-1602.
249. See, e.g., Garcia v. United States, 826 F.2d 806 (9th Cir. 1987)(court reversed a $2.1 million damages award and dismissed the case of a Mexican couple. The husband was shot in the stomach by a Patrol agent while protesting the agent's apprehension of a juvenile. The husband died before the Government filed its appeal. See also AFSC v. United States, supra note 39, at 9-11).
250. See, e.g., AFSC v. United States, supra note 39, at 26 (incident involving El Centro Border Patrol Agent Luis Santiago Esteves. Rape charges against Esteves were dropped when his Mexican victim refused to testify out of fear for her safety). See also Frontier Injustice, supra note 11 at 9; infra text accompanying notes 259-61.
252. United States Department of Justice, Office of the Inspector General, Investigations Division, Fact Sheet (unpublished paper on file with the author). The charges were filed against ten Border Patrol agents and one INS detention officer in Texas and California between 1979 and 1989. These resulted in six convictions, two guilty pleas, one mistrial, one acquittal and one dismissal in exchange for resignation from the INS.
Two notable prosecutions are the cases of *United States v. Elmer* and *People v. Esteves*. In *Elmer*, a criminal conviction seemed inevitable. The agent shot an unarmed alien twice in the back, dragged his body fifty yards, tried to bury it, threatened his partner, and failed to report the incident to his supervisors. Nonetheless, Agent Elmer was acquitted of the charges of murder, attempted murder, assault and obstruction of justice.

Attorneys involved with the prosecution offer varied explanations for the acquittal. One blames the loss on the county prosecutors, whom he describes as inexperienced in civil rights cases with political implications. Another described the result as typical of most prosecutions of law enforcement officials, and likened it to the state trial of the Los Angeles police officers that followed the notorious 1991 Rodney King beating. One attorney explained that there were major difficulties in having the state court prosecution removed to federal court. The speculation about what or who is to blame for the loss is less important than noting that when it comes to criminal prosecutions of law enforcement officials, juries are extremely reluctant to convict the defendants.

On the other hand, California Border Patrol Agent Luis Santiago Esteves was eventually convicted of forcible rape and oral copulation against a twenty year old immigrant woman. He had detained her to check her papers and then forced her at gun point to disrobe and engage in sexual acts. This conviction followed an unsuccessful state prosecution for rape against a minor who, approximately 18 months earlier, Esteves had offered to assist with her deportation hearing. Instead, he sexually assaulted and battered the young woman. Although he was eventually acquitted of rape, the incident led to Esteves' arrest and conviction for the earlier rape. Both rapes followed earlier allegations of sexual harassment by a U.S. citizen. Nevertheless, Esteves remained as an agent with the El Centro Patrol Sector for two years after the reported misconduct.

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255. Tessie Borden, *Jury Clears Border Agent In Alien's Killing*, ARIZ. DAILY STAR, Dec. 17, 1992 at A1. Elmer was subsequently charged with aggravated assault stemming from another shooting incident that occurred before the Miranda killing. See *Frontier Injustice, supra* note 11, at 6-7.

256. Telephone interview with Jesús Romo-Vejar, attorney for the victim's family (July 26, 1993).


258. Telephone interview with Jesse Smith, Santa Cruz County (Ariz.) Prosecutor (July 26, 1993). Elmer, who has since resigned from the Patrol, was retried in U.S. District Court for federal civil rights violations and acquitted. *Elmer is Acquitted of Rights Charges in Slaying of Alien*, ARIZ. DAILY STAR, Feb. 4, 1994 at A1.


260. *Id.* at 8-10.
If disciplining offending officers is one aim of the litigants, there is no guarantee that a damage award, an injunction against the INS or a guilty verdict will result in the reprimand, suspension or termination of an individual officer. However, as with civil litigation, criminal prosecutions are a remedy that should be pursued despite the many hurdles.  

