



DHS Immigration Enforcement Memorandums Deconstructed

The Department of Homeland Security (DHS) Secretary John Kelly released [two memorandums](#) on Feb. 20, 2017 to provide further direction to DHS employees on the implementation of the president's [recent executive orders on immigration](#). The memoranda are entitled "Implementing the President's Border Security and Immigration Enforcement Improvements Policies" and "Enforcement of the Immigration Laws to Serve the National Interest."

The "Implementing the President's Border Security and Immigration Enforcement Improvements Policies" memorandum expands detention regardless of criminal history and only permits release from detention when:

1. The alien is removed from the United States;
2. The alien is granted relief from removal or the individual is a U.S. citizen, national, lawful permanent resident, asylee, refugee, or holds temporary protected status or another valid immigration status in the United States;
3. The alien withdraws an application for admission and leaves;
4. The alien is required to be released by statute, judicial order or due to a binding settlement agreement;
5. DHS grants parole;
6. An asylum officer finds the alien has a "credible fear" of persecution or torture, and the alien poses no security risk and agrees to comply with any additional conditions of release.

It is probable that DHS does not have the capacity to launch this broad detention plan immediately with respect to personnel and facilities. The memorandum calls for an additional 5,000 border patrol agents and 500 air and marine agents to secure the border. DHS will need a significant appropriation from Congress in order to fully implement this plan. Recognizing that resources at this time are limited, the memorandum calls upon a prioritization of detention based on an alien's flight risk and potential danger. NCSL's [Immigration Reform Policy](#) supports full federal funding for DHS to carry out its responsibilities at the border.

It should be noted that this memorandum removes the detention exemptions for the disabled, elderly and pregnant that existed in a prior DHS memorandum.

Pursuant to the president's prior immigration executive orders, DHS will identify and quantify all sources of direct and indirect aid and assistance, excluding intelligence activities, being provided to the Mexican government.

The memorandum also calls for the expansion of the 287(g) program on a voluntary basis. The 287(g) program allows DHS to enter into memoranda of understanding with receptive states or localities which would allow state and local law enforcement to act as immigration officers "in relation to the apprehension, investigation, or detention of aliens in the United States." DHS believes that state and local law enforcement help, and cooperation in the detention plan is "critical" to its success. The director of the U.S. Immigration and Customs Enforcement (ICE) should therefore engage immediately with willing jurisdictions to devise a 287(g) agreement specifically tailored to work well in that jurisdiction. NCSL's [Immigration Reform Policy](#) supports voluntary state involvement in civil immigration issues and opposes efforts to shift federal immigration enforcement responsibilities to state and local law enforcement.

The memorandum requires a comprehensive study of border security including the availability of federal and state resources to contribute to border security, and orders the planning, design, construction, and maintenance of a border wall to begin immediately and for the identification of all available funding for this project.

The memorandum states that if an immigration officer deems an alien inadmissible to the U.S. under the Immigration and Nationality Act (INA), the officer shall order the alien removed from the U.S. without further hearing or review unless the alien is an unaccompanied child, indicates the intention to apply for asylum, or a fear of persecution or torture or a fear of return to his or her country, has a valid immigration status, or is a U.S. citizen. The Expedited Removal (ER) provisions of the INA are within the sole discretion of the DHS secretary. The memorandum outlines that DHS will use ER for aliens who have not been continuously present in the U.S. for the two years before apprehension, and can be applied anywhere in the U.S. and at any time. Under prior guidelines, ER could only be used against aliens encountered within 100 air miles of the border and within 14 days of entry and against aliens who arrived by sea other than at a port of entry. NCSL's Immigration Reform Policy states that federal enforcement efforts at the worksite or in communities should be coordinated with state and local governments, particularly where children are involved.

In an attempt to save money, DHS requires aliens arriving on land from Mexico or Canada to be returned to the territory from which they arrived pending the outcome of a formal removal proceeding which can be conducted via video-conference. An asylum officer will determine whether an alien has a "credible fear" of return based on whether the alien can demonstrate that there is "significant possibility" that the alien could establish eligibility for asylum under the INA. The memorandum calls for an allocation of all available resources to expand their detention capabilities at or near the Mexican border and increase the number of asylum officers to address credible fear claims. Again, in order to fully implement these proposals, a significant congressional appropriation must be made.

