



SUMMARY AND ANALYSIS OF EXECUTIVE ORDER “Border Security and Immigration Enforcement Improvements”

January 25, 2017

This document will be updated with additional analysis as more information becomes available. A detailed section-by-section summary and analysis of the order follows the executive summary.

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EXECUTIVE SUMMARY

On January 25, 2017, President Trump signed an executive order, “**Border Security and Immigration Enforcement Improvements**” which includes plans to build a costly wall at the southern border and provides additional resources to Border Patrol agents. By curtailing due process at the border and increasing detention along the southern border, the order will result in asylum seekers, families, children, and others being turned away and denied access to humanitarian protection guaranteed for decades under U.S. law. These vulnerable people will almost certainly be sent back to dangerous, possibly life-threatening circumstances, without the opportunity to seek legal protection consistent with due process.

Fund the Construction of a Border Wall: The executive order directs the Department of Homeland Security (DHS) to take immediate steps to allocate available funds to start constructing a physical wall on the Southern border and to create a long-term funding plan for the wall. Adding to the existing border fencing is superfluous and wasteful. As of early 2017, approximately 650 miles of border fence already exists: 350 miles of primary pedestrian fencing, 300 miles of vehicle fencing, 36 miles of secondary fencing behind the primary fencing, and 14 miles of tertiary pedestrian fencing behind the secondary fence. The estimated cost of the remaining border wall segments ranges from \$15 to \$25 billion, with each mile of fencing costing \$16 million. The head of the National Border Patrol Council, a union representing 16,000 Border Patrol agents which endorsed President Trump during his campaign, [said](#), “We do not need a wall along the entire 2,000 miles of border.”

In order to build the wall, Congress will have to appropriate significant additional funding. It is unclear if Congress is willing to spend these billions of dollars or incur the additional cost in yearly maintenance and upkeep of the fence.

Mass Detention at the Border and in the Interior: The order contemplates a massive expansion in detention. It announces that it is the policy of the administration to detain individuals on mere *suspicion* of violating immigration law pending further proceedings. The order also contemplates the detention of all individuals crossing the Southern border, directing DHS to immediately end “catch and release” and ensure that immigrants in removal proceedings are detained to the maximum extent of the law, whether they are merely awaiting their court hearing or have a final order deportation. Contrary to President

Trump's campaign rhetoric, DHS ended the widespread use of "catch and release" (releasing those who crossed the border from detention while they await their removal hearings) in 2006.

Such an indiscriminate national detention policy would impose tremendous due process and humanitarian costs on immigrant families and communities not only at the border but throughout the country. It would also run afoul of federal court decisions ruling that detention cannot be used to deter people from seeking protection. Moreover, DHS does not currently have enough detention capacity to accomplish this and would likely need additional funding from Congress.

Expand Detention Capacity: The order further directs DHS to immediately construct detention facilities at or near the southern border and to assign asylum officers and immigration judges to detention facilities to conduct interviews and removal proceedings. The federal government is operating under a Continuing Resolution until April 28, 2017, and it is doubtful that significant funds exist to implement these plans. Construction and maintenance costs for new detention facilities are exorbitant; spending on ICE's 34,000 detention beds costs taxpayers over \$2 billion each year. Additional hiring of asylum officers will likely be necessary as most asylum officers are already spending much of their time conducting asylum screenings for those apprehended at the border. To date, EOIR has been unable to onboard the number of immigration judges it was funded to hire through appropriations in FY2017. It is unclear whether asylum officers or immigration judges would be deemed exempt from the recent executive order authorizing a government-wide hiring freeze.

Expand Expedited Removal: The order directs DHS to expand "expedited removal" to the maximum extent allowed by law. While prior policies had restricted expedited removal to wide border regions (within 100 miles of any U.S. border) and recent unlawful entrants (within 14 days), the order would expand application of this procedure throughout the country, to individuals who unlawfully entered the United States and cannot prove to DHS that they have been continuously present for the previous two years.

The order will eviscerate due process for huge numbers of undocumented individuals in the United States, even those with family ties and deep roots in our communities like Dreamers. Expedited removal allows DHS enforcement officers to deport individuals without ever seeing an immigration judge – often in as little as 24 hours – with no guarantee of legal counsel and little chance to obtain representation from detention. The United States Commission on International and Religious Freedom – an independent, bipartisan federal commission – has documented that expedited removal turns many asylum seekers back into danger without allowing them a meaningful chance to present a claim to a judge.

Expand 287(g): The order also directs the Secretary of Homeland Security to encourage the expansion of the problematic 287(g) program which empowers state and local law enforcement to enforce immigration laws. The 287(g) program had been reduced significantly under the Obama administration. The 287(g) expansion will require significant funds from Congress to accomplish.

Conduct Removal Proceedings Outside U.S.: The order instructs DHS to ensure that applicants for admission arriving on land from Mexico and Canada are returned to the country from which they came pending a formal removal proceeding. In order to do this, there will likely need to be cooperation from Mexico and Canada. It is unclear how this would be implemented.

