Executive Order: Border Security and Immigration Enforcement Improvements

BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) (INA), the Secure Fence Act of 2006 (Public Law 109 367) (Secure Fence Act), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104 208 Div. C) (IIRIRA), and in order to ensure the safety and territorial integrity of the United States as well as to ensure that the Nation's immigration laws are faithfully executed, I hereby order as follows:

As a prelude to the Purpose set forth below for this Order, we at the National Immigrant Justice Center (NIJC) are proud to share our purpose. We are honored to provide legal representation to hundreds of men, women, and children who have fled persecution and death. We are honored to get to know our clients and their families as they courageously rebuild their lives as Americans. Many of these men, women, and children came here as asylum seekers across our southern border. Today they are our family members, classmates, coworkers, and neighbors. The foundational premise of this Order - which smears refugees and asylum seekers as threats - undermines our country's identity as a nation of immigrants and beacon of hope for the persecuted.

Section 1. Purpose. Border security is critically important to the national security of the United States. Aliens who illegally enter the United States without inspection or admission present a significant threat to national security and public safety. Such aliens have not been identified or inspected by Federal immigration officers to determine their admissibility to the United States. The recent surge of illegal immigration at the southern border with Mexico has placed a significant strain on Federal resources and overwhelmed agencies charged with border security and immigration enforcement, as well as the local communities into which many of the aliens are placed.
It's important to protect public safety and national security. That's why groups like NIJC think it would be wiser to have a rational immigration system that channels immigrants through lawful mechanisms. But the premise that the human beings seeking to enter the U.S. along the southern border are threats to national security and public safety is erroneous. Furthermore, the president should not purport to speak for local border communities, many of whom have welcomed refugees with open arms. Read this news story, for example, about the beautiful welcome asylum seeking families received in San Antonio, Texas.

A very large percentage of the men, women, and children arriving at the border are indeed refugees fleeing persecution. In Department of Homeland Security Secretary John Kelly's confirmation hearings before the Senate, he shared his confidence that, "people that are coming up here from Central America" are fleeing "some of the most dangerous countries on the planet." The American Immigration Council has published the remarkable findings of a large survey of these migrants, finding their decisions to migrate to the United States driven primarily by their past experiences of crime and violence, not U.S. immigration policies.

Consider the story of NIJC client Maria, who fled Central America with her son after they received death threats from a gang. After presenting themselves at the border and enduring months in detention, Maria and her son were granted asylum.

Facts matter. The president fundamentally misunderstands the situation on the border when he refers to "the recent surge of illegal immigration at the southern border with Mexico...." In his cabinet-level exit memo, outgoing DHS Secretary Jeh Johnson stated that, "Today, it is now much harder to cross our southern border without authorization and avoid detection and apprehension. Apprehensions in recent years—a strong indicator of total attempts to cross the border—are much lower than they used to be. In FY 2016, total apprehensions by the Border Patrol on our southwest border, between ports of entry, numbered 408,870. This represents a fraction of the number of apprehensions routinely observed from the 1980s through 2008 (see below)."

Transnational criminal organizations operate sophisticated drug- and human-trafficking networks and smuggling operations on both sides of the southern border, contributing to a significant increase in violent crime and United States deaths from dangerous drugs. Among those who illegally enter are those who seek to harm Americans through acts of terror or criminal conduct. Continued illegal immigration presents a clear and present danger to the interests of the United States.

It's true there are dangerous cartels in Mexico and violent gangs in Central America. But many of the men, women, and children crossing the border are fleeing those same cartels
and gangs. See the American Immigration Council report findings discussed above. Moreover, immigrants are less likely to commit crimes than native-born Americans and studies show that a number of U.S. border cities are among the safest in the United States. Rhetoric that conflates migration with criminality is rooted in fear, not reality.

Federal immigration law both imposes the responsibility and provides the means for the Federal Government, in cooperation with border States, to secure the Nation’s southern border. Although Federal immigration law provides a robust framework for Federal-State partnership in enforcing our immigration laws and the Congress has authorized and provided appropriations to secure our borders the Federal Government has failed to discharge this basic sovereign responsibility. The purpose of this order is to direct executive departments and agencies (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.

This order says in one breath that it wants a “federal-state partnership” and in the next breath it states that states must do whatever the president says. Federal responsibility for immigration implies an obligation to develop a system that actually works for America and for Americans, one that is workable and enforceable.

Sec. 2. Policy. It is the policy of the executive branch to:

(a) secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism;

The wall just makes no sense. In the words of Seth Stoddard, a former high-ranking Department of Homeland Security official under Presidents Obama and Bush, the crisis on the southern border is “different from the one Trump thinks exists. It doesn’t involve Mexican migrants, and a wall won’t solve it. The actual crisis involves thousands of migrants from Central America’s ‘Northern Triangle’... who are fleeing brutal gang violence, extreme poverty or malnutrition. Roughly half of these migrants are women and young children escaping desperate circumstances, facing the real possibility of death or rape if they stay.... We don’t have a border security crisis or an uncontrolled flood of people coming from Mexico to take our jobs. Instead, we have a humanitarian crisis.”

