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Authority to Enforce the Immigration and Nationality Act (INA) in the Wake of the Homeland Security Act: Legal Issues

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Stephen R. Viña
Legislative Attorney
American Law Division

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Summary

For decades, the administrative authority to interpret, implement, enforce, and adjudicate immigration law within the U.S. lay almost exclusively with one officer: the Attorney General. The most general statement of this power was found in §103(a)(1) of the Immigration and Nationality Act of 1952 (INA), the statute that comprehensively regulates immigration law in the United States. With the transfer of nearly all immigration functions to the Department of Homeland Security on March 1, 2003, however, §103(a)(1) of the INA has necessarily required various modifications to clarify the respective authorities newly obtained by the Secretary of Homeland Security and retained by the Attorney General. Accordingly, §103(a)(1) of the INA has been amended twice, and now places primary responsibility for enforcing and administering immigration law in the United States with the Secretary of Homeland Security.

Section 103(a)(1) as amended, however, still apparently allows the Attorney General to retain a significant amount of authority to enforce, administer, and interpret immigration law. The extent of the Attorney General's authority has become highly contentious in the wake of several events, including (1) the enforcement of immigration laws by the DOJ's Federal Bureau of Investigation even after all immigration enforcement functions were effectively removed from the DOJ, (2) DOJ's issuance of immigration-related regulations on February 28, 2002, the day before the abolishment of the Immigration and Naturalization Service, and (3) the Attorney General's ruling in *In re D-J-, Respondent*. Considerable cooperation between the two Departments in addition to congressional measures to clarify the INA, such as the Homeland Security Technical Corrections Act of 2003 (H.R. 1416), may be in order to resolve the complexities presented by the substantial transformation. This report will be updated as warranted.

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Authority to Enforce the Immigration and Nationality Act (INA) in the Wake of the Homeland Security Act: Legal Issues

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

The Attorney General shall be charged with the administration and enforcement of the Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such other laws relate to the power, functions, and duties conferred upon the President, the Secretary of State, or diplomatic or consular officers; Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.²

The enforcement aspect of this power meant that the Attorney General, among other things, had ultimate responsibility for (1) inspecting individuals seeking to enter the U.S. at ports of entry as to their admissibility under the INA, (2) patrolling land borders between ports of entry, (3) detecting aliens who are in the U.S. in violation of immigration law, (4) prosecuting actions to remove aliens not entitled to be in the U.S., (5) detaining aliens not entitled to be in the U.S., and (6) adopting regulations and exercising discretion with respect to these forgoing powers. Apart from enforcement, the service aspect of the Attorney General's immigration authority included, among other things, the responsibility to process and determine the millions of applications and petitions submitted annually for various preferences within the immigration system, for various types of humanitarian or discretionary relief from general strictures of the INA, or for naturalization. Separate still from the enforcement and service functions was the authority of the Attorney General to adjudicate actions, to remove aliens, and to hear appeals from various types of determinations made in the consideration of applications, petitions or other front line actions to implement the INA.

¹Codified at 8 U.S.C. §1101(a)(1).

²Codified at 8 U.S.C. §1103(a)(1) (subsequently amended in 2002 and 2003). Direct presidential authority under the INA is quite circumscribed, being generally limited to emergency powers and setting refugee admissions. The Secretary of State, the State Department, and the diplomatic and consular officers therein had primary authority for interpreting and implementing provisions on issuing visas overseas, as well as having a role in implementing certain provisions that implicated sensitive foreign policy concerns.

In practice, the Attorney General delegated the office's immigration power, while retaining final decision making power in individual cases.³ The enforcement and service functions were generally delegated to the Commissioner of the Immigration and Naturalization Service (INS). The adjudication function was delegated to immigration judges and the Board of Immigration Appeals, which were located in the Executive Office of Immigration Review (EOIR). EOIR is an entity within the Justice Department that was separate from INS.

The INA: Post-Homeland Security

In the Homeland Security Act of 2002 (HSA), Congress reallocated administrative authority over immigration law. Essentially, the enforcement functions and the service functions, respectively, that were being conducted through the Commissioner of INS (along with authorities and personnel attendant to those functions) were transferred to two separate entities within the new Department of Homeland Security. The functions carried out by EOIR were retained in the Justice Department under the Attorney General.