INTERNATIONAL FORUMS

International forums, such as the Organization of American States (OAS) or the United Nations (UN), are also available to victims of INS and Border Patrol abuse, but usually only when all domestic remedies have been exhausted. Given the threat of deportation and the inaccessibility of the American justice system, domestic remedies are often difficult to attempt, much less exhaust. International petitions have been used on behalf of large numbers of plaintiffs represented by human rights organizations.

International forums cannot necessarily provide relief such as monetary damages, injunctive relief or disciplinary action. Still, the process can result in heightened international scrutiny and diplomatic pressures which may ultimately curb or mitigate the abusive practices. The petition processes are also less costly and less fraught with procedural and evidentiary obstacles that are likely to impede civil litigation in the United States. Finally, the petitions can be brought by laypersons and grassroots activists.


261. See Mexican Human Rights Commission, supra note 23, at 72 (recommending further collaboration between the FBI and Mexican investigative authorities).


264. See Tardu & McCarthy, supra note 263; Alston, supra note 263.


ties following the drowning deaths of ten undocumented farm workers in the United States in the course of raids on agricultural lands adjacent to canals or other bodies of water. Although the petition was ultimately dismissed for failure to state a cause of action, the petitioners managed to keep the matter on the Commission agenda for more than three years and therefore in the public spotlight. Related publicity and the attention brought to the deaths by prominent clergy, professors, news media and the Mexican Consul may have finally prodded the local INS agents into carrying lifesaving equipment.

A 1992 petition filed with the Inter-American Commission by several nongovernmental organizations in the United States and Mexico as well as the alien victims — and survivors — of INS’ use of force, decries the perfunctory investigations and minor punishment of Service officers that followed public charges without convictions or lawsuits with judgment for the defendants.

The OAS petition documents the procedural status of each plaintiff and illustrates the inadequacies of domestic remedies. A problem for many of the plaintiffs was that their indigence prevented them from pursuing appeals after an unfavorable trial court decision. As these cases indicate, the cost of an appeal is often prohibitive for victims of Border Patrol and INS abuse.

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270. Id. at 524.

271. AFSC v. United States, supra note 39. The petition cites approximately twenty instances of gross human rights violations in the use of deadly force, improper use of firearms and physical and verbal abuse, along the border with Mexico. Petitioners claim that the INS internal procedures are inadequate for redressing their grievances and ask for an on-site investigation by the human rights commission. Id. at 8-12. The Commission opened a case on the matter and advised the United States Government of the complaint. Letter from Edith Márquez Rodriguez to Peter Schey (Oct. 19, 1992)(on file with the author).

272. AFSC v. United States, supra note 39.

273. Petitioners included a man shot when coming to the aid of his pregnant wife who was being abused by a Border Patrol agent, another who was beaten by Border Patrol agents while on the ground, suffering permanent back and shoulder injuries and a man rendered paraplegic when shot by a Border Patrol agent. Other petitioners were the wife of a man who died after being shot by a Border Patrol agent, a man shot by a Border Patrol agent while in Mexico, losing use of his left foot, and the family of a woman who died from a heart attack brought on by severe stress in an INS interrogation. AFSC v. United States, supra note 39, at 8-12. Many of these incidents are also chronicled in BRUTALITY UNCHECKED, supra note 9, and SEALING OUR BORDERS, supra note 4.
Still, the petitioners must rebut the argument by the United States that they have not exhausted their domestic remedies and that their indigence alone does not excuse them seeking further relief in U.S. courts before turning to international tribunals.274

Diplomatic channels must also be utilized where possible. The Mexican Human Rights Commission, for example, suggests an expanded consular presence in the United States to interview detainees, hear their complaints and assist in their deportation and exclusion proceedings.275 The Commission also recommends a presence at international bridges, airports and other locations where Mexican citizens are “endangered” by U.S. law enforcement.276 Other suggestions include an “ad hoc mechanism” to protect and settle problems related to the human rights of migratory workers to eradicate border violence.277 Finally, the Mexican officials recommend better training for the Border Patrol in “the idea of undifferentiated respect for human life and dignity” and that the officers “be inculcated with an increasingly less police-like stance, or one aimed at combating criminal practices, and increasingly more humanitarian attitudes . . . ”278