(b) detain individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law, pending further proceedings regarding those violations;
More on this below, but the United States is already engaged in the mass detention of immigrants - as of the issuance of this Order, DHS’s Immigration and Customs Enforcement (ICE) detains more than 40,000 men, women and children in jails or jail-like facilities, many of which are located vast distances from access to legal representation.

(c) expedite determinations of apprehended individuals' claims of eligibility to remain in the United States;

This language is vague, but to the extent it refers to completing the entirety of one’s immigration court proceedings while detained, it is deeply flawed. While many asylum seekers languish in years-long immigration court backlogs under the current system, the answer is not to swing wildly to the other extreme. We should not force these complicated matters involving traumatized applicants and nuanced facts to be litigated at breakneck speed from remote detention facilities where access to counsel is limited or nonexistent. Recent efforts by the outgoing administration to expedite the case processing of mothers with children have already demonstrated the ways in which basic rights protections are undermined when we rush this legal process. Due process and our moral obligations require more.

(d) remove promptly those individuals whose legal claims to remain in the United States have been lawfully rejected, after any appropriate civil or criminal sanctions have been imposed; and

This is a thinly veiled threat to sanction failed asylum seekers and other immigrants who do not prevail in their efforts to win immigration relief. As Human Rights Watch and myriad other organizations have documented, the criminalization of migration creates unreasonable obstacles to protection for bona fide asylum seekers, in addition to coming at a steep financial cost to the taxpayer.

(e) cooperate fully with States and local law enforcement in enacting Federal-State partnerships to enforce Federal immigration priorities, as well as State monitoring and detention programs that are consistent with Federal law and do not undermine Federal immigration priorities.

Again, the president wants "cooperation" with states and localities, but only if they agree with the new priorities of this administration. The Constitution gives states the power to say no as well as yes. This principle is called anti-commandeering and was explained nicely by three law professors in a recent op-ed in the Washington Post.

Sec. 3. Definitions. (a) "Asylum officer" has the meaning given the term in section 235(b)(1)(E) of the INA (8 U.S.C. 1225(b)(1)).
(b) "Southern border" shall mean the contiguous land border between the United States and Mexico, including all points of entry.

(c) "Border States" shall mean the States of the United States immediately adjacent to the contiguous land border between the United States and Mexico.

(d) Except as otherwise noted, "the Secretary" shall refer to the Secretary of Homeland Security.

(e) "Wall" shall mean a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.

(f) "Executive department" shall have the meaning given in section 101 of title 5, United States Code.

(g) "Regulations" shall mean any and all Federal rules, regulations, and directives lawfully promulgated by agencies.

(h) "Operational control" shall mean the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.

This is unattainable and irresponsible policy making. Border policy needs to focus on safety – safety for Americans AND safety and compassion for the migrants regularly turning themselves into Border Patrol in their desperation to find protection. Check out The Atlantic's heart-breaking photographic depiction of what this really looks like on the southern border.

Sec. 4. Physical Security of the Southern Border of the United States. The Secretary shall immediately take the following steps to obtain complete operational control, as determined by the Secretary, of the southern border:

(a) In accordance with existing law, including the Secure Fence Act and IIRIRA, take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border, using appropriate materials and technology to most effectively achieve complete operational control of the southern border;

(b) Identify and, to the extent permitted by law, allocate all sources of Federal funds for the planning, designing, and constructing of a physical wall along the southern border;

(c) Project and develop long-term funding requirements for the wall, including preparing Congressional budget requests for the current and upcoming fiscal years; and
(d) Produce a comprehensive study of the security of the southern border, to be completed within 180 days of this order, that shall include the current state of southern border security, all geophysical and topographical aspects of the southern border, the availability of Federal and State resources necessary to achieve complete operational control of the southern border, and a strategy to obtain and maintain complete operational control of the southern border.

After issuing this Order, the president shared with MSNBC his estimate that building this wall will cost $8 billion. A study from MIT found that the costs would actually be as much as $27 billion to $40 billion. Mexico is not going to pay for it. What’s more, this effort is superfluous. The border is already heavily militarized and has been for years, to the extent that it has been referred to as a “low-intensity war zone.”

Sec. 5. Detention Facilities. (a) The Secretary shall take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico.

ICE already maintains a vast and sprawling detention system that deprives more than 40,000 men, women, and children of their liberty on a daily basis without the capacity to provide for their basic safety, health, or due process rights. Monitoring organizations and civil society organizations including NIJC have documented the parade of horrors that occur inside the walls of these facilities, including deaths attributable to violations of ICE’s own medical care standards, physical abuse, the excessive use of segregation, and failure to provide for basic health and sanitation needs. NIJC and our partners have long advocated for the use of alternatives to detention that are more appropriate for the civil context of removal proceedings and have proven effective in ensuring appearances at a drastically lower cost than detention. The ACLU recently enumerated the benefits, efficacy, and cost savings of community-supervised alternative to detention programs in its white paper on ICE’s use of private prisons.

