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# Concentric Coordination: The Immigration Law Division in the Department of Homeland Security Office of the General Counsel

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**A**s immigration law issues have become increasingly prominent, the need for coordinated Executive Branch management has become increasingly visible as well. Issues like the influx of Central Americans arriving at the Southwest Border, vetting of Syrian refugees, and screening of foreign travelers have all required a coordinated, multi-agency approach.

This article provides a window into the concentric coordination that effective modern immigration administration requires today—vertical coordination within the Department of Homeland Security (DHS), from component agencies up through the Secretary to the White House, and horizontal coordination between DHS and other agencies that play a role in implementing immigration laws. This article does so by highlighting the role of the Immigration Law Division, within the DHS Office of the General Counsel (OGC), in facilitating intra- and interagency coordination based on the priorities set by the Secretary of Homeland Security in each Administration.

The Immigration Law Division serves as DHS OGC's center of immigration law expertise. As DHS enters its fifteenth year of existence, the Immigration Law Division carries out its responsibilities within an evolving institutional structure for the administration and enforcement of the immigration laws.

Congress created DHS after the 9/11 attacks. When it did so, Congress dramatically changed the structure

through which the Executive Branch executes immigration law—centralizing that structure in some aspects, but decentralizing it as to others.

First and foremost, Congress positioned federal immigration law functions within a broader, and larger, homeland security structure. DHS took over parts of nine other federal departments, including parts of the Departments of Justice, Defense, Treasury, Transportation, and Agriculture, to form a separate Department dedicated to securing the United States from the many threats it faces. DHS became the third-largest Cabinet department, with over 230,000 employees today.

Additionally, Congress placed under the new DHS umbrella, with limited exceptions, the immigration functions of the legacy Immigration and Naturalization Service, formerly within the Department of Justice (DOJ). Today, three separate components within DHS carry out DHS's immigration functions. Customs and Border Protection (CBP) primarily enforces U.S. borders and inspects immigrants seeking admission. Immigration and Customs Enforcement (ICE) primarily handles interior immigration enforcement, including detention and removal. And U.S. Citizenship and Immigration Services (USCIS) primarily adjudicates applications for immigration benefits, including naturalization, asylum, adjustment to lawful permanent resident status, and employment authorization.

Meanwhile, Congress left key immigration functions in the hands of other Cabinet-level agencies. For example, DOJ's Executive Office for Immigration Review retained operation of the immigration

courts, which process hundreds of thousands of cases annually, and the Board of Immigration Appeals. The Department of State retained consular visa processing functions in its Bureau of Consular Affairs, as well as its core foreign affairs functions, which inevitably intersect with immigration law and policy. The Department of Health and Human Services (HHS) Office of Refugee Resettlement is responsible for the care and custody of unaccompanied children, large numbers of whom recently migrated from Central America. The Department of Labor, among other things, adjudicates labor certification applications for temporary and permanent employment-based immigration.

All told, this expansive structure requires enormous coordination, both within DHS and with DHS's sister agencies. The Immigration Law Division plays a central role in that effort by, among other things, helping to coordinate the provision of consistent, accurate legal advice by the over 1800 attorneys in DHS. This structure requires vertical coordination within DHS at the outset. Each component—CBP, ICE, and USCIS—has its own Commissioner or Director and its own head lawyer (the Chief Counsel or Principal Legal Advisor), tasked with implementing different provisions of the immigration laws. These lawyers ultimately report to the DHS General Counsel through a DHS Deputy General Counsel. Within this structure, the Immigration Law Division often assists in resolving difficult legal issues that cut across the components.

And once DHS reaches one legal voice, the immigration structure requires horizontal coordination

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between DHS and other federal departments and agencies. The Immigration Law Division often serves as liaison in the interagency process, in an effort to resolve difficult issues. Indeed, certain immigration statutes explicitly require interagency coordination. For example, the Homeland Security Act conferred upon the Secretary of Homeland Security primary authority with respect to establishing visa policies, with limited exception. There, close coordination with Department of State attorneys is essential. And increased Central American arrivals in the United States has required close coordination between DHS and HHS with respect to the care and custody of unaccompanied children, and with EOIR as to immigration court processing priorities. As necessary, the White House will play a coordinating role, through its National Security Council or Domestic Policy Council (regarding immigration policymaking, depending on the issue) and/or the Office of Management and Budget (particularly regarding regulatory initiatives).