The HSA effectuated the transfer of immigration authority in statutory language that is separate and apart from the INA itself: e.g., “there are transferred from the Commissioner of Immigration and Naturalization to the Director of the Bureau of Citizenship and Immigration Services the following [immigration service-related] functions, and all personnel, infrastructure, and funding provided to the Commissioner in support of such functions”⁴ In essence, the immigration-related transfers in the HSA are stated in terms of on-the-ground operations – which resided largely in the Commissioner of INS – rather than through a comprehensive amendment of immigration authority as set forth in the INA – which places primary authority with the Attorney General. These transfers became effective on March 1, 2003. Under the immigration provisions of the Homeland Security Act, *authorities* follow *functions*: “. . . a Federal official to whom a function is transferred . . . may, for purposes of performing the function, exercise all authorities under any other provision of law that were available with respect to the performance of that function to the official responsible for the performance of the function immediately before [transfer].”⁵

As stated above, before the HSA was passed Congress vested administrative authority over immigration law almost exclusively in the office of the Attorney General. Operationally, most of this authority was delegated to, and carried out by, the Commissioner of Immigration and Naturalization and the INS. Still, the Attorney

³When the Homeland Security Act was enacted (P.L. 107-296), 8 C.F.R. §2.1(a) read:

Without divesting the Attorney General of any of his powers, privileges, or duties under the immigration and naturalization laws . . . there is delegated to the Commissioner the authority of the Attorney General to direct the administration of the Service and to enforce the Act. . . .

⁴P.L. 107-296, §451(b); *see also* §441 (transferring from the Commissioner of INS to the Under Secretary of Border and Transportation Security all INS enforcement programs).

⁵*Id.* at §456.

General retained ultimate authority to interpret, enforce, implement, and adjudicate, even to the degree of retaining the discretion to intervene in individual cases.

Under §477(c)(2)(F) of the HSA, the Secretary of DHS has the authority to submit recommendations for conforming the INA through an implementation plan. Nonetheless, in an apparent effort to clarify the immigration authority that was to remain with the Attorney General given the different focuses present under the HSA and the authorities under the INA, Congress amended §103(a)(1) of the INA in §1102 of the HSA, and further amended it in Division L, §105 of the Consolidated Appropriations Resolution of 2003.⁶ In contrast to the version quoted above, the provision now reads:

The *Secretary of Homeland Security* shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except in so far as this chapter or such laws relate to the powers, function, and duties conferred upon the President, *Attorney General*, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided, however, That determination and ruling by the *Attorney General* with respect to all questions of law shall be controlling. (emphasis added)

The Secretary of DHS, in accordance with his new designation, issued a Final Rule on March 6, 2003, to clearly define his newly obtained authority to administer and enforce immigration functions.⁷ This Final Rule amended title 8 of the Code of Federal Regulations (C.F.R.), §2.1 to read, in part:

All authorities and functions of the Department of Homeland Security to administer and enforce the immigration laws are vested in the Secretary of the Homeland Security. The Secretary of Homeland Security may, in the Secretary's discretion, delegate any such authority or function to any official, officer, or employee of the Department of Homeland Security

The background information for the Rule states that the regulation is a step in the process of separating DHS enforcement and service functions from the DOJ's adjudication functions as "envisioned by the Act," and that DOJ and DHS are working together to ensure that this complex task proceeds as smoothly as possible.

Section 103 of the INA, as amended

Through the amendments and regulations noted above, primary responsibility for administering and enforcing immigration law in the U.S. now lies with the Secretary of DHS; however, the amendments still apparently allow the Attorney General to exercise a significant amount of authority. When reviewing the current language of §103(a)(1) of the INA that states "[t]he Secretary of [DHS] shall be charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens, except in so far as this

⁶P. L. 108-7, Div. L, §105(a)(1).

⁷Authority of the Secretary of Homeland Security; Delegations of Authority; Immigration Laws, 68 Fed. Reg. 10922, 10923 (March 6, 2003) (codified at 8 C.F.R. §2.1).

chapter or such laws relate to the powers, function, and duties conferred upon the . . . Attorney General,” at least two sets of issues arise. The first is determining precisely which “powers, functions, and duties” Congress intended to transfer to the exclusive jurisdiction of DHS. The second is determining those areas in which both the Attorney General and DHS are to have a measure of authority and how those respective authorities interrelate.

