



SUMMARY AND QUESTIONS/ANALYSIS OF EXECUTIVE ORDER “Enhancing Public Safety in the Interior of the United States”

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.

For questions, please contact:

Greg Chen, gchen@aila.org

Royce Murray, rmurray@immcouncil.org

EXECUTIVE SUMMARY

On Wednesday January 25, 2017, President Trump signed an executive order, “Enhancing Public Safety in the Interior of the United States,” announcing a massive expansion in interior enforcement. The order defines enforcement priorities extremely broadly, placing all unauthorized individuals at risk of deportation, including families, long-time residents, and Dreamers. The order will have devastating consequences for immigrant communities and undermine public safety rather than make our nation more secure. The order compels states and localities to enforce federal immigration laws without establishing clear protections against abusive and discriminatory practices by local law enforcement that may violate the Constitution or federal law. Finally, the order revives the constitutionally-suspect Secure Communities program (which the Department of Homeland Security (DHS) terminated in 2012), orders DHS to consider stripping federal funding from so-called Sanctuary Cities, and encourages additional criminal prosecutions of immigrants for illegal entry.

Universalize Enforcement Priorities: The order announces new interior enforcement priorities that have the effect of making every undocumented immigrant in the United States a priority for removal. The priorities are not ranked and are presented as equally important. Because it includes those who merely committed an act that could be charged as a crime, all those who entered without inspection become priorities because illegal entry is a crime under 8 U.S.C. §1325. Likewise, because the order asserts the position that many visa holders who overstay or violate their visas present a threat to national security and public safety, DHS could seek to deport them under the new priority of being a risk to public safety or national security.

Increase Immigration and Customs Enforcement (ICE) Resources: The order directs DHS to hire an additional 10,000 ICE officers to conduct enforcement and removal operations and encourages the expansion of the problematic 287(g) program which empowers state and local law enforcement to act as ICE officers and enforce federal immigration laws. The 287(g) program had been reduced significantly under the Obama administration. Both the hiring of ICE officers and the 287(g) expansion will require significant funds from Congress to accomplish. ICE Enforcement and Removal Operations currently has approximately 7,000 officers so this would more than double that staffing. Even if the funding is appropriated it will take significant time to hire and train the additional officers.

Punish Sanctuary Jurisdictions: The order directs the Department of Justice (DOJ) and DHS to ensure that jurisdictions that limit their cooperation with DHS under 8 U.S.C. §1373 are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes. The order authorizes DHS to designate jurisdictions as “sanctuary jurisdictions,” without providing any definition of the term. Nothing in federal law requires localities to enforce federal immigration laws; 8 U.S.C. §1373 merely addresses the exchange of information regarding citizenship and immigration status among federal, state, and local government entities and DHS officials. The executive order does not immediately strip funding from “sanctuary cities.” Nor does it make it clear which federal funding sources could be denied since it exempts funding for law enforcement purposes. Any federal effort to compel localities to engage in immigration enforcement will face strong legal challenges, including claims that mandatory compliance violates the Tenth Amendment of the U.S. Constitution.

Increase Immigration Prosecutions: The order directs DOJ and DHS to direct adequate funds to criminal prosecutions of foreign nationals crossing the border without inspection. Border prosecutions, however, are nothing new and have increased dramatically in the past decade. In courts across the Southwest border, the federal government has systematically prosecuted unlawful border crossers for illegal entry and illegal re-entry in group hearings that violate fundamental due process. Asylum seekers have been wrongfully prosecuted under this initiative. These prosecutions, often referred to as “Operation Streamline,” were intended to deter border crossings but instead have clogged up the federal courts and wasted precious government resources with little evidence that the program is achieving its goals. Immigration-related prosecutions currently represent more than half of the total federal court docket – more than all other federal prosecutions for drugs, firearms, and fraud combined.

Revive Secure Communities: The order reinstates the controversial Secure Communities Program and terminates the Priority Enforcement Program (PEP) which DHS created in its place. Secure Communities required local law enforcement to share with DHS information about individuals in its custody and authorized DHS to issue detainers to local jails and correctional facilities for the purpose of holding an individual beyond the scheduled release date and until ICE could take custody. In 2014, DHS terminated Secure Communities after it became mired in controversy and litigation due to constitutional concerns regarding ICE detainers and the racial profiling it triggered. Several localities now have expressly limited their roles with respect to immigration enforcement, including detainer requests, to better protect their communities and ensure their law enforcement officials comply with the Constitution.

