



Increased Border Security and Immigration Enforcement Executive Order and DHS Memo Frequently Asked Questions

On Jan. 25, 2017, President Trump issued Executive Order 13767, “Border Security and Immigration Enforcement Improvements.”¹ As justification for new policies, the EO cited an alleged threat to national security and safety posed by noncitizens who have not been inspected and admitted, and the strain on federal and local resources resulting from the “surge of illegal immigration” on the southern border.²

On Feb. 20, 2017, Department of Homeland Security Secretary John Kelly issued a memorandum, “Implementing the President's Border Security and Immigration Enforcement Improvements Policies.”³ The DHS memo clarifies certain vague aspects of the EO, such as the policy on unaccompanied minors, and includes a new section on penalizing parents for any

role they play in “smuggling” their children.

What are the goals of the Executive Order and DHS memo?

The EO and the memo direct DHS to secure funding for the construction of a wall along the Mexican border and to increase border enforcement. This would include building new detention facilities along the southern border, hiring 5,000 more Customs and Border Protection officers,⁴ engaging in new agreements with state and local governments (known as 287(g) agreements), and limiting protections for vulnerable populations. Both the EO and the memo call for the attorney general to prioritize the

1 82 FR 8793 (Jan. 30, 2017).

2 *Id.*

3 See www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

4 CBP's current fiscal year budget targets 21,070 border patrol agents. See Department of Homeland Security, “Budget in Brief Fiscal Year 2017” (Feb. 9, 2017), available at www.dhs.gov/sites/default/files/publications/FY2017_BIB-MASTER.pdf. It is unclear if CBP will keep its current hiring standards in place or apply lower standards to meet the hiring goal. See U.S. Customs and Border Protection “Basic Qualifications and Medical Requirements for Border Patrol Agents” (May 16, 2014), available at www.cbp.gov/careers/join-cbp/which-cbp-career/border-patrol-agent/application-process/basic-bp-requirements.

prosecution of any offense “having a nexus to the southern border,” which would include unlawful entry or re-entry. Implementing many of these directives will depend on congressional funding and the cooperation of the Mexican government. If these directives succeed, detention will be expanded, deportations accelerated at the expense of due process, and criminal penalties for immigration offenses increased. The changes would be a notable departure from the current system.

Who is affected by this Executive Order?

This EO and memo affect the following people: 1) undocumented immigrants arrested near the U.S.-Mexico border and those who have been inside the United States for less than two years; 2) noncitizens who are considered priorities for deportation; 3) vulnerable populations such as parole-seekers, asylum-seekers, and unaccompanied minors, and 4) parents who play any role in bringing their children illegally to the United States.

1) Undocumented people arrested crossing the border and those who have been inside the United States for less than two years

- DHS is directed to detain immigrants apprehended at the border for the entirety of their removal proceedings by ending the “catch and release” policy, although this practice actually ended 10 years ago. Indeed, at increasing rates in recent years, people have been held in custody at government expense during the processing of their cases. Those who present a credible fear of persecution to an asylum officer are temporarily released from custody only under strict controls, such as an ankle monitor or an immigration bond. Data shows that people who are allowed to leave detention pursuant to a bond hearing attend their future hearings in 86 percent of

cases.⁵

- DHS is directed to increase the use of expedited removal. This process applies to immigrants without valid documents or who commit fraud or misrepresentation, and cannot prove that they have been physically present in the U.S. for two years. Those subject to expedited removal can be immediately removed from the U.S. without an opportunity to speak to a lawyer or present their claims before an immigration judge, unless they show either an intention to apply for asylum or a fear of persecution.⁶ Currently, expedited removal is limited to undocumented people 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. However, under this EO, expedited removal could be used to remove undocumented people *anywhere in the United States*. Advise clients to carry proof of two years of physical presence with them at all times, for example, a letter from the legal representative or proof of tax filings for the past years.
- DHS is directed to return undocumented immigrants arriving on land from Mexico or Canada to that territory *before* having a hearing in immigration court. This would even affect those placed in removal proceedings before an immigration judge after they have been found by an asylum officer to have a credible fear of persecution or torture.⁷ Those who are not Mexican or Canadian nationals and who lack the means to remain in those countries will face extra difficulties as they await their court hearings. The choice between homelessness in Mexico or Canada or returning to persecution in their home countries could lead to many *in absentia* removal orders. If Mexico and Canada do not agree to accept these returned immigrants, they will be sent back to their countries of origin, which will also lead to many

⁵ Human Rights First “Immigration Court Appearance Rates” Factsheet (November 2016), available at www.humanrightsfirst.org/sites/default/files/hrf-immigration-court-appearance-rates-fact-sheet-nov2016.pdf.

⁶ INA § 235(b)(1)(A)(i).