With regard to the first set of issues, it is notable that the INA itself still designates the Attorney General as the individual responsible for administering most provisions and programs. It has been argued that only a section-by-section revision of the INA, removing references to the Attorney General whenever the power is effectively held by the Secretary, will truly clarify the allocation of authorities between the two departments.⁸ H.R. 1416, the Homeland Security Technical Corrections Act of 2003, reported on May 15, 2003, would accomplish this end with respect to §103 and §287(g) of the INA.⁹ According to the House Report for H.R. 1416, the bill “improves the Homeland Security Act of 2002 and honors the original intentions of the drafters by making grammatical and technical corrections.”¹⁰

Also, with respect to the citizenship and immigration services transferred to DHS, §456 of the HSA deems any reference to another component of government in the authorities associated with the citizenship and immigration services transferred to DHS to refer to the Director of the Bureau of Citizenship and Immigration Services or to the Bureau of Citizenship and Immigration Services.

Though issues on the transition of authority may appear less thorny in the long run than issues of shared authority, some controversies have arisen. For example, various news sources and interest groups reported that in December of 2002, the Attorney General issued an order delegating authority to the Federal Bureau of Investigation to exercise the powers and duties of immigration officers.¹¹ The order went into effect on February 28, 2003, the day before the official transfer of INS from the DOJ, and authorizes “special agents of the FBI” to investigate, determine the location of, and apprehend any alien who is in the United States in violation of the

⁸David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, 80 INTERPRETER RELEASES No. 17, 601, 613 n. 66 (2003).

⁹H.R. 1416, 108th Cong. §7 (1st Sess. 2003). H.R. 1416 was reported by the Select Committee on Homeland Security and placed on the Union Calendar no. 51 on May 15, 2003.

¹⁰H.R. Rep. No. 108-104 (2003).

¹¹*Attorney General Delegates Immigration Authority to FBI*, American Immigration Lawyers Association, WASHINGTON UPDATE, Vol 7, No. 5 (April 10, 2003) available at [<http://www.aila.org/fileViewer.aspx?docID=10043>]; Maurice Belanger, *Power Play? Attorney General Gives Immigration Enforcement to FBI*, NATIONAL IMMIGRATION FORUM, available at [http://www.ilw.com/lawyers/colum_article/articles/2003,0424-Belanger.shtml]; Laura Parker, *FBI Interviews Iraqis, Uses New Immigration Arrest Powers*, USA TODAY, March 21, 2003; Dan Eggen, *Rules on Detention Widen*, THE WASHINGTON POST, March 20, 2003, at A11; *FBI Gets Power Over Immigration Charges*, THE ASSOCIATED PRESS, March 20, 2003.

INA.”¹² In effect, the order gave over 11,000 FBI agents the authority to detain and arrest foreigners on alleged civil immigration charges in cases where its agents lack enough evidence to file criminal charges – a power once only possessed by immigration officials. This expansion of FBI authority by the Attorney General was provided in conjunction with the government’s efforts to interview the more than 50,000 Iraqis in the U.S. during Operation Liberty Shield.¹³

Under §103(4) of the INA, the Attorney General has the authority to authorize any employee of the DOJ (i.e. FBI employees) to perform any of the duties that are imposed by the INA on employees of the INS.¹⁴ Accordingly, the Attorney General was arguably within his legal capacity to issue this order since the INA had not been modified to effectively eliminate the Attorney General’s authority to issue such an order in February. Still, such a delegation arguably complicated the Secretary of DHS’s anticipated responsibilities in the field of immigration enforcement and possibly raised issues of accountability.