Pressure Recalcitrant Countries: The order directs the Secretary of State to ensure that diplomatic efforts and negotiations with other countries include a requirement that foreign states accept the return of their nationals. This provision was included to address the difficulties that DHS has deporting some individuals, particularly those with certain criminal histories, because the foreign state delays the issuance of identity and travel documents. These issues have long been under negotiation but the order’s requirement that foreign states agree to this in the course of any other negotiations could greatly complicate a wide range of bilateral or multilateral agreements.

SECTION-BY-SECTION AND ANALYSIS

Sec. 1 and 2: Purpose and Policy

- The purpose of the EO is to direct executive departments and agencies to employ all lawful means to enforce the immigration laws of the United States. The immigration laws cannot be faithfully executed if we exempt classes or categories of removable aliens from potential

enforcement. It notes that many aliens who illegally enter the U.S. or overstay or violate the terms of their visas present a significant threat to national security and public safety.

- The policy of the executive branch is to:
 - Ensure the faithful execution of the INA against all removable aliens consistent with the Constitution.
 - Use all available resources to ensure the efficient and faithful execution of U.S. immigration laws.
 - Ensure that jurisdictions who do not comply with federal law do not receive federal funding unless required by law.
 - Ensure that individuals ordered removed are promptly removed.
 - Support victims of crimes committed by removable aliens and their families.

Sec. 3: Definitions.

- Where applicable, the terms of the EO are defined under INA §101.

Sec. 4: Enforcement of the Immigration Laws in the Interior of the United States.

- Directs agencies to employ all lawful means to ensure faithful execution of immigration laws against all removable aliens.

Sec. 5: Enforcement Priorities

- DHS shall prioritize for removal noncitizens described in 212(a)(2) [**criminal and related inadmissibility grounds**], 212(a)(3) [**security and related inadmissibility grounds**], and 212(a)(6)(C) [**fraud, misrepresentation inadmissibility grounds**], 235 [**expedited removal of inadmissible arriving aliens**], and 237(a)(2) [**criminal grounds of removal**] 237(a)(4) [**security and related grounds of removal**], *as well as* “removable aliens” who:
 - Have been convicted of any criminal offense;
 - Have been charged with any criminal offense, where such charge has not been resolved;
 - Have committed acts that constitute a chargeable criminal offense;
 - Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a government agency;
 - Have abused any program related to receipt of public benefits;
 - Are subject to a final order of removal, but have not departed; or
 - Otherwise pose a risk to public safety or national security.

Questions and Analysis:

- While the EO does not specifically rescind any prior DHS memoranda, it directs the Secretary to review existing memoranda and procedures to ensure they are consistent with this directive. This raises a question as to the effective date of the new enforcement priorities outlined in the EO.
- “Committed acts that constitute a chargeable criminal offense” is exceptionally broad and could include very minor offenses such as jaywalking, driving without a license, etc.
- The priorities as a whole could include all undocumented immigrants. Those who entered without inspection could be considered to have committed the act of illegal entry under INA §275 and both they and visa violators could be considered a priority as a threat to public safety or national security, per section 1.

- How will “abuse” related to public benefits be interpreted?
- Note that there is no ranking of the enforcement priorities. They are presented as equal priorities.

Sec. 6: Civil Fines and Penalties

- Within one year, issue guidance and promulgate regulations to collect all penalties DHS is authorized to collect from “unlawfully present” noncitizens and “those who facilitate their presence” in the U.S.

Questions and Analysis:

- May refer to INA §275(b) [penalty for EWI]; INA §274C [penalties for document fraud]; INA §274D [penalty for failure to depart]; and INA §274A(e)(4) [employer sanctions].

Sec. 7: Additional Enforcement and Removal Officers

- Hire 10,000 additional ICE ERO officers.

Sec. 8: Federal-State Agreements

- Directs DHS to immediately take action to enter into agreements with states and localities under INA §287(g) [performance of immigration officer functions by state officers and employees].
- Through these agreements or otherwise, authorize state and local law enforcement officials to investigate, apprehend, and detain aliens in the United States.
- Permits 287(g) agreements to be structured in a manner specific to each jurisdiction.

Questions and Analysis:

- Concern that 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 completely lack transparency and accountability.