⁷ INA § 240.

in absentia orders. Those with *in absentia* orders are inadmissible for a period of five years.⁸ There is no waiver to excuse the five-year bar and only a Motion to Reopen and Rescind an *In Absentia* Order will overcome this.⁹

2) Non-citizens who are priorities for deportation

The new enforcement priorities were first detailed in the EO, “Enhancing Public Safety in the Interior of the United States.” Given the scope of the stated priorities, virtually all removable noncitizens are vulnerable to enforcement actions.¹⁰ It remains to be seen how ICE will interpret and implement these broad priorities. Perhaps the most troubling priority of the EO concerns those who “in the judgment of an immigration officer, otherwise pose a risk to public safety or national security” because this vague guidance provides “immigration officers” wide discretion.

The EO and memo call for the expanded use of INA 287(a) agreements in the border region. Section 287(g) agreements are voluntary partnerships between state or local law enforcement agencies and federal immigration officers. In these partnerships, state or local police are granted authority to arrest or detain people who are suspected of violating immigration laws and/or screen the people they arrest for immigration violations using federal databases. ICE then picks them up from police custody. The memo instructs ICE and (for the first time) CBP to “engage immediately with all willing and qualified law enforcement jurisdictions...[to] enter into agreements under 287(g) of the INA” in regions “near the southern border.”¹¹

These partnerships undermine community safety by discouraging undocumented crime victims and witnesses from interacting with the police. They also rely on limited local dollars to do federal immigration work that police are not required to perform. The result is that any undocumented immigrant or deportable non-citizen who has contact with a 287(g) law enforcement agency—whether it is for a broken taillight or reporting a serious crime—will be at increased risk of removal.

3) Vulnerable populations

People seeking parole

The EO directs DHS to ensure that the parole provisions of the Immigration and Nationality Act “are not illegally exploited to prevent the removal of otherwise removable aliens.” This directive does not change the statutory criteria for parole, which may be granted for urgent humanitarian reasons or for significant public benefit.¹² It does, however, direct DHS to exercise parole authority on a “case-by-case” basis. According to the memo, which cites the need for proper use of parole authority, DHS employees will receive “written policy guidance and training” to see that they “exercise [] parole authority only on a case-by-case basis, consistent with the law and written policy guidance.”

The memo characterizes parole for “pre-designated categories” as a practice that undermines immigration law and poses a threat to border security. Though parole in place for military families is not specifically mentioned, it is unclear whether the program would be affected. DHS guidance so far does not clarify its position,

⁸ INA § 212(a)(6)(B).

⁹ For guidance on Motions to Reopen, see CLINIC and The Asylum Seeker Advocacy Project (ASAP) at the Urban Justice Center’s “A Guide to Assisting Asylum-Seekers with In Absentia Removal Orders,” available at cliniclegal.org/resources/guide-assisting-asylum-seekers.

¹⁰ Section 4 of that Order directs agencies to employ all lawful means to execute immigration laws against “all removable aliens.” Section 5 prioritizes non-citizens who are inadmissible or deportable due to a criminal conviction or for other specific reasons in INA §§ 212(a)(2), (a)(3), (a)(6)(C), 235, 237(a)(2) and (a)(4).

¹¹ An earlier leaked version of this Memorandum, dated Jan. 25, 2017, called also for the mobilization of the National Guard.

¹² INA § 212(d).

though media sources have reported that parole in place is protected.¹³

Asylum-seekers

As asylum officers and immigration judges are added to detention centers at the border, many asylum-seekers, including women and children, will be detained while their asylum claims are being decided. This means fewer asylum-seekers will have access to legal representation and a fair chance to present their legitimate claims. In an effort to prevent what the EO calls an “exploitation” of the asylum process, the government will heighten the standard for what constitutes a “credible fear.” As a result, fewer asylum-seekers will have an opportunity to present their legitimate claims before an immigration judge. It is unclear if the EO will require asylum-seekers to return to the territory from which they came pending a hearing before an immigration judge. This could lead to people being placed in dangerous situations in Mexico or in the country of origin before having an opportunity to present their claims before an immigration judge.

Asylum saves the lives of extraordinarily vulnerable people forced to flee their homes to escape persecution and torture. Asylum-seekers include survivors of sexual or gender-based violence, people fleeing gang violence, and unaccompanied children. In fact, asylum-seekers often flee the very same “transnational criminal organizations [that] operate sophisticated drug- and human-trafficking networks and smuggling operations on both sides of the southern border” highlighted in Section 1 of the EO as motivation for its directives.

Unaccompanied children

On its face, the EO merely calls for the training of DHS personnel on the “proper application” of the definition of “Unaccompanied Alien Child”¹⁴ found in section 235 of the Trafficking Victims Protection and Reauthorization Act of 2008, or the TVPRA,¹⁵ which contains important child protections, and the Homeland Security Act of 2002. The memo provides evidence of DHS’ intentions for the EO’s reference to the TVPRA: the identification of abuses and the processing of unaccompanied minors consistent with the TVPRA and “any applicable court order,” which likely refers to the *Flores* Settlement Agreement.¹⁶ In particular, the memo cites reunification of unaccompanied minors with parents as an abuse and a reason for re-designation as accompanied minors.