V. CONCLUSION

In the end, policymakers — with help from advocates and analysts — will have to wrestle with the threshold question of civilian oversight. If a review board is to truly spotlight abuses, punish unacceptable behavior and encourage an acceptable code of conduct, one must consider some of the elements discussed above. The special characteristics of immigrants and immigration law enforcers mean that the system must be perceived as accessible, confidential, prompt, impartial and even-handed.

The policymakers will also need to ask themselves how to measure the success of any review board. This will mean more than counting the number of complaints filed or cases brought to hearing.

However, a civilian review board alone cannot always deter misconduct. Despite some of the obstacles mentioned here, lawyers must persevere with civil suits for damages, criminal prosecutions, and petitions to international organizations or tribunals. And, if the abusive conduct is to be ended, nongovernmental human rights organizations must continue to “mo-

274. See Letter from Domingo E. Acevedo to Peter Schey (Sept. 9, 1993)(on file with the author). See also Hector Gros Espiell, The Organization of American States (OAS), supra note 262, at 552-54.
276. Id. at 71.
277. This idea was first proposed in a 1990 summit between Presidents George Bush and Carlos Salinas de Gortari. Id. See also Comments by Victor Clark Alfaro, supra note 23, on the potential of a binational monitoring commission.
278. MEXICAN HUMAN RIGHTS COMMISSION, supra note 23, at 72.
bilize shame”\textsuperscript{279} against the immigration authorities and the United States government in all available forums.

\textsuperscript{279} This term was coined by Professor Emeritus Frank C. Newman, University of California at Berkeley, School of Law (Boalt Hall).
Sec. 1 Outreach.

(a) The Board shall designate one employee as the Board National Outreach Coordinator.

(b) The Board shall designate one employee at each District Office as the Board District Outreach Coordinator.

(c) The National Outreach Coordinator shall be responsible for developing and implementing a plan to make the public aware of the internal review process and to assist persons filing complaints.

(d) The outreach plan shall, at a minimum, include provisions for the following:

(i) establishment and operation of a toll-free hotline staffed by multilingual personnel, to receive complaints;

(ii) development of written outreach materials in multiple languages, including posters and brochures, which provide basic information about the right to file a complaint if an abuse has occurred and the process for filing a complaint;

(iii) dissemination of outreach materials to INS facilities, including regional, district and local offices, INS detention centers or any contract facility where detainees are held in INS custody;

(iv) coordination with District Outreach Coordinators;

(v) liaison activities with voluntary agencies and community-based organizations and with appropriate electronic and print media.

(e) Priority in implementing the outreach plan, including allocation of funds, shall be given to areas along the United States' southern border.

Sec. 2 Complaint form.

(a) A uniform complaint form shall be developed.

(b) The complaint form shall be available in multiple languages.

(c) The complaint form shall be made available in regional, district and local INS offices, as well as in any facility where persons are detained under INS custody.

(d) INS shall also make the complaint form available through private voluntary agencies and community-based organizations, especially those serving the immigrant community.

Sec. 3 Filing of complaint.

(a) Complaints may be filed in person, by mail or by telephone.
(b) When a complaint of officer misconduct is brought to the attention of any Service or Board employee, the employee shall inform the complainant of proper procedures for filing a complaint.

(c) Anonymous complaints and complaints from third parties shall be received.

Sec. 4 Acknowledgment of receipt of complaint.

The Board shall acknowledge, by mail, receipt of all complaints, whenever it has a mailing address for the complainant. Along with the acknowledgment, an information packet describing the internal investigation process and the rights of the complainant and subject of the complaint shall be sent to the complainant.

Sec. 5 Representation of complainant.

Complainants shall have the option of being represented in the complaint process by an attorney, representative of a non-profit organization, or anyone else not charging a fee.