Late in 2016, NIJC joined more than 200 civil society organizations and a dozen former immigration judges in calling on former DHS Secretary Jeh Johnson to remedy the due process failings rampant in the system, but he took no action. The system President Trump has been handed, which he will use to carry out this Order, is sorely lacking in meaningful oversight and accountability measures.

But at least we all now understand why stock in private prison companies soared after Trump’s election.
(b) The Secretary shall take all appropriate action and allocate all legally available resources to immediately assign asylum officers to immigration detention facilities for the purpose of accepting asylum referrals and conducting credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1225(b)(1)) and applicable regulations and reasonable fear determinations pursuant to applicable regulations.

At present, U.S. Citizenship and Immigration Services (USCIS) is taking as many as five years to adjudicate pending asylum cases pending. Pulling asylum officers off the existing caseload will only exacerbate the existing dysfunction in the system.

Ahmed (pseudonym), one of NJC’s clients, fled religious persecution in Jordan after he converted to Christianity, but his wife and children were unable to leave with him. As he waited for the Asylum Office to adjudicate his asylum application, it grew increasingly dangerous for his wife and children to remain in Jordan. More than one year after he filed for asylum, Ahmed continues to wait for the Asylum Office to adjudicate his case so he can petition for his wife and children to reunite with him and obtain safety.

(c) The Attorney General shall take all appropriate action and allocate all legally available resources to immediately assign immigration judges to immigration detention facilities operated or controlled by the Secretary, or operated or controlled pursuant to contract by the Secretary, for the purpose of conducting proceedings authorized under title 8, chapter 12, subchapter II, United States Code.

The backlog problem arises here as well. Immigration courts nationwide are so backlogged that some of them aren’t even giving out new courts dates anymore; The New York Times has described the system as “crippled by delays and bureaucratic breakdowns.” With the president’s federal hiring freeze in place and ramped-up enforcement sending more noncitizens into the system, there is no relief in sight. Pulling judges from their courts and sending them to preside over cases in detention centers remedies nothing and, indeed, adds to the existing pandemonium.

Jean (pseudonym), an NJC client, had to wait more than eight years for his asylum case to be adjudicated due to extensive immigration court backlogs in Chicago. By the time he was finally granted asylum in early 2017, his marriage had ended due to the long separation from his wife and his child had grown to a teenager.

Sec. 6. Detention for Illegal Entry. The Secretary shall immediately take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings or their removal from the country to the extent permitted by law. The Secretary shall issue new policy guidance to all Department of Homeland Security personnel regarding the appropriate and consistent
use of lawful detention authority under the INA, including the termination of the practice commonly known as "catch and release," whereby aliens are routinely released in the United States shortly after their apprehension for violations of immigration law.

On the one hand, this looks at first glance like business as usual. But note the phrases “pending the outcome of their removal proceedings” and “to the extent permitted by law.” The president is basically ordering that noncitizens not be considered for release from detention except as required by statute (which means nobody). The phantom of “catch and release” is invoked to justify indefinite detention.

The president is doubling down on the policies that led Central American mothers detained in Pennsylvania to embark on a hunger strike. The women stated their purpose as follows: “We left our homes in Central America to escape corruption, threats, and violence. We thought this country would help us, but now we are locked up with our children in a place where we feel threatened, including by some of the medical personnel, leaving us with no one to trust.”

Sec. 7. Return to Territory. The Secretary shall take appropriate action, consistent with the requirements of section 1232 of title 8, United States Code, to ensure that aliens described in section 235(b)(2)(C) of the INA (8 U.S.C. 1225(b)(2)(C)) are returned to the territory from which they came pending a formal removal proceeding.

Immigration laws passed in 1996 do authorize the immigration authorities to return someone to a contiguous country (i.e., Mexico) pending removal proceedings. That provision hasn’t been frequently used because it’s complicated; for instance, it would require the use of immigration courtrooms in ports of entry. More than half the noncitizens seeking to enter the United States are not Mexicans. Sending them back to Mexico requires cooperation from Mexico. Does the president have a plan to get Mexico’s cooperation for this effort?

Sec. 8. Additional Border Patrol Agents. Subject to available appropriations, the Secretary, through the Commissioner of U.S. Customs and Border Protection, shall take all appropriate action to hire 5,000 additional Border Patrol agents, and all appropriate action to ensure that such agents enter on duty and are assigned to duty stations as soon as is practicable.

Note that this document does not authorize the hiring of any new immigration judges to deal with all these supposedly expedited removal proceedings. See The Guardian’s reporting on this contradiction. As described above, our immigration courts are already in crisis, backlogged by more than 500,000 cases. The New York Times reporter Julia Preston described our immigration courts as “a justice system in collapse.” Things are about to get a lot worse.
Sec. 9. Foreign Aid Reporting Requirements. The head of each executive department and agency shall identify and quantify all sources of direct and indirect Federal aid or assistance to the Government of Mexico on an annual basis over the past five years, including all bilateral and multilateral development aid, economic assistance, humanitarian aid, and military aid. Within 30 days of the date of this order, the head of each executive department and agency shall submit this information to the Secretary of State. Within 60 days of the date of this order, the Secretary shall submit to the President a consolidated report reflecting the levels of such aid and assistance that has been provided annually, over each of the past five years.

