

AILA BACKGROUNDER

CONCURRENT JURISDICTION OF DHS AND DOJ

BACKGROUND: The Homeland Security Act (HSA), Pub. L. 107-296, abolished the Immigration and Naturalization Service (INS) and transferred responsibility for immigration services and enforcement from the Department of Justice (DOJ) to the new Department of Homeland Security (DHS), while preserving DOJ's jurisdiction over the Executive Office for Immigration Review (EOIR). Within DHS, the immigration services and enforcement components were divided into distinct departments reporting up through different chains of command (the Directorate of Border and Transportation Security administers the enforcement functions and the Bureau of Citizenship and Immigration Services administers the services functions). AILA opposed this sharp bureaucratic division between inextricably interrelated functions because of the serious concerns it raises about policy coordination and implementation.

Although AILA also strongly opposed folding these immigration functions into a colossal new security apparatus, we were relieved that the HSA at least maintained the services and enforcement components within a single agency. AILA was concerned that assigning the components to separate agencies would lead to significant interagency disputes about the interpretation and implementation of the many policies affecting both services and enforcement. Despite the successful aversion of one potential conflict involving overlapping agency authorities, the HSA unintentionally created another jurisdictional dilemma.

ISSUE: While the immigration services and enforcement functions remain housed under a single agency roof (DHS), DOJ retains jurisdiction over EOIR, the administrative entity with control over the Immigration Judges and the Board of Immigration Appeals. In a February 28, 2003, rulemaking purporting to transfer immigration authorities to DHS through a reorganization of 8 C.F.R., the Attorney General asserted DOJ's concurrent authority to promulgate substantive rules in numerous areas that implicate EOIR. To take one example, the rule establishes concurrent jurisdiction over 8 C.F.R. Section 208, which governs proceedings related to asylum and withholding of removal. The rule suggests that concurrent jurisdiction is required because the provisions in this Section "are so interrelated that no simple division of jurisdiction is possible."

The implications of this decision are not merely theoretical; significant practical concerns loom on the near horizon. It has been reported that DOJ will issue regulations *proscribing* gender-related persecution claims on the grounds that gender is not a cognizable social group for purposes of asylum. Many observers believed that the DOJ initiative to roll back protections for women experiencing persecution would die with the transfer of immigration functions to DHS. Instead, given DOJ's reported intentions to pursue this rulemaking, we are left with an institutional dynamic in which DHS conceivably could respond with a conflicting regulation *recognizing* gender-related persecution as the basis for asylum claims.

As such, dual rulemaking jurisdiction over important areas of the immigration laws could precipitate Cabinet-level institutional power struggles. Any protracted interagency squabbling resulting from this will paralyze the government's ability to fairly and efficiently administer the nation's immigration laws. Moreover, even without the specter of power politics, concurrent jurisdiction over substantive rulemaking has little to recommend it. The promulgation of conflicting rules and divergent policy interpretations will undermine even the best efforts to administer immigration laws in a fair and consistent manner and the duplication of policy development efforts will waste valuable executive resources. In short, it is simply not good government.

AILA'S POSITION: The most complete solution to this structural problem would be for Congress to reconstitute EOIR as an independent adjudicative body with no substantive rulemaking authority. Unleashing EOIR from its DOJ moorings would eliminate concerns about conflicting interagency authority. In addition to neutralizing concurrent jurisdiction concerns, this restructuring would further other important goals: it would provide immigration adjudicators with the independence necessary to conduct fair and impartial hearings. This change would thereby significantly enhance the perceived legitimacy of immigration decisions, a ubiquitous concern under the present system.

Alternatively, Congress must take action to force DOJ to abandon its asserted authority to make substantive immigration rules. DOJ should be limited to making procedural rules related to the operation of EOIR. Although the line between procedure and substance is thin, we believe that using this distinction as an operating principle will effectively reduce the prospect of interagency tensions and confusion.

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