

Understanding Trump's Executive Order Affecting Deportations & "Sanctuary" Cities

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On January 25, 2017, President Donald Trump signed an executive order (EO) titled "Enhancing Public Safety in the Interior of the United States."¹ The Department of Homeland Security (DHS) has since issued an implementation memo and a "Q&A" that elaborate on how the executive order is to be implemented.² The EO and its accompanying implementation documents have dramatically changed how immigration laws are enforced in the interior of the United States.

The executive order calls for major changes to interior enforcement

Among other things, the EO

1. calls for tripling the number of officers available for immigration enforcement,
2. drastically expands who the government considers a priority for deportation,
3. makes it easier to deport immigrants without due process, and
4. threatens to take away critical federal funding from jurisdictions that have sought to build trust with their immigrant residents.

The EO jeopardizes due process and other constitutional protections that all people have regardless of their immigration status. The EO also encourages the use of racial profiling by U.S. Immigration and Customs Enforcement (ICE) and local law enforcement officials. In other words, this EO has serious negative implications for the well-being and safety of all communities, immigrant and nonimmigrant alike.

Orders that the number of ICE officers be tripled

The EO directs the DHS secretary to hire 10,000 new ICE officers, to the degree that the law and appropriation of funds by Congress makes this possible. Hiring 10,000 new officers would triple ICE's current force of about 5,000 officers.

¹ The full text of the executive order is available at www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united.

² *Enforcement of the Immigration Laws to Serve the National Interest* (DHS memo from Sec. John Kelly to Kevin McAleenan, Acting Commissioner, U.S. Customs and Border Protection, et al., Feb. 20, 2017), www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf; and *Q&A: DHS Implementation of the Executive Order on Enhancing Public Safety in the Interior of the United States* (Office of the Press Secretary, DHS, Feb. 21, 2017), www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-enhancing-public-safety-interior-united-states.

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It is not uncommon for ICE agents to violate people’s civil rights, lie to them or otherwise try to deceive them, and engage in other misconduct when doing immigration enforcement work. A tripling of the number of ICE officers would translate into more ICE officers on the streets, in jails, and in other places. It would intensify the climate of fear that already has descended on many immigrant communities, and the number of abuses committed by ICE officers would increase in number and severity.

Drastically expands ICE “enforcement priorities”

Enforcement Priorities under the Obama Administration	Enforcement Priorities under the Trump Executive Order	New Priorities Based on DHS Implementation Memo and Q&A
<p>Mostly focused on immigrants with certain convictions:</p> <ul style="list-style-type: none"> • “Aggravated felony” • “Significant misdemeanor” • People who entered or reentered without permission after 1/1/14 • People ordered removed on or after 1/1/14 • People with gang-related allegations or convictions 	<p>A broad expansion of who is considered a deportation priority:</p> <ul style="list-style-type: none"> • Anyone with a conviction • Anyone “charged with any criminal offense, where such a charge was not resolved”³ • Anyone who committed acts that could constitute a chargeable offense • Anyone who entered without presenting immigration documents • Anyone with a final removal order • Anyone who poses a “risk to public safety or national security”⁴ • Anyone who “abused” a public benefits program • Anyone suspected of committing fraud or misrepresentation of their immigration case 	<p>Almost any removable immigrant may now be deported:</p> <ul style="list-style-type: none"> • No one except DACA recipients is exempt from removal⁵ • “All those in violation of the immigration laws may be subject to immigration arrest, detention and, if found removable by final order, removal from the United States”⁶ • <i>No one</i> will be deprioritized except for DACA recipients

Because the federal government does not have the resources to deport every person in the U.S. who is undocumented or deportable, it focuses its efforts on those whom it considers to be “priorities” for enforcement.

During the Obama administration, in response to criticism over a dramatic increase in the number of people who were being deported, DHS formally revised its enforcement priorities on Nov. 20, 2014. While still broad, the priorities were intended to focus on

³ Executive order, *supra* note 1, at sec. 5(b).

⁴ Executive order, *supra* note 1, at sec. 5(g).

⁵ DACA recipients may be processed for removal, however, if they have an existing order of removal or a criminal conviction.

⁶ “Q5: What are ICE’s priorities under this executive order?” in *Q&A, supra* note 2.

(1) people with certain criminal convictions (“aggravated felony,”⁷ felony, “significant misdemeanor,”⁸ or three or more misdemeanors) and (2) people who had entered or reentered the U.S. without permission after Jan. 1, 2014. Although not always followed, the priorities created some limitations on ICE’s enforcement actions.

Under the new EO, however, the priority categories are vastly expanded. They are now so numerous and broad that, in effect, the EO eliminates actual prioritization. The table above outlines how the new priorities differ from the Obama administration’s immigration enforcement priorities to include virtually any removable noncitizen.