Sec. 10. Federal-State Agreements. It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.

This is misguided. Immigration law is complex and determining the immigration status of any individual can be a difficult task, opening the door to massive liability for local law enforcement agencies acting as federal immigration agents. In Illinois in 2016, a federal judge entered judgment for $20,000 to U.S. citizen who spent a week in immigration detention. What’s more, assuming the role of a federal immigration enforcement officer poisons the relationship of local law enforcement with immigrant communities, making community policing even more difficult—if not impossible.

(a) In furtherance of this policy, the Secretary shall immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g) of the INA (8 U.S.C. 1357(g)).

287(g) is the section of the Immigration and Nationality Act that permits local law enforcement agencies to enter into agreements to deputize their police officers to enforce federal immigration laws. It turns local jails into immigration detention centers. The program and its problems are described well by the American Immigration Council here. Simply put, this program undermines the safety of the communities it claims to protect. 287(g) agreements, in operation, inevitably breed mistrust between communities and the police who strive to protect them. Investigations by the DHS Office of the Inspector General and Government Accountability Office have revealed the many ways in which 287(g) agreements result in racial profiling and other civil rights abuses. This is a program that should have been terminated years ago, not expanded.
(b) To the extent permitted by law, and with the consent of State or local officials, as appropriate, the Secretary shall take appropriate action, through agreements under section 287(g) of the INA, or otherwise, to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary. Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.

See above. And don’t forget: Section 287(g) makes it harder for police to do their job. The Major Cities Chiefs Police Association has formally adopted the position that state and local police involvement in enforcing immigration law undermines immigrant community trust and cooperation with police and significantly diverts resources from their core mission to create safe communities.

(c) To the extent permitted by law, the Secretary may structure each agreement under section 287(g) of the INA in the manner that provides the most effective model for enforcing Federal immigration laws and obtaining operational control over the border for that jurisdiction.

Sec. 11. Parole, Asylum, and Removal. It is the policy of the executive branch to end the abuse of parole and asylum provisions currently used to prevent the lawful removal of removable aliens.

We’re not sure what abuse the president refers to here, or his sources for making such sweeping claims. But we are confident in our claim that the government abuses its power when it detains thousands of men, women, and children who are bona fide asylum seekers and for whom unnecessary detention causes irreversible psychological harm. Our sources are many and include, to name a few: Human Rights First’s recent report on ICE’s failure to use its discretion to release asylum seekers who pose no risk to the community; Physicians for Human Rights’ devastating report on the ways in which immigration detention devastates the mental health of already traumatized asylum seekers; and the ACLU’s recent report on the use of private prisons showing the skyrocketing numbers of asylum seekers currently in detention.

(a) The Secretary shall immediately take all appropriate action to ensure that the parole and asylum provisions of Federal immigration law are not illegally exploited to prevent the removal of otherwise removable aliens.

See above. Also take a look at the 2016 report of the United States Commission on International Religious Freedom, presenting the findings of a robust examination of the
existing expedited removal processing at our southern border. The findings are troubling, including reports of flawed or non-existent training modules and immigration officers who express hostility toward asylum claims.

(b) The Secretary shall take all appropriate action, including by promulgating any appropriate regulations, to ensure that asylum referrals and credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1125(b)(1)) and 8 CFR 208.30, and reasonable fear determinations pursuant to 8 CFR 208.31, are conducted in a manner consistent with the plain language of those provisions.

For decades, Customs and Border Patrol has failed to actually give asylum seekers the process allowed under the expedited removal statute, a failure documented by the report of the U.S. Commission on International Religious Freedom described above. This is not what the president is getting at, of course, but it is the only plausible reading of this section of the Order that would put our nation in line with our domestic and international legal obligations, not to mention our moral obligations.

(c) Pursuant to section 235(b)(1)(A)(iii)(I) of the INA, the Secretary shall take appropriate action to apply, in his sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(i) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(iii)(II).

It's hard to know exactly what this means. The section cited, INA § 235(b)(1)(A)(iii)(I), doesn't "designate" any noncitizen; it authorizes the secretary of DHS to do so. So technically the president instructed Secretary Kelly to apply the statute as he wishes. Is the president telling Secretary Kelly to expand expedited removal, in the secretary's sole discretion? According to ICE's most recently available statistics, more than 80 percent of all individuals facing removal proceedings are already placed in fast-track proceedings. In its report, the U.S. Commission on International Religious Freedom has joined the many voices (here's another, for example) cautioning that this mass expediting of removal proceedings threatens to undermine due process protections and send bona fide asylum seekers back to harm. Expanding this program would be irresponsible and cruel.