Limit Humanitarian Protection: The order targets two important statutory mechanisms for protecting vulnerable immigrants: "parole" (by which DHS can allow an individual to enter into or stay in the U.S. or be released from detention for urgent humanitarian reasons or significant public benefit) and "credible fear" determinations for asylum seekers. The order requires DHS to ensure that these protections are not

“exploited” to allow individuals to remain in the U.S. who are otherwise removable. DHS’s statutory parole authority is broad, and has been used in the past on a case-by-case basis to keep families together in the U.S., especially military families. A policy change in this area could have devastating implications for close family members of U.S. soldiers. In addition, heightening the credible fear standard could make it even harder for asylum seekers with genuine claims under U.S. law to ever get the opportunity to present those claims to a judge.

Criminal Prosecution of Unlawful Entry: The order directs the Attorney General to prioritize the prosecution of any offense with a nexus to the southern border – including nonviolent offenses like unlawful entry. This would further militarize southern border communities and take limited U.S. Attorney resources away from prosecuting other types of crimes, including violent crimes, thereby reducing public safety. As of FY 2013, these immigration-related prosecutions already represented 44% of the total federal court docket.

SECTION-BY-SECTION AND ANALYSIS

Sec. 1 and 2: Purpose and Policy.

- Asserts that individuals who illegally enter the U.S. “present a significant threat to national security and public safety.”
- States that it is the policy of the executive branch to:
 - Detain individuals on mere suspicion of violating the law, including immigration law;
 - Expedite determinations of eligibility claims; and
 - Cooperate fully with States and local law enforcement to enforce federal immigration priorities.
- States that the purpose of the order is to “direct executive departments and agencies ... to deploy all lawful means to secure the Nation’s southern border, to prevent further illegal immigration into the United States, and to repatriate illegal aliens swiftly, consistently, and humanely.”

Sec. 3: Definitions

- Provides definitions for the following terms: “asylum officer,” “southern border,” “border states,” “the Secretary,” “wall,” “executive department,” “regulations,” and “operational control.”
- Defines wall as a “contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.”
- Defines “operational control” as “the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.”

Sec. 4: Physical Security of the Southern Border of the U.S.

- Directs DHS to take immediate steps to obtain complete operational control of the southern border, including:
 - Planning, designing, and constructing a wall.
 - Allocating federal funds for the southern border wall.
 - Projecting and developing long-term funding for the southern border wall, including preparing Congressional budget requests.

- Undertaking a comprehensive study on the security of the southern border within 180 days, including current state and strategy to obtain full operational control.

Questions and Analysis:

- Note that, according to section 3, “complete operational control” would mean zero unlawful entries.

Sec. 5: Detention Facilities

- Directs DHS to immediately construct detention facilities at or near the southern border.
- Directs DHS to assign asylum officers to immigration detention facilities to conduct credible and reasonable fear interviews.
- Directs AG to assign immigration judges to immigration detention facilities to conduct removal proceedings.

Questions and Analysis:

- The Federal government is under a Continuing Resolution until April 28th, so it is unclear if significant funds exist to implement these plans. The direction to build facilities, and assign asylum officers and immigration judges to detention facilities will be of little utility without additional hiring and appropriations, as most asylum officers are already spending much of their time processing CFIs and RFIs. Additionally, EOIR has been unable to hire enough immigration judges to meet the number for which they received appropriations in FY2017. It is unclear whether asylum officers or immigration judges would be deemed exempt from the recently-announced hiring freeze.

Sec 6: Detention for Illegal Entry

- Directs DHS to immediately take action to detain noncitizens apprehended “for violations of immigration law pending the outcome of their removal proceedings or their removal ...to the extent permitted by law.”
- Directs DHS to issue guidance on detention authority including the termination of “catch and release.”

Questions and Analysis:

- The language in this section is broad enough that it could be interpreted to mandate detention for anyone in removal proceedings. However, DHS’s detention authority is limited by the INA (especially, in §236(a), for individuals pending §240 proceedings), and such an interpretation would run afoul of these provisions. Moreover, this detention provision is in the “Illegal Entry” section of the Executive Order, which is focused on the southern border, and it references “catch and release,” so it may be intended to be limited to individuals that are apprehended at the border.
- Note that “catch and release” ended 10 years ago. See [AILA Immigration Policy Update – “Catch and Release.”](#) (AILA Doc. No. 16090803)

Sec. 7: Return to Territory

- Instructs DHS to ensure that applicants for admission arriving on land from contiguous territories, described in INA §235(b)(2)(C), are returned to the territory from which they came pending a formal removal proceeding.

Questions and Analysis:

- INA §235(b)(2)(C) refers to INA §240 proceedings and excludes people subjected to expedited removal per INA §235(b)(2)(B)(ii).
- If the administration's intentions are to have this apply to asylum seekers, they would have to affirmatively decide to not place each individual asylum seeker in expedited removal and instead issue NTAs.
- Presumably, individual returned to contiguous territory pending 240 proceeding would receive NTA before being sent back.
- Sending Mexican asylum-seekers back to Mexico for any length of time would violate U.S. domestic and international obligations.