Under the new “priorities” as interpreted by the implementation guidance, anyone who is “in violation of the immigration laws may be subject to immigration arrest, detention, and, if found removable,” will be deported.⁹ Thus, virtually anyone in the U.S. who currently is undocumented is now a priority for removal. Under this system, a person who has pending criminal charges, even if the person has been released and may eventually not face any charges if they are later dismissed, is a priority for deportation. Similarly, any lawful permanent resident who has a criminal conviction may also now be a priority for deportation.

In addition, any adult who was ordered deported as a minor and is unaware of that deportation order is now a priority. And anyone who, “[i]n the judgment of an immigration officer, ... pose[s] a risk to public safety or national security” is also a priority.¹⁰ This latter is another overbroad, extremely vague category. Law enforcement officers regularly judge individuals to be threats to public safety based solely on their appearance or their presence in a particular neighborhood. For example, being listed, as a result of racial or other profiling, in a database containing information about gang members or suspected gang members has, in the past, been enough to deem a person to be a threat to public safety.

The EO also directs DHS to “prioritize for removal ... removable [noncitizens] who ... [h]ave abused any program related to receipt of public benefits.”¹¹ According to the “Q&A” published by DHS on Feb. 21, the “threshold of abuse of a public benefit program [that] will render someone removable” is: “Those who have *knowingly defrauded* the government or a public benefit system will be priority enforcement targets.”¹² But it has *always* been the case, since long before Trump signed the EO on Jan. 25, that people should not misrepresent themselves in order to obtain a benefit for which they are not eligible.

⁷ “Aggravated felony” is an overbroad category that includes some offenses that under criminal law are considered misdemeanors. For instance, under immigration law a conviction for theft with a year suspended sentence is an aggravated felony. Having an aggravated felony conviction severely limits a person’s eligibility for relief from deportation.

⁸ “Significant misdemeanors” are offenses that immigration authorities consider to be more serious than other kinds of misdemeanors. They include domestic violence offenses, burglary, and driving under the influence, among other offenses.

⁹ “Q5: What are ICE’s priorities under this executive order?” in Q&A, *supra* note 2.

¹⁰ Executive order, *supra* note 1, at sec. 5(g).

¹¹ *Id.* at sec. 5 and sec. 5(e).

¹² “Q18: What threshold of abuse of a public benefit program will render someone removable?” in Q&A, *supra* note 2 (emphasis added).

Limits prosecutorial discretion

According to the memo that provides implementation guidance for the EO, “prosecutorial discretion” will no longer be available to classes or categories of people.¹³ Instead, it will be applied on a “case-by-case basis in consultation with ... [U.S. Customs and Border Protection], ICE, or [U.S. Citizenship and Immigration Services].”¹⁴ This suggests that ICE agents and field offices will no longer be able to exercise prosecutorial discretion as they did in the past, taking into account individual equities a detained person might have, such as that they have had to deal with domestic violence or that their child is seriously ill.

Expands expedited removal

Expedited removal is an administrative process whereby a person detained by immigration authorities is quickly deported from the U.S. without an opportunity to appear before an immigration judge or otherwise have their case decided in court. Under the EO and the implementing guidance, DHS is now expanding the application of expedited removal to any undocumented noncitizen detained near the border who has a final order of removal or who cannot document that they have been present in the U.S. for at least two years. ICE will deport such people without a hearing or review unless they express fear of returning to their home country (i.e., unless they claim they are eligible for asylum). Expanding expedited removal will make it very difficult for people with valid asylum claims to apply for asylum, as they won’t have time to seek the legal help they need to file an application. Not giving people the opportunity to appear before an immigration judge also is a denial of their right to due process.

Increases likelihood that people will be deported because of racial profiling

A result of these changes will be that more immigration and local law enforcement officers will feel empowered to racially profile people they suspect are noncitizens in order to target them for immigration enforcement under these new “priorities.” People stopped and arrested by law enforcement on a pretext—e.g., they look “foreign” or “suspicious” (because of the color of their skin) and one of their car’s taillights is out, so the officer stops them to fish for evidence that they’ve done something illegal—will now be much more likely to face deportation. Once a person is arrested and charged with an offense, under the Jan. 25 EO they become an immigration enforcement priority merely for being charged, and they likely will be turned over to ICE.

More local 287(g) agreements will result in more racial profiling by law enforcement

Through the 287(g) program, local jurisdictions enter into agreements with DHS that allow certain local law enforcement officers to enforce federal immigration laws. Currently, ICE has 287(g) agreements with 32 law enforcement agencies in 16 states,¹⁵ significantly less

¹³ *Enforcement of the Immigration Laws to Serve the National Interest*, supra note 2, p. 4. “Except as specifically provided in this memorandum, prosecutorial discretion shall not be exercised in a manner that exempts or excludes a specified class or category of aliens from enforcement of the immigration laws.”

¹⁴ *Id.*

¹⁵ *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, www.ice.gov/factsheets/287g#signedMOA.

than in previous years due to widespread documentation of the program's abusive effects. Under the Jan. 25 EO, however, the program would be subject to broad and unchecked expansion.