(d) The Secretary shall take appropriate action to ensure that parole authority under section 212(d)(5) of the INA (8 U.S.C. 1182(d)(5)) is exercised only on a case-by-case basis in accordance with the plain language of the statute, and in all circumstances only when an individual demonstrates urgent humanitarian reasons or a significant public benefit derived from such parole.

This seems to effectively overturn the longstanding policy of DHS to parole legitimate asylum seekers rather than detain them for the crime of seeking freedom. So many times at
NIJC we hear the shock of someone who fled persecution to come to the United States, seeing our country as a beacon for freedom, only to be locked up in a jail. Of course it also violates international law and the Refugee Convention, to detain asylum seekers categorically, i.e., not based on the individual circumstances of the individual. It might help to recall that these treaty obligations arose after World War II because of the failure of so many governments to protect people being persecuted by the Nazi German regime. Never again, we said. We bound our country by solemn promise to protect legitimate asylum seekers. Our current president does not seem to know or care about that.

(e) The Secretary shall take appropriate action to require that all Department of Homeland Security personnel are properly trained on the proper application of section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. 1232) and section 462(g)(2) of the Homeland Security Act of 2002 (6 U.S.C. 279(g)(2)), to ensure that unaccompanied alien children are properly processed, receive appropriate care and placement while in the custody of the Department of Homeland Security, and, when appropriate, are safely repatriated in accordance with law.

Sec. 12. Authorization to Enter Federal Lands. The Secretary, in conjunction with the Secretary of the Interior and any other heads of agencies as necessary, shall take all appropriate action to:

(a) permit all officers and employees of the United States, as well as all State and local officers as authorized by the Secretary, to have access to all Federal lands as necessary and appropriate to implement this order; and

(b) enable those officers and employees of the United States, as well as all State and local officers as authorized by the Secretary, to perform such actions on Federal lands as the Secretary deems necessary and appropriate to implement this order.

Sec. 13. Priority Enforcement. The Attorney General shall take all appropriate steps to establish prosecution guidelines and allocate appropriate resources to ensure that Federal prosecutors accord a high priority to prosecutions of offenses having a nexus to the southern border.

It's hard to overstate the overly aggressive prosecution of immigration offenses already occurring every day in the United States. Prosecutions for illegal entry, illegal reentry and other immigration offenses made up 52 percent of all federal prosecutions in 2016, totaling 69,636 prosecutions. The criminal prosecution of asylum seekers violates U.S. obligations under international law.
Sec. 14. Government Transparency. The Secretary shall, on a monthly basis and in a publicly available way, report statistical data on aliens apprehended at or near the southern border using a uniform method of reporting by all Department of Homeland Security components, in a format that is easily understandable by the public.

Sec. 15. Reporting. Except as otherwise provided in this order, the Secretary, within 90 days of the date of this order, and the Attorney General, within 180 days, shall each submit to the President a report on the progress of the directives contained in this order.

Sec. 16. Hiring. The Office of Personnel Management shall take appropriate action as may be necessary to facilitate hiring personnel to implement this order.

Sec. 17. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,

Questions about this document? Contact Heidi Altman, director of policy for NJJC, at haltman@heartlandalliance.org.
Executive Order: Enhancing Public Safety in the Interior of the United States

Annotated by the National Immigrant Justice Center

January 25, 2017

EXECUTIVE ORDER

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ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED STATES

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA) (8 U.S.C. 1101 et seq.), and in order to ensure the public safety of the American people in communities across the United States as well as to ensure that our Nation's immigration laws are faithfully executed, I hereby declare the policy of the executive branch to be, and order, as follows:

The basic premise of this Order is wrong. Our communities are safest when all members receive due process, do not feel compelled to live outside the mainstream, and can trust in police. Our immigration laws, like all the laws of the nation, should be executed in a manner that honors our core American values. Consider the story of Nely1 a recipient of Deferred Action for Childhood Arrivals who was a victim of armed robbery when an assailant entered the store where she worked in Indiana. Because she trusted police would give her aid and not try to deport her or her undocumented parents, she called 911, reported the crime, and provided police with all the information she could to support the investigation. What message are Nely and her family to take from this Order?

1 All client names have been changed. Contact NIJC for further information about these matters.
Section 1. Purpose. Interior enforcement of our Nation’s immigration laws is critically important to the national security and public safety of the United States. Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety. This is particularly so for aliens who engage in criminal conduct in the United States.

Rhetoric that conflates migration with criminality is rooted in fear, not reality. Immigrants commit less crime than native-born Americans. To be precise about this: “A variety of different studies using different methodologies have found that immigrants are less likely than the native-born to engage in either violent or nonviolent ‘antisocial’ behaviors ... and that immigrant youth who were students in U.S. middle and high schools in the mid-1990s and are now young adults have among the lowest delinquency rates of all young people.” This quote is from “The Criminalization of Immigration in the United States,” published in 2015.

Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.