Sec. 6 Retaliation.

(a) The procedure established for the filing of a complaint alleging misconduct on the part of a Service employee prohibits retaliation. "Retaliation" means any action or threat of action, including but not limited to action to enforce other provisions of the Act (e.g., provisions relating to exclusion and deportation), against anyone because he or she has filed a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing related to the procedures established for the filing of a complaint.

(b) Complainants who are in detention shall be afforded special measures of protection against retaliation, including removal upon request of the complainant to a detention facility other than that in which the accused Service employee is employed.

(c) Any written statement describing the procedure for the filing of a complaint shall include an assurance that participation in the complaint procedure will not result in formal or informal retaliation.

(d) Any person shall be entitled to pursue through the complaint procedure an allegation that retaliation has occurred.

Sec. 7 Confidentiality.

(a) The identity of any complainant or witness shall be considered confidential.

(b) This right of confidentiality may be waived at any time by the complainant or witnesses, with respect to themselves only.
(c) Information discovered in the course of an investigation shall not be used by the Service to initiate deportation or exclusion proceedings, nor may it be used by the Service in any way in any immigration proceeding.

(d) Any Service or Board employee who uses, publishes, or permits information to be examined in violation of this section or engages in any other unauthorized use of such information shall be subject to disciplinary proceedings.

Sec. 8 Selection and training of investigators.

(a) Each complaint shall be investigated by an employee of the Board.

(b) Investigators shall not be employed concurrently in any other branch of the Service.

(c) The Service shall ensure that adequate numbers of women and minority-group officers are represented in the applicant pool from which investigators are chosen.

(d) Investigators shall receive formal training in appropriate topics, including: (1) standards regarding the use of force; (2) professional standards of conduct; (3) appropriate investigative methods; and (4) the rights of both complainants and officers accused of misconduct.

Sec. 9 Assignment of cases.

(a) Every complaint shall be assigned to an investigator.

(b) Every incident involving the use of deadly force by a Service employee shall be assigned to an investigator, regardless of whether a complaint has been lodged.

(c) The most serious and complex cases shall be assigned to the most experienced investigators. In determining the level of seriousness and complexity involved, such factors as the type of misconduct alleged, the rank of the accused employee, the number of complainants and employees involved, and the amount of any publicity received shall be considered.

(d) No investigator shall be assigned to a case involving an individual with whom he or she is personally acquainted.

(e) The investigator shall be notified in writing of his or her assignment, and shall receive a copy of the complaint (if written) or a written statement of the facts alleged (if oral) and any supporting documentation provided by the complainant or other source.

Sec. 10 Investigative procedures.

(a) A set of standard procedures shall be developed for each of the following categories of complaints: (1) Category One: felonies or acts involving the use of deadly force; (2) Category Two: Misdemeanors and acts involving the excessive use of non-deadly force; (3) Category Three: Non-
criminal violations of professional standards of conduct. The procedures developed shall be appropriate for the nature and seriousness of each category.

(b) Any referral of complaints to outside agencies for investigation for possible prosecution shall be monitored by the Board. Such referral shall in no way inhibit or impede the internal investigative process, which shall continue until a final disposition is reached, nor shall it prevent the appropriate Service supervisor from imposing disciplinary sanctions.

(c) In each case, the investigator shall interview the complainant. Where future investigations are warranted, the investigator shall first interview all the witnesses to the incident, and finally the subject of the complaint.

(d) Each individual to be interviewed shall be notified in advance of the time and place of the interview. Complainants, witnesses and employees accused of misconduct shall be notified of their right to have a representative present during the interview.

(e) Interviews shall be recorded on tape or by stenographer. Voluntary consent of complainants and witnesses who are not Service employees must be obtained prior to recording.

(f) Investigators shall not wear uniforms.

(g) A finding that an employee violated the law shall result in prompt referral to the appropriate agency.