Sec. 9: Sanctuary Jurisdictions

- The AG and DHS shall ensure that sanctuary jurisdictions are not eligible to receive Federal grants except as deemed necessary for law enforcement purposes.
- DHS has the authority to designate jurisdictions as “sanctuary jurisdictions.”
- The AG shall take enforcement actions against any entity that violates 8 USC §1373 [pertaining to communication between government agencies and the federal immigration authorities] or which has a law, policy, or practice that hinders federal law enforcement.
- Directs DHS to publish a weekly list of criminal actions committed by aliens and any jurisdiction that failed to honor detainers for such aliens.
- Directs OMB to obtain information on all Federal funds received by a sanctuary jurisdiction.

Questions and Analysis:

- The AG and DHS Secretary can determine which grants are deemed necessary for law enforcement purposes. But it is unclear what grants/funding would actually be implicated. Community development block grants? Other funding?

Section 10: Review of Previous Immigration Actions and Policies

- Directs DHS to terminate Priority Enforcement Program (PEP) and reinstitute Secure Communities (SCOMM).
- Directs DHS to review regulations, policies, and procedures and if necessary, publish for notice and comment proposed regulations to rescind or revise any regulations that are inconsistent with the EO, and consider whether to withdraw or modify any inconsistent policies and procedures.
- Consolidate and revise applicable agency forms “to more effectively communicate with recipient law enforcement agencies.”

Questions and Analysis:

- The regulatory/policy review piece is sandwiched between a directive to terminate PEP and reinstitute SCOMM, and a directive relating to revising forms to more effectively communicate with law enforcement agencies (detainers). Was the intention that the regulatory/policy review apply to ALL regulations and policies that might be implicated by the EO or only those relating to SCOMM and detainers?
- The agency forms the order is referring to likely are the immigration detainer and notification forms revised by the Obama Administration, I-247N, I-247D, and I-247X.
- It is also unclear to what extent the protocols governing when ICE decides to place detainers on or take enforcement action against individuals identified through SCOMM – protocols codified in the SCOMM Standard Operating Procedures – will be revised.

Section 11: Department of Justice Prosecutions of Immigration Violators

- AG and DHS to ensure adequate resources are devoted to criminal immigration prosecutions.
- AG and DHS to develop strategies to reduce violent crime and reach of transnational criminal organizations into U.S.

Section 12: Recalcitrant Countries

- DHS and DOS to implement sanctions, consistent with INA §243(d), against countries that “deny or delay” accepting return of their nationals who are ordered removed.
- Work to ensure that accepting the return of nationals ordered removed from the U.S. is a “condition precedent” in diplomatic negotiations with other countries.

Questions and Analysis:

- Note that INA §243(d) indicates that this authority will be exercised on an individual basis and that visas could be suspended but only until the AG notifies DHS that the country has accepted the individual. So theoretically, this wouldn’t involve a lengthy cessation of visas until a Memorandum of Understanding on repatriation or other agreement is reached to cover all individuals from the recalcitrant country.

Section 13: Office for Victims of Crimes Committed by Removable Aliens

- ICE must establish an office to provide “proactive, timely, adequate, and professional services to victims of crimes committed by removable aliens and the family members of victims.”

- Includes quarterly reporting requirements to study the effects of victimization by criminal aliens in the United States.

Section 14: Privacy Act

- Agencies shall exclude anyone who is not a U.S. citizen or LPR from Privacy Act protections regarding personally identifiable information, to the extent consistent with law.

Questions and Analysis:

- Does DHS have the authority to exclude these individuals from Privacy Act protections? Is this permitted under the Privacy Act and is it already federal policy? If not, how much impact would this have with the caveat “to the extent consistent with the law?”

Section 15: Reporting

- DHS and AG shall provide the President with a report on progress made on these directives within 90 and 180 days of this EO.

Section 16: Transparency

- DHS and AG shall collect and provide quarterly reports on:
 - Immigration status of all noncitizens incarcerated by the Bureau of Prisons;
 - Immigration status of all noncitizens incarcerated as pretrial detainees under the supervision of the U.S. Marshals Service; and
 - Immigration status of all convicted noncitizens incarcerated in state/local facilities.

Section 17: Personnel Actions

- OPM shall facilitate hiring under this EO.

Questions and Analysis:

- Though not explicitly stated, it is likely that the Administration would consider ICE ERO officers as exempt from the hiring freeze as positions that are necessary “to meet national security or public safety responsibilities.”

Section 18: General Provisions

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