The President has it backward. In fact, sanctuary jurisdictions are well within their legal rights and exercising sound policy judgment by limiting cooperation with federal immigration detainers that are issued without judicial warrants and systemically violate the Constitution and federal law. For background, see NIJC and the American Immigration Lawyers Association’s Policy Brief entitled, “Immigration and Customs Enforcement’s Detainer Program Operates Unlawfully Despite Nominal Changes.” Moreover, the “fabric of our republic” is bound together by immigrant threads. The fabric unravels without immigrant contributions. What do Rupert Murdoch, Charlize Theron, retired Gen. John Shalikashvili, and Madeleine Albright have in common? All came to the United States as immigrants.

Sanctuary jurisdictions are about safety, protection, and community. What they most certainly do not do is “cause harm to the American people.” In fact, a study released by the Center for American Progress just after the issuance of this Order found that Sanctuary jurisdictions (defined as counties that do not cooperate with federal immigration enforcement by holding individuals in jail longer than they would otherwise be released) have lower crime rates than similar jurisdictions without sanctuary policies.
Tens of thousands of removable aliens have been released into communities across the
country, solely because their home countries refuse to accept their repatriation. Many of
these aliens are criminals who have served time in our Federal, State, and local jails. The
presence of such individuals in the United States, and the practices of foreign nations that
refuse the repatriation of their nationals, are contrary to the national interest.

Although Federal immigration law provides a framework for Federal-State partnerships
in enforcing our immigration laws to ensure the removal of aliens who have no right to be
in the United States, the Federal Government has failed to discharge this basic sovereign
responsibility. We cannot faithfully execute the immigration laws of the United States if
we exempt classes or categories of removable aliens from potential enforcement. The
purpose of this order is to direct executive departments and agencies (agencies) to
employ all lawful means to enforce the immigration laws of the United States.

This is simply disconnected from reality. The federal government under President Obama's
tenure in fact engaged in historic numbers of aggressive immigration enforcement
operations. In 2016 alone, our government held 352,882 immigrants in detention and
deported 240,255. President Obama deported more individuals from the United States than
any previous president. For support on this, look no further than ICE's own enforcement
statistics. And if you're still skeptical, even snopes.com agrees.

Sec. 2. Policy. It is the policy of the executive branch to:

(a) Ensure the faithful execution of the immigration laws of the United States, including
the INA, against all removable aliens, consistent with Article II, Section 3 of the United
States Constitution and section 3331 of title 5, United States Code;

(b) Make use of all available systems and resources to ensure the efficient and faithful
execution of the immigration laws of the United States;

(c) Ensure that jurisdictions that fail to comply with applicable Federal law do not
receive Federal funds, except as mandated by law;

(d) Ensure that aliens ordered removed from the United States are promptly removed;
and

(e) Support victims, and the families of victims, of crimes committed by removable
aliens.
See the Office for Victims of Crime, a component of the Office of Justice Programs, U.S. Department of Justice.

Sec. 3. Definitions. The terms of this order, where applicable, shall have the meaning provided by section 1101 of title 8, United States Code.

Sec. 4. Enforcement of the Immigration Laws in the Interior of the United States. In furtherance of the policy described in section 2 of this order, I hereby direct agencies to employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens.

Sec. 5. Enforcement Priorities. In executing faithfully the immigration laws of the United States, the Secretary of Homeland Security (Secretary) shall prioritize for removal those aliens described by the Congress in sections 212(a)(2), (a)(3), and (a)(6)(C), 235, and 237(a)(2) and (4) of the INA (8 U.S.C. 1182(a)(2), (a)(3), and (a)(6)(C), 1225, and 1227(a)(2) and (4))...

These statutory citations refer to the grounds of inadmissibility and deportability related to criminal convictions and terrorism-related activities and the grounds of inadmissibility related to the procurement of immigration benefits via fraud. These priorities were more or less the priorities of the Obama Administration. It is troubling that these grounds also include EVERY applicant for admission to the United States. To put that in plain language: the President of the United States has just declared that all arriving asylum seekers are priorities for enforcement.

...as well as removable aliens who:

(a) Have been convicted of any criminal offense;

ANY criminal offense? Speeding? Underage drinking? Driving with an expired license? We don't see a statute of limitations here either, so this provision sweeps in offenses that occurred years or decades ago. According to the Pew Research Center, about two-thirds of the undocumented population has resided in the United States for more than a decade. The consequences of deportation are stark—often permanently separating children from their parents and tearing communities apart. In most cases, the punishment of deportation is vastly disproportionate to the offense itself.
(b) Have been charged with any criminal offense, where such charge has not been resolved;

Again, any charge, no matter how minor. People will be targeted for removal immediately rather than giving the presumed-innocent person an opportunity to prove their innocence. When we abandon the principle of a presumption of innocence our whole justice system is undermined.

(c) Have committed acts that constitute a chargeable criminal offense;

Again, any criminal offense – which seems to include any unlawful entry. And note the lack of details regarding who makes the determination that such acts have been committed and what the standard is for such a determination. Did you ever drink a beer during college? Did you ever drive 80mph in a 65mph zone? Deport.