A 2013 University of Illinois report surveying Latinos from various countries living in the U.S. found that 70 percent of undocumented Latino immigrants and 28 percent of Latino U.S. citizens were less likely to contact law enforcement if they were victims of a crime, for fear that police would inquire about their immigration status or the immigration status of people they know.¹⁶ In part because of this chilling effect on local law enforcement's ability to do its work effectively, and because the 287(g) program has drawn [sharp criticism](#) and diverts law enforcement resources from where they're most effective,¹⁷ local jurisdictions have, until now, tended to move away from involvement in 287(g) agreements. Previously, the program was embraced by outliers such as Joe Arpaio, the former sheriff of Maricopa County, Ariz., and others whose participation in the program resulted in [routine racial profiling](#) and discrimination against Latinos.¹⁸

Attacks and stigmatizes local policies that build trust between law enforcement and immigrant communities and that uphold residents' constitutional rights

The EO threatens to punish localities, i.e., "sanctuary" cities and towns, that place limits on how much they will assist with federal immigration enforcement actions. The language of the EO is vague and gives the secretary of Homeland Security and the U.S. attorney general broad authority to define what is a "sanctuary" jurisdiction. The intended effect seems to be to coerce localities into reversing their policies by threatening them with loss of federal funding and other penalties.

While it remains to be seen how this provision of the EO will be implemented, it raises serious constitutional questions and has already resulted in legal challenges. It appears to seek to coerce localities into complying with federal ICE "detainers"—requests by ICE that certain people be held in law enforcement custody so that ICE can take them into immigration detention—that numerous federal courts have said have resulted in violations of the Fourth Amendment. This provision of the EO is an attempt to intimidate hundreds of localities around the country that adopted "sanctuary" policies in order to enhance *all* community members' safety, and to pressure localities to be complicit in the federal government's violation of the Constitution and federal law.

The EO also aims to stigmatize "sanctuary" jurisdictions by mandating the weekly publication of a list of criminal activities committed by noncitizens who were released by localities that declined to hold them for ICE enforcement purposes. This attempt to publicly

¹⁶ Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* (Dept. of Urban Planning and Policy, Univ. of Illinois at Chicago, May 2013), www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

¹⁷ Letter to Hon. Janet Napolitano, Secretary, U.S. Dept. of Homeland Security, from Lucille Roybal-Allard and other members of Congress, Dec. 12, 2012, https://aclum.org/sites/all/files/legal/287g/letter_napolitano.pdf.

¹⁸ See, e.g., "Justice Department Releases Investigative Findings on the Alamance County, N.C., Sheriff's Office: Findings Show Pattern or Practice of Discriminatory Policing Against Latinos," U.S. Justice Dept. press release, Sept. 18, 2012, www.justice.gov/opa/pr/2012/September/12-crt-1125.html.

shame individuals and localities whose policies uphold the Constitution and due process will perpetuate and encourage harmful and xenophobic stereotypes about noncitizens.

Revives “Secure Communities”

The EO orders that [Secure Communities](#) be revived.¹⁹ The Secure Communities program was an ICE program that allowed fingerprints of individuals arrested by state and local law enforcement to be sent to DHS in order to identify people with an immigration history. Although the program purportedly targeted “criminal aliens” who had been convicted of serious offenses, Secure Communities applied to immigrants regardless of guilt or innocence, how or why they were arrested, and whether their arrests were based on racial or ethnic profiling or were just a pretext for checking immigration status.

Former DHS Secretary Jeh Johnson said that Secure Communities’ “very name has become a symbol for general hostility toward the enforcement of our immigration laws.”²⁰ And numerous federal courts have held that state and local authorities’ compliance with ICE “detainers”—requests by ICE that certain people be held in law enforcement custody so that ICE can take them into immigration detention—have resulted in violations of the Fourth Amendment. Nevertheless, the EO will likely result in many more detainers being issued, since it envisions a detainer being issued for any removable noncitizen who is arrested, regardless of how or why they were arrested and even if they are found not to be chargeable for any offense. The EO’s resurrection of Secure Communities will revive the [egregious problems](#) the program created before the Obama administration terminated it,²¹ and it likely will result in an increased ICE presence in local jails as well.

¹⁹ For more information about this program, see *DHS’s “Secure Communities”: No Rules of the Road* (NILC, Mar. 2011), www.nilc.org/issues/immigration-enforcement/scomm-no-rules-of-road-2011-03-0/.

²⁰ Memo from Jeh Johnson, Secretary, U.S. Dept. of Homeland Security, to Thomas S. Winkowski, et al., Subject: Secure Communities, Nov. 20, 2014, www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

²¹ *DHS Proposes Fantasy Remedies to Cure Fundamental Flaws in the Secure Communities Program* (NILC, July 2011), www.nilc.org/issues/immigration-enforcement/dhs-6-17-11-memos-qa-2011-07/.