Sec. 8: Additional Border Patrol Agents

- Directs DHS to hire 5,000 additional Border Patrol agents as soon as practicable.

Questions and Analysis:

- CBP is currently required to have 21,370 agents, but has been unable to meet this requirement.

Sec. 9: Foreign Aid Reporting Requirements

- Directs head of each executive department and agency to identify and report to DHS within 30 days all Federal aid given to the Government of Mexico for the past five years.
- Within 60 days, DHS must submit a consolidated report to the President.

Sec. 10: Federal-State Agreements

- Instructs DHS to enter into INA §287(g) agreements.
- Directs DHS to authorize state and local law enforcement officials to investigate, apprehend, or detain aliens – through 287(g) agreements, or otherwise “to the extent permitted by law, and with the consent of State or local official.”
- Allows DHS to structure 287(g) agreements in whatever way is most effective for enforcing immigration laws and obtaining operational control over the border for that jurisdiction.

Questions and Analysis:

- Concern that language of this section – authorizing delegation of federal immigration enforcement authority to state/local actors through 287(g) agreements “or otherwise” – may contemplate informal, even verbal delegations of such authority that will lack transparency and accountability.

Sec. 11: Parole, Asylum and Removal

- Directs DHS to ensure that the parole and asylum provisions of the INA “are not illegally exploited to prevent the removal of otherwise removable aliens.”
- Directs DHS to ensure that referrals to asylum officers and credible/reasonable fear determinations for those in “expedited removal” and “reinstatement of removal” are conducted “in a manner consistent with the plain language of these provisions.”
- Directs DHS to take action to apply “expedited removal” to the maximum extent permitted by statute: to any individual who has not been “admitted or paroled” who cannot prove she has been continuously present in the U.S. for the 2 years prior to being determined inadmissible. (INA §235(b)(1)(A)(iii)(II)).
- Directs DHS to ensure that humanitarian parole authority (INA §212(d)) is exercised only on a “case by case” basis, in accordance with the “plain language” of the provision, and only when a noncitizen can demonstrate “urgent humanitarian reasons” or “significant public benefit” (the existing criteria in the statute) that is “derived” from such parole.
- All DHS personnel must be trained on the unaccompanied children sections of the Trafficking Victims Protection and Reauthorization Act of 2008 (TVPRA) and the Homeland Security Act of 2002 to ensure that these children “are properly processed, receive appropriate care and placement” while in DHS custody, and when appropriate, “are safely repatriated in accordance with law.”

Questions and Analysis:

- Current policies restrict the application of expedited removal to noncitizens apprehended at ports of entry or within 100 miles of any U.S. border who cannot prove they have been continuously present for 14 days. This directs the Secretary to expand ER authority to cover anyone in the nation who entered without inspection within two years.
- By statute, expedited removal only applies to certain categories of noncitizens: those (1) who lack valid entry documents, (2) who commit fraud or misrepresent a material fact to obtain admission, or (3) who falsely claim U.S. citizenship. That is, expedited removal only applies to those who are inadmissible under INA §§212(a)(6)(C) and (a)(7)). The EO does not alter these baseline criteria.
- It is unclear whether the parole section is meant to apply to the parole only of asylum seekers, or whether it could be interpreted more broadly to apply to other uses of parole, such as advance parole for adjustment applicants and individuals with Temporary Protected Status (TPS), parole-in-place, etc. Note, however, the policy pronouncement that precedes this section, which states that it is the policy of the executive branch to “end the *abuse* of parole” to “*prevent the lawful removal of removable aliens.*”

Sec. 12: Authorization to Enter Federal Lands

- Directs the DHS Secretary, the Secretary of Interior, and any other agency head to:
 - Authorize U.S. officers and employees, and certain State and local employees to have access to Federal lands as is necessary to carry out the EO.
 - Enable the officers and employees to be able to perform actions necessary on Federal lands to carry out the EO.

Sec. 13: Priority Enforcement

- Directs the AG to create prosecution guidelines and emphasize that the prosecution of offenses having a nexus to the southern border should be highly prioritized and given the necessary resources.

Sec. 14: Transparency

- DHS must publicly report the number of noncitizens apprehended at or near the southern border on a monthly basis.
- The method of reporting data will be uniform across all DHS components.

Sec. 15: Reporting

- Both DHS (within 90 days) and the AG (within 180 days) are required to report to the President on the progress of the directives outlined in the EO.

Sec. 16: Hiring

- OPM must facilitate hiring of personnel to carry out the EO.

Questions and Analysis:

- It is unclear whether the Administration means that employees necessary to carry out this EO – including additional Border Patrol officers and possibly additional asylum officers and immigration judges – are exempt from the recently announced hiring freeze. The Administration would likely consider BP officers exempt as jobs deemed “necessary to meet national security or public safety responsibilities,” but it is less clear if the same would apply to asylum officers and immigration judges.

Sec. 17: General Provisions

- Nothing in this order shall affect the legal authority of any executive department or agency, or the functions of OMB.
- The EO shall be implemented consistent with applicable law and subject to the availability of appropriations.
- The EO is not intended to create any right or benefit enforceable at law or in equity.