Immigration Law Division lawyers serve as counselors in the classic sense. The Secretary of Homeland Security, like most Cabinet heads, makes decisions with ramifications for a wide range of legal contexts, including regulations, litigation, and legislation. As such, Immigration Law Division lawyers are generalists by necessity, collaborating with other OGC law divisions on any number of matters implicating immigration law and its intersections with constitutional law, administrative law, international law, privacy law, and fiscal law.

To provide more detail about the Immigration Law Division's role in these legal contexts:

**Regulations.** The Immigration Law Division regularly advises on DHS rulemakings relating to immigration, in conjunction with OGC's Regulatory Affairs Law Division (RLD). RLD lawyers "manage" and oversee the regulatory process for DHS—coordinating back-and-forth discussion with the White House's Office of Information and Regulatory Affairs,

DHS components, and other federal agencies, as well as ensuring compliance with various legal requirements (e.g., under the Constitution or the Administrative Procedure Act).

The Immigration Law Division can assist these vertical and horizontal discussions when DHS issues rulemakings that implement immigration law. Recent examples of such rulemakings include modernization of certain employment-based visas, 81 Fed. Reg. 82,398 (Nov. 18, 2016); establishment of an "Electronic Visa Update System" that collects information from certain foreign travelers, 81 Fed. Reg. 72,481 (Oct. 20, 2016); and revisions to fees for immigration benefits applications, 81 Fed. Reg. 73,292 (Oct. 24, 2016). Additionally, the Immigration Law Division regularly comments on immigration-related regulations issued by other federal agencies, such as the Department of State, the Department of Labor, and the Executive Office for Immigration Review (within DOJ).

**Litigation.** The Immigration Law Division regularly utilizes its subject-matter expertise to assist the federal government in litigation, especially in cases involving high-profile or novel immigration law issues. Immigration Law Division lawyers, along with attorneys in OGC's Legal Counsel Division and other high-level DHS officials, provide litigation support to DOJ, which takes the lead role in defending DHS in federal court.

Cases involving immigration law commonly reach the Supreme Court. Over its past two terms, the Court has taken *United States v. Texas*, 136 S. Ct. 2271 (2016), in which 26 states challenged DHS's exercise of authority to provide "deferred action" and work authorization to certain immigrants; a class-action challenge seeking bond hearings for aliens subjected to mandatory detention provisions, *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (mem.), *granting cert. to* 804 F.3d 1060 (9th Cir. 2015); an equal protection challenge to naturalization provisions, *Lynch v. Morales-Santana*, 136 S. Ct. 2545 (2016) (mem.), *granting cert. to* 804 F.3d 520 (2nd Cir. 2015); and multiple cases addressing the complicated

intersections between criminal statutes and immigration removal provisions, e.g., *Torres v. Lynch*, 136 S. Ct. 1619 (2016); *Lynch v. Dimaya*, 137 S. Ct. 31 (2016) (mem.), *granting cert. to* 803 F.3d 1110 (9th Cir. 2015); and *Esquivel-Quintana v. Lynch*, 137 S. Ct. 368 (2016) (mem.), *granting cert. to* 810 F.3d 1019 (6th Cir. 2016).

Immigration Law Division lawyers regularly edit, comment on, and provide research in support of DOJ's briefs, *certiorari* petitions, and *en banc* petitions. Further, they help moot the DOJ lawyers who will argue a case, up to and including the Solicitor General. Some cases extensively address technical, legal, and historical aspects of immigration law. In such cases, the expertise of the Immigration Law Division can be particularly helpful.

**Legislation.** Immigration Law Division lawyers regularly help analyze and comment on legislative proposals when members of Congress or their staff seek comments or guidance from DHS on proposed and pending bills. Guidance can take the form of analysis of immigration law provisions, including the legal and historical context of proposed language changes, impacts upon associated areas of immigration law, or DHS's operational ability to implement proposals. Immigration Law Division lawyers work closely with their OGC Legal Counsel Division colleagues specializing in legislation (who in turn support DHS's Office of Legislative Affairs), as well as with component counsel, to coordinate and meld their legal and operational views. Additionally, for legislation on which the Administration may wish to comment positively or negatively (e.g., by voicing support or threatening a veto), Immigration Law Division lawyers will help DHS comment on proposed Statements of Administration Policy.

Looking ahead, as the next Secretary of Homeland Security sets priorities within the next Administration, the Immigration Law Division remains ready to play its role in the concentric coordination of immigration issues such as these within the Executive Branch. ○