A narrow definition of “Unaccompanied Alien Child” would prevent fewer children from qualifying for TVPRA protections. If this is the aim, it is unclear how the DHS will reconcile the consequences of this narrow definition with the *Flores* Settlement Agreement, which has been held to apply to both accompanied and unaccompanied minors.¹⁷

4) Parents bringing children to the United States illegally

Under the memo’s directives, any noncitizen who helps a child enter the U.S. unlawfully is at greater risk of immigration enforcement or referral for criminal prosecution. The memo makes no exception for parents who bring their children to the U.S. unlawfully. Memo language claims an intent to protect children from the dangers of a journey to the U.S., but ignores the equally

13 See e.g. Jessica Lussenhop, “DHS: No deportation threat for military families,” BBC NEWS (Feb. 24, 2017), available at www.bbc.com/news/world-us-canada-39082725?S.

14 Homeland Security Act § 462(g)(2), 6 USC § 279(g)(2).

15 8 USC § 1232.

16 The *Flores* Settlement Agreement is available at: cliniclegal.org/sites/default/files/attachments/flores_v_reno_settlement_agreement_1.pdf.

17 *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).

dangerous conditions that force many children to flee the Northern Triangle. Note that under INA §§ 212(a)(6)(E) and 237(a)(1)(E), noncitizens may be found inadmissible or deportable for assisting or encouraging others to enter the U.S. unlawfully. Both provisions allow for waivers of inadmissibility or deportability when the person smuggled into the U.S. is the noncitizen's son or daughter.

Why is the president targeting vulnerable asylum-seekers?

Section 11 of the EO says the U.S. asylum system has been abused. This claim is unsupported. A recent study from the U.S. Government Accountability Office found that, “[f]rom fiscal years 2008 through 2014, annual grant rates for affirmative asylum applications...ranged from 21 to 44 percent. In the same period, grant rates for defensive asylum applications...ranged from 15 to 26 percent.”¹⁸ Requesting asylum is a right under international and U.S. law, and this protection is difficult to obtain in the U.S. given the substantive and procedural requirements, such as the definition of a viable particular social group and one-year filing deadline.¹⁹

Nonetheless, the memo seeks to root out “asylum-related fraud.” It instructs asylum officers to “elicit all information from the alien that is necessary to make a legally sufficient determination,” “consider other facts known to him,” and to reach a *favorable* finding “only after the officer has considered all relevant evidence.” It directs U.S. Citizenship and Immigration Services to “increase the operational capacity of the Fraud Detection and National Security Directorate to detect and prevent fraud,” and tells USCIS, CBP, and ICE to report to the DHS secretary within 90 days “regarding

fraud vulnerabilities in the asylum and benefits adjudication processes” and propose fixes.

What is the president's authority to set detention and enforcement priorities?

In general, Congress has the power to create immigration laws and the executive branch (including the president and agencies like DHS) has the power and responsibility of enforcing them. That means the president has discretion to spend resources in the most effective and efficient manner. However, many of the directives in this EO pose funding and legal challenges. Congress would need to appropriate funds to build a border wall and detention facilities, and hire and assign CBP officers, asylum officers, and immigration judges. A border wall alone would cost taxpayers an estimated \$8 billion to \$40 billion.²⁰

How will increased enforcement affect case processing times for those held in detention centers?

Section 4 of the EO calls for the DHS secretary to “allocate all legally available resources to immediately assign asylum officers to immigration detention facilities.” In fact, the word “allocate” for asylum offices is in sharp contrast to the clear call to “hire 5,000 additional Border Patrol agents” as seen in Section 8. Without properly trained additional asylum officers at immigration detention facilities, highly vulnerable asylum-seekers will be subject to prolonged detention as they await a credible fear interview. During detention, traumatized asylum-seekers are at increased risk of suffering mental and physical health problems, including depression, post-traumatic stress disorder, and frequent infections.²¹

18 Variation Exists in Outcomes of Applications across Immigration Courts and Judges, U.S. Government Accountability Office, (Nov. 14, 2016), available at www.gao.gov/products/GAO-17-72.

19 TRAC's “Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality” (December 13, 2016), available at <http://trac.syr.edu/immigration/reports/448/>.

20 See e.g., Danielle Kurtzleben, “President Trump Is Moving Forward With His Wall. Is It Really Going To Happen?,” NPR, (Jan. 25, 2017), available at www.npr.org/2017/01/25/511619026/donald-trumps-moving-forward-with-his-wall-is-it-really-going-to-happen.

21 American Immigration Council, “Asylum in the United States Fact Sheet” (Aug. 22, 2016), available at www.americanimmigrationcouncil.org/research/asylum-united-states.

Are there constitutional concerns related to prolonged imprisonment in detention centers?

People held for immigration enforcement are detained in both government-run detention centers and in those run by the for-profit prison industry. But the government cannot detain people indefinitely following a removal order that cannot be enforced.²² To do so would violate the Fifth Amendment's Due Process Clause. However, the limits on prolonged government detention while a person seeks admission are less clear. This issue is currently before the U.S. Supreme Court in *Jennings v. Rodriguez*.²³

*This document will evolve as the administration releases more information.
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²² *Zadvydas v. Davis*, 533 U.S. 678 (2001).

²³ 136 S. Ct. 2489 (2016).