The memorandum cautions that until formal DHS guidance is issued, decisions to parole an alien into the U. S. should be made sparingly. With respect to unaccompanied minor alien children, the memorandum states that unless these children meet the statutory requirements of "unaccompanied alien child" (must be under the age of 18 and have no parent or legal guardian present in the U.S.), that child is subject to repatriation to the country of origin. The DHS secretary notes that there have been abuses of this statutory requirement which have resulted in unaccompanied minor aliens being placed in the care of their parents who are already in the U. S. illegally. The memorandum calls for criminal enforcement or removal of "any individual" (including parents or family members) who directly or indirectly smuggle or traffic an alien child, family placement for qualifying children may be thwarted. DHS will develop "uniform written guidance and training...regarding the proper processing of unaccompanied children, the timely and fair adjudication of their claims for relief from removal, and, if appropriate, their safe repatriation." Risk of harm to the child from smuggling or trafficking activity must be taken into account in making removal determinations about that child.

The memorandum requires directors of the Joint Task Forces and ICE-led Border Enforcement Security Task Forces (BESTs) to implement strategies to disrupt transnational criminal organizations, focused on alien smuggling or trafficking, drug trafficking, illegal entry and reentry, visa fraud, identity theft unlawful possession or use of official documents, and acts of violence committed against persons or property at or near the border. It calls for an increase in the number of special agents and analysts and should include people from state and local agencies. NCSL's [Immigration Reform Policy](#) supports state-federal cooperation in countering human trafficking, weapons and drug smuggling.

Finally, the memorandum requires public reporting of statistical data regarding aliens apprehended at or near the border for violating immigration laws. The memorandum expressly states that it is internal guidance and may be changed or superseded at any time. It also expressly states that its content does not confer a private right of action.

The second memorandum is entitled "Enforcement of the Immigration Laws to Serve the National Interest." It lays out DHS's enforcement priority to faithfully execute the immigration laws of the U. S. In so doing, DHS will no longer exempt classes or categories of removable aliens from potential enforcement. Recognizing that resources are limited, DHS shall prioritize removable aliens as follows:

1. Aliens who have been convicted of any criminal offense;
2. Aliens who have been charged, but not convicted of any criminal offense;
3. Aliens who have committed acts which constitute a chargeable offense;
4. Aliens who have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency;
5. Aliens who have abused any program related to receipt of public benefits;
6. Aliens who are subject to a final order of removal but have not complied with their legal obligation to depart the U.S.; or
7. Aliens who, in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

The memorandum reiterates that criminal aliens are a threat to U.S. citizens and must be a priority for removal. NCSL's [Immigration Reform Policy](#) recognizes that criminal aliens often are incarcerated in state prisons and supports the full funding of the federal State Criminal Alien Assistance Program (SCAAP) to offset state costs of incarceration.

Effective immediately, the Priority Enforcement Program is terminated and the Secure Communities program is restored. ICE should expand the Criminal Alien Program in any willing jurisdiction in the U. S. Removal proceedings shall be initiated against aliens incarcerated in federal, state and local correctional facilities. The 287(g) program allows a qualified state or local law enforcement officer to be designated an "immigration officer" with the authority to investigate, identify, apprehend, arrest, detain and conduct searches authorized under the INA, under the direction and supervision of DHS.

The memorandum also states that prosecutorial discretion should be applied on a case-by-case basis and may not be used to exempt or exclude a specified class or category of aliens from enforcement of immigration laws.

DHS will establish a new Victims of Immigration Crime Engagement (VOICE) Office within the office of the ICE director, which purposes to create a link between ICE and victims of crimes committed by criminal aliens. The VOICE office will inform victims with offender information as permitted by law. The ICE director will also hire 10,000 additional ICE agents to help enforce immigration laws in the interior of the U.S. and develop hiring plans to do so. ICE is also required to issue guidance to assist with the collection of any fines and fees owed to DHS by law by aliens or those who facilitate those aliens' unlawful presence in the United States. U.S. Privacy Act protections will no longer apply to persons who are neither U.S citizens nor lawful permanent residents.

The memoranda rescinds all conflicting guidance, with the exception of the DACA and DACA/DAPA memoranda. It remains unclear whether the memoranda remain in place regarding the prohibited enforcement actions at sensitive locations; and victims or witnesses of crimes; or primary caregivers of children.

Additional Resources:

<http://www.ncsl.org/research/immigration/deferred-action.aspx>

<http://www.ncsl.org/research/immigration/child-migrants-to-the-united-states.aspx>

<http://www.ncsl.org/research/immigration/state-criminal-alien-assistance-program.aspx>

<http://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx>

For more information, please contact Susan Parnas Frederick (susan.frederick@ncsl.org) or Ann Morse (ann.morse@ncsl.org)