For example, the Final Rule issued by DHS on March 6, 2003, clearly vests all authorities and functions to enforce and administer immigration laws in the Secretary. Thus, it appears immigration enforcement by FBI officials instituted by the Attorney General after March 6, 2003, would run counter to the regulation promulgated by DHS. The technical changes provided by H.R. 1416 would apparently eliminate this possible conflict since it would effectively remove the Attorney General from a position where he may delegate immigration functions to DOJ officials. Under H.R. 1416, INA §103(4) would read:

Except as otherwise provided by law, the Secretary of Homeland Security may require or authorize any employee of the Department of Homeland Security to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon any other employee of the Department. (amended provisions in italics)

Shared Authority. Current law clearly contemplates continued roles for both DHS and the Attorney General under immigration law. For instance, all original and appellate jurisdiction over cases adjudicated by immigration judges (IJ’s) remains under the Attorney General through the Executive Office of Immigration Review (EOIR). Furthermore, the Attorney General retains ultimate administrative authority under §103 to determine and rule on questions of law arising under the INA.

Within EOIR, immigration judges, with limited exception, preside over proceedings in which the government seeks to remove aliens from the U.S. These proceedings require rulings not only on the grounds for removal, but also on such attendant matters as bond and departure controls. Also, immigration judges are

¹² Laura Parker, *FBI Interviews Iraqis, Uses New Immigration Arrest Powers*, USA TODAY, March 21, 2003.

¹³ *Id.*

¹⁴ Codified at 8 U.S.C. §1103(4). Moreover, under INA §103(6) the Attorney General may also confer upon any employee of the U.S., with appropriate approval, any of the duties imposed by the INA.

frequently asked to rule on discretionary alternatives to removal, such as asylum. Although these matters are legally complex, they are also separately addressed by DHS immigration officers under various circumstances.

The Board of Immigration Appeals (BIA), the appellate body within EOIR, hears appeals from matters decided by immigration judges. Additionally, the BIA has jurisdiction to consider appeals of various decisions now made by immigration officials in DHS. These decisions can be on such matters as the imposition of fines, granting of bond, and granting certain discretionary waivers. Historically, the BIA has been solely an administrative creation of the Attorney General; the Attorney General personally retained ultimate authority to decide cases – facts and law alike – on request of a party or on the Attorney General’s own initiative. While the BIA now has a firmer statutory basis, the Attorney General still has final say in immigration cases that come within EOIR’s ambit.

Thus, the Attorney General took personal jurisdiction over the case of *In re D-J-Respondent*¹⁵ at the request of DHS. The opinion addresses an unauthorized alien from Haiti who was taken into custody and detained by the INS after arriving aboard a vessel that sailed to Biscayne Bay, Florida, on October 29, 2002 with 216 other illegal aliens from Haiti and the Dominican Republic. For bond proceedings, the case instructs IJ’s and the BIA to consider “national security interests” implicated by the encouragement of further unlawful mass migrations from unauthorized migrants who arrive in the United States by sea seeking to evade inspection. The opinion further states that in all future bond proceedings involving aliens seeking to enter the United States illegally,¹⁶ IJ’s and the BIA must consider evidence establishing that significant national security interests are implicated from sources in the executive branch.

Nominally, the opinion in *In re D-J-* is addressed to decisions made within the context of EOIR proceedings. However, officials within DHS also make bond determinations that may or may not subsequently come before EOIR. Similarly, officials within DHS can make asylum decisions with respect to applicants not already in proceedings before an immigration judge, while unsuccessful applicants may subsequently revive their asylum applications before immigration judges in the context of removal proceedings.

Under these circumstances, where separate agencies have overlapping authority over legally complex determinations, some leading commentators see the possibility for confusion and tension. Suppose, for example, the Attorney General decided to

¹⁵23 I&N Dec. 572 (A.G. 2003), 2009 BIA Lexis 3.

¹⁶Cuban migrants receive more generous treatment under U.S. law than foreign nationals from most other countries. This policy is reflected in the Cuban Adjustment Act of 1966 (P.L. 89-73), as amended, which provides that certain Cubans who have been physically present in the U.S. for at least 1 year may adjust to permanent residence status at the discretion of the Attorney General. In essence, Cubans who do not reach the shore, are interdicted and returned to Cuba unless they cite fears of persecution. For more information on Cuban and Haitian Migrants, see CRS Report RS21349, *U.S. Immigration Policy on Haitian Migrants*, by Ruth Ellen Wasem.

review a case on personal initiative instead of on request of DHS and concluded that DHS's position on a particular question was wrong. Suppose, for example, that the Attorney General decided in such a case that, contrary to DHS's view, a particular set of circumstances do not amount to the type of persecution that merits a grant of asylum. Is DHS indirectly bound by this interpretation because the Attorney General has final administrative say on legal questions? If DHS continues to apply its interpretation in considering asylum applications filed with it and grants asylum in cases in which immigration judges could not, what legal or policy consequences follow? On the other hand, is it still appropriate for the Attorney General to have primary authority to interpret a law primarily implemented by another agency, an agency arguably more familiar with day-to-day operational realities?