(h) If a complainant or witness has an outstanding deportation order, the Service shall not execute the order until the investigation is complete and a final disposition rendered.

(i) The subject of any investigation regarding the use of deadly force shall be temporarily reassigned, pending the final disposition of the investigation, to a position in which he or she is unlikely to encounter a situation requiring the use of deadly force.

(j) Investigation shall be completed in no more than 60 days except in the following situations, when the investigation shall be completed in no more than 30 days: (1) the case involves the use or alleged use of deadly force by a Service employee; (2) the complainant or a witness is in the Service’s custody; or (3) other special circumstances identified by the Board warranting expediting the investigation.

Sec. 11 Disposition of complaints.

(a) Each complainant, or his or her designated representative, and the subject of the complaint, shall receive written notice of the preliminary disposition of the complaint immediately upon termination of the investigation. Such written notice will include designation of a category of disposition and a detailed finding of fact.
(b) The categories of disposition to be used are: (1) sustained; (2) not sustained; (3) exonerated; (4) unfounded; and (5) misconduct not based on the original complaint.

(c) When the investigation is complete and a final disposition reached, the entire record, including the investigative file, shall be available to the public, subject to confidentiality protections.

Sec. 12 Request for reconsideration.

(a) A form for request for reconsideration by the Board and information on deadlines for filing it will be included in the written notice of preliminary disposition sent to both complainant and subject of complaint.

(b) Complainant and subject will have 15 days from the date on notification of the parties of the preliminary disposition to file a request for reconsideration. The Board may extend the deadline for filing upon the written request of either party, only if good cause is shown.

(c) If neither complainant (or complainant’s designated representative) nor subject file a request for reconsideration, the investigation will be closed and the disposition will become final.

(d) A notice of final disposition, including a disposition reference to any request for reconsideration, will be mailed to the parties within 30 days of the deadline for filing the request for reconsideration, or within 15 days in cases where the complainant or witnesses are in INS detention, in cases where deadly force has been alleged, or in other special circumstances determined by the Board.

(e) Requests for reconsideration shall be handled by an appeals unit within the Board that is distinct and separate from the Board’s corps of investigators.

(f) When complaints are sustained, a final notice shall be sent to the complainant describing the disciplinary action taken against the subject by INS.

Sec. 13 Disciplinary action.

(a) When a complaint against an INS officer is sustained, discipline shall be imposed by the appropriate Service supervisor, consistent with Service command structures, and subject to approval by the District Director, Border Patrol Sector Chief, or other appropriate Service district or sector supervisor.

(b) The disciplinary action imposed shall fall within the range of actions established by Service disciplinary guidelines.
Sec. 14  Use of recidivist lists for performance review.

(a) Once three complaints have been filed against a particular officer, that officer will be placed on a Service recidivist list.

(b) A supervisor will be notified when an officer under his or her command appears on a Service recidivist list. The supervisor will conduct a review of said officer's performance and will recommend appropriate remedial action, including training or counseling, as necessary.

(c) Multiple complaints filed against Service officers under a particular supervisory officer's command shall trigger a performance review of that officer consistent with Service command structures, and appropriate remedial action will be taken as necessary.

Sec. 15  Records of Complaints and Statistical Summaries.

(a) Records regarding the filing of complaints which allege misconduct on the part of Service employees shall be systematically collected and maintained by the Service or the Board. These records shall include recidivist lists of Service employees against whom complaints have been filed.

(b) Consistent with the provision regarding confidentiality, the Service or Board shall compile and publish, at least annually, a statistical summary of all complaints received and their final dispositions.

(c) At a minimum, these summaries should include the following information: the number of complaints filed, the citizenship of the complainant, the race or national origin of the complainant, the sex of the complainant, whether the complaint was filed by a Service employee or a private individual, the Service region and district in which the complaint arose, the job title of the accused Service employee, the category and type of complaint, the ultimate disposition of the complaint, and any sanctions imposed.

(d) Such statistical summaries should be available to all Service employees and to the public.