(d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;

(e) Have abused any program related to receipt of public benefits;

Terms like “abuse” are the kind of ambiguous blather that leaves all parties confused and renders the system unworkable. Noncitizens are generally ineligible for public benefits, except in a few states that allow limited classes of noncitizens to obtain them.

(f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or

(g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

This permits a low-level bureaucrat to act as judge, jury, and executioner. And the President has just declared that unauthorized immigration is a threat to public safety and national security. So basically, everyone.

Recap: These enforcement priorities put a target on the back of every single person arriving at our borders – including bona fide asylum seekers – and every undocumented person in the interior.
Sec. 6. Civil Fines and Penalties. As soon as practicable, and by no later than one year after the date of this order, the Secretary shall issue guidance and promulgate regulations, where required by law, to ensure the assessment and collection of all fines and penalties that the Secretary is authorized under the law to assess and collect from aliens unlawfully present in the United States and from those who facilitate their presence in the United States.

Targeting people who are compelled to help their immigrant neighbors according to their deeply held religious beliefs may violate the Religious Freedom Restoration Act (RFRA). To see this argument spelled out, see the U.S. Catholic Conference of Bishops et al amicus brief to the Supreme Court in Arizona v. United States.

Sec. 7. Additional Enforcement and Removal Officers. The Secretary, through the Director of U.S. Immigration and Customs Enforcement, shall, to the extent permitted by law and subject to the availability of appropriations, take all appropriate action to hire 10,000 additional immigration officers, who shall complete relevant training and be authorized to perform the law enforcement functions described in section 287 of the INA (8 U.S.C. 1357).

The President’s Executive Orders are at odds with themselves. Earlier this week, the President issued a federal hiring freeze which is almost certain to mean that the Department of Justice cannot hire new Immigration Judges to process the cases that will arise out of the apprehensions made by these “additional enforcement and removal officers.” See the Guardian’s reporting on this contradiction. Our immigration courts are already in crisis, backlogged by more than 500,000 cases. Julia Preston of the New York Times describes our immigration courts as “a justice system in collapse.” But apparently things are about to get a lot worse.

Sec. 8. Federal-State Agreements. It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.

This is misguided. Immigration law is complex and determining the immigration status of any individual can be a difficult task, opening the door to massive liability for local law enforcement agencies acting as federal immigration agents. See, Federal Judge Enters Judgment for $20,000 to U.S. Citizen who Spent a Week in Immigration Detention. What’s
more, assuming the role of a federal immigration enforcement officer poisons the relationship of local law enforcement with immigrant communities, making community policing even more difficult if not impossible.

(a) In furtherance of this policy, the Secretary shall immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g) of the INA (8 U.S.C. 1357(g)).

287(g) is the section of the Immigration and Nationality Act that permits local law enforcement agencies to enter into agreements to deputize their police officers to enforce federal immigration laws. It turns local jails into immigration detention centers. The program and its problems are described well by the American Immigration Council online here. Simply put, this program undermines the safety of the communities it claims to protect. 287(g) agreements, in operation, inevitably breed mistrust between communities and the police who strive to protect them. Investigations by the DHS Office of the Inspector General and Government Accountability Office have revealed the many ways in which 287(g) agreements result in racial profiling and other civil rights abuses. This is a program that should have been terminated years ago, not expanded.

(b) To the extent permitted by law and with the consent of State or local officials, as appropriate, the Secretary shall take appropriate action, through agreements under section 287(g) of the INA, or otherwise, to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary. Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.

See above. Oh and we forgot to mention: Section 287(g) makes it harder for police to do their job. The Major Cities Chiefs Police Association has formally adopted the position that state and local police involvement in enforcing immigration law undermines immigrant community trust and cooperation with police and significantly diverts resources from their core mission to create safe communities.

(c) To the extent permitted by law, the Secretary may structure each agreement under section 287(g) of the INA in a manner that provides the most effective model for enforcing Federal immigration laws for that jurisdiction.
Sec. 9. Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.

(a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.

8 U.S.C. 1373 is a much more limited law than the President seems to think it is. This provision — on its face — only prohibits state and local governments and agencies from enacting laws or policies that limit the sharing of information with DHS about “the immigration or citizenship status” of any person. Seriously it’s true — read the statute. Also the Department of Justice has publicly affirmed the legality of local policies that limit participation with federal immigration detainers. You can listen to the former Principal Deputy Assistant Attorney General attesting as much to Congress at time stamp 1:28:18.

Having said all this, we still would likely to politely remind the President that forcing localities to cooperate with federal immigration enforcement is unlawful under the Tenth Amendment of the United States. Forcing localities to cooperate by coercion, through the stripping of federal funds let’s say, is no less unlawful. Three law professors recently explained this well in an op-ed in the Washington Post.

Some people might say:

"Every violation of state sovereignty by federal officials is not merely a transgression of one unit of government against another; it is an assault on the liberties of individual Americans... [Federal] grants turn state and local elected officials into agents of the federal government [and] transforms recipients into appendages of the Washington bureaucracy. We call upon Congress to help a Republican president to reduce and ultimately eliminate this system of conditioned grants so that state and local taxpayers can decide for themselves what is best for their own communities."
But that was just the 2016 Republican Platform at pp. 15 – 16:

(b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.