February 28, 2002, Regulations Promulgated by the DOJ. Many saw the prospect of controversy over shared power foreshadowed in regulations issued by the Attorney General the day before most operational functions transferred to DHS. As indicated above, before the DHS was established both INS and the EOIR were elements of the DOJ; thus, the regulations affecting these components were included in the same chapter of the Code of Federal Regulations (C.F.R.). The HSA, while transferring most immigration related functions (i.e., enforcement and citizenship services) to the DHS, did retain in the DOJ, under the direction of the Attorney General, the functions of EOIR. To address the authority retained by the DOJ, Congress added subsection (g) to §103 of the INA.¹⁷ Subsection (g) states:

The Attorney General shall have such authorities and functions under this Act and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.

In accordance with the retained authority, the DOJ issued a Final Rule on February 28, 2002, that reorganized Title 8 of the C.F.R. to reflect the restructuring scheme created by the HSA.¹⁸ The regulation (1) created a new Chapter V in 8 C.F.R beginning with Part 1001 to maintain those regulations that solely relate to the functions of EOIR, (2) duplicated certain provisions that relate to proceedings before both the INS and EOIR, and (3) made a number of technical amendments.¹⁹

According to the background information provided in the Final Rule, entire parts common to both the INS and EOIR were moved and duplicated for purposes of "convenience" and "continuity." As "shared provisions," the Attorney General and the Secretary of DHS "*can* consult each other when contemplating changes in

¹⁷Section 1102 of the HSA added the new subsection (g) to §103 of the INA.

¹⁸Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9824 (Feb. 28, 2003) (codified at 8 C.F.R pts. I, V).

¹⁹*Id.* For a complete listing of the rationales for each change, see 68 FR 9824, 9826, Summary of the Changes From 8 CFR Chapter I to Chapter V.

those rules that affect both EOIR and INS”²⁰ – consultation is not mandatory. In determining the definition of “asylum,” for instance, a senior DOJ official reportedly stated that “[b]oth departments have equity” and that “[n]either department will promulgate a rule without the assent of the other.”²¹ The General Comments of the Final Rule indicate that no substantive changes have been made.²²

Another indication of potential confusion in the regulations occurs in background comments regarding Temporary Protected Status (TPS), a program in which the Attorney General not only granted individuals protected status but also designated which nationalities were potentially eligible for such status. The background information of the Final Rule states that the “duplication should not be viewed as any indication that the Department of Justice is involved in those (i.e. designation) future decisions,” but is nevertheless necessary to “ensure continuity.”²³ In recognition of the possible confusion that could result from duplicated authorities (like that of TPS), the Rule indicates that “further refinement to clarify the authority” transferred to the Secretary of DHS and retained by the Attorney General will be necessary.

Conclusion

On March 1, 2003, the Department of Homeland Security became responsible for securing our nation's borders and managing the immigration process. In the past, these two important missions were bundled together within one agency - the Immigration and Naturalization Service, under the primary control of the Attorney General. Although §103(a)(1) of the INA has been amended to reflect this massive transfer of authority, the Attorney General still apparently retains some authority to affect the practices and procedures utilized by DHS as demonstrated by the aforementioned events. While congressional measures and administrative clarifications may provide the explicit guidance to clarify delegations of authority, such measures appear to demonstrate a need for the continued cooperation between the two departments.

²⁰*Id.* at 9824-25 (emphasis added).

²¹Martin, *supra* note, 8 at 617 n.82 (citing George Lardner Jr., *Ashcroft Reconsiders Asylum Granted to Abused Guatemalan; New Regulations Could Affect Gender-Based Persecution*, THE WASHINGTON POST, March 3, 2002 at A2).

²²68 Fed. Reg. at 9825.

²³INA §244 (codified as amended at 8 U.S.C. §1254); 68 Fed. Reg. 9824, 9827.