More fear mongering. See above.

(c) The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.

Sec. 10. Review of Previous Immigration Actions and Policies. (a) The Secretary shall immediately take all appropriate action to terminate the Priority Enforcement Program (PEP) described in the memorandum issued by the Secretary on November 20, 2014, and to reinstitute the immigration program known as "Secure Communities" referenced in that memorandum.

In case you forgot how widely reviled the Secure Communities program was, check out just this one example of many opinion pieces railing against the program in USA Today in 2011. When then-DHS Secretary Johnson announced the repeal of Secure Communities in 2014 he noted the serious legal problems that plagued Secure Communities, a program whose "very name has become a symbol for general hostility toward enforcement of our immigration laws." The President and DHS Secretary Kelly are on notice that NIJC and our partners will be vigilant in holding them accountable to the many illegalities that are sure to follow this pronouncement. Even Secure Communities’ replacement program, the Priorities Enforcement Program, has operated via a detainer program that is systemically in violation of the Fourth Amendment, due process protections, and the Immigration and Nationality Act. For a description of the constitutional problems plaguing these programs, see the AILA/NIJC Policy Brief entitled "Immigration and Customs Enforcement’s Detainer Program Operates Unlawfully Despite Nominal Changes."

Oh and check out this decision issued the day before this Order from a federal judge in Rhode Island finding ICE and the local Department of Corrections Director to have violated the Fourth Amendment in holding a naturalized U.S. citizen in jail for 24 hours under an immigration detainer issued without any probable cause finding.
(b) The Secretary shall review agency regulations, policies, and procedures for consistency with this order and, if required, publish for notice and comment proposed regulations rescinding or revising any regulations inconsistent with this order and shall consider whether to withdraw or modify any inconsistent policies and procedures, as appropriate and consistent with the law.

(c) To protect our communities and better facilitate the identification, detention, and removal of criminal aliens within constitutional and statutory parameters, the Secretary shall consolidate and revise any applicable forms to more effectively communicate with recipient law enforcement agencies.

Sec. 11. Department of Justice Prosecutions of Immigration Violators. The Attorney General and the Secretary shall work together to develop and implement a program that ensures that adequate resources are devoted to the prosecution of criminal immigration offenses in the United States, and to develop cooperative strategies to reduce violent crime and the reach of transnational criminal organizations into the United States.

It's hard to over-state the overly aggressive prosecution of immigration offenses already occurring every day in the United States. Prosecutions for illegal entry, illegal reentry and other immigration offenses made up 52% of all federal prosecutions in 2016, totaling 69,636 prosecutions.

Sec. 12. Recalcitrant Countries. The Secretary of Homeland Security and the Secretary of State shall cooperate to effectively implement the sanctions provided by section 243(d) of the INA (8 U.S.C. 1253(d)), as appropriate. The Secretary of State shall, to the maximum extent permitted by law, ensure that diplomatic efforts and negotiations with foreign states include as a condition precedent the acceptance by those foreign states of their nationals who are subject to removal from the United States.

Sec. 13. Office for Victims of Crimes Committed by Removable Aliens. The Secretary shall direct the Director of U.S. Immigration and Customs Enforcement to take all appropriate and lawful action to establish within U.S. Immigration and Customs Enforcement an office to provide proactive, timely, adequate, and professional services to victims of crimes committed by removable aliens and the family members of such victims. This office shall provide quarterly reports studying the effects of the victimization by criminal aliens present in the United States.

More fear-mongering.
Sec. 14. Privacy Act. Agencies shall, to the extent consistent with applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.

This provision invites vigilantism by threatening to expose the private information of noncitizens. It also puts individuals who are escaping persecution or are victims of crime at risk of being identified and further harmed by their persecutors. When we allow the erosion of rights for the most vulnerable among us, our entire population suffers.

Sec. 15. Reporting. Except as otherwise provided in this order, the Secretary and the Attorney General shall each submit to the President a report on the progress of the directives contained in this order within 90 days of the date of this order and again within 180 days of the date of this order.

Sec. 16. Transparency. To promote the transparency and situational awareness of criminal aliens in the United States, the Secretary and the Attorney General are hereby directed to collect relevant data and provide quarterly reports on the following:

(a) the immigration status of all aliens incarcerated under the supervision of the Federal Bureau of Prisons;

(b) the immigration status of all aliens incarcerated as Federal pretrial detainees under the supervision of the United States Marshals Service; and

(c) the immigration status of all convicted aliens incarcerated in State prisons and local detention centers throughout the United States.

Sec. 17. Personnel Actions. The Office of Personnel Management shall take appropriate and lawful action to facilitate hiring personnel to implement this order.

Sec. 18. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,

*Questions about this document? Contact Heidi Altman, Director of Policy for NIJC, at haltman@heartlandalliance.org.*