Center for Immigration Studies February 2017

President Trump's Immigration-Related Executive Orders

Part 1: Border security and immigration enforcement improvements

By Dan Cadman

In his campaign to win the presidency, candidate Donald Trump spoke often and at length about the immigration problems confronting American society, including his belief that the policies put in place by the Obama administration ran contrary to the interests of the American people.

His words hummed like a tuning fork to many voters and Mr. Trump's positions on immigration, although often controversial, helped propel him to the White House.

Many wondered if, having won the presidency, he would forget his promises. In the span of a few days, that doubt was dispelled as the first two of several executive orders (EOs) on immigration were signed by our new chief executive, "Border Security and Immigration Enforcement Improvements", and "Enhancing Public Safety in the Interior of the United States".

This document examines and discusses the key points of the executive order on border security. Others will follow dealing with the additional executive orders issued to date.

Section 1 lays out the purpose of the executive order — ensuring national security and public safety by effectively policing the border and combatting transnational criminal smugglers. The document does not mince words: "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."

Section 2 establishes national policy in five succinct subsections:

a) Secure the southern border with a wall and personnel;
b) Detain individuals arrested entering illegally;
c) Expedite decisions about those arrested;
d) Quickly deport those ordered removed; and
e) Cooperate with state and local governments that aid federal efforts.

Section 3 defines terms used in the remainder of the executive order, most of which have the meanings ordinarily understood and/or already defined by law and regulation. A few are worth excerpting for specific mention, however. For instance:

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

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Clearly the administration is cognizant that, because of the terrain, which includes desert flatlands, rocky promontories and (not least) the Rio Grande, the barrier may require different forms in different portions of the southern border.

> *(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*. (Emphasis added.)

The insistence on 100 percent prevention as the only acceptable definition of operational control of the border substantially raises the bar from previous administrative and failed legislative attempts to define "operational control" of the border in lesser terms. This is significant not only in providing a marker for the high expectations of the new White House, but also because past congressional attempts to enact "comprehensive reform", such as the notorious Gang of Eight bill, linked broad-based amnesty to fuzzy definitions of "operational control", which virtually ensured that amnesty would take place while actually guaranteeing nothing where effective border enforcement was concerned.

Section 4 reverts to the policy laid out in Section 2(a) to erect a physical barrier on the southern border, and directs the secretary of the Department of Homeland Security (DHS) — the newly confirmed James Kelly, former Marine general — to immediately begin design, planning, and construction using existing sources of funding, while also projecting long-term requirements. The secretary is also directed to provide the president, within six months, a comprehensive study of the status quo and commensurate strategy to achieve the previously defined operational control.

Section 5 requires the secretary to identify funds and allocate resources to immediately begin to construct, or otherwise procure (e.g., via lease or contractual arrangements), detention facilities proximate to the southern border to hold those apprehended attempting to enter illegally.

Significantly, this section obliges the DHS secretary to post asylum officers to such detention centers to hear claims made by interdicted entrants and render prompt "credible fear" decisions; and, concurrently, requires the attorney general to assign immigration judges to hear cases of aliens seeking asylum who fail the credible fear test yet wish to pursue the claim in the immigration court. (Note, though, that consistent with the directive to "expedite decisions" about interdicted illegal border crossers, it is likely that aliens who do not seek asylum will be subject to the expedited removal process, which is outside the purview of immigration judges.)

Section 6 ends "catch and release" — the practice of conditionally releasing apprehended aliens pending hearings, which in practical terms guaranteed delays of up to several years due to backlogs in the immigration courts for non-detained cases — by directing the DHS secretary to detain interdicted illegal border crossers pending the outcome of their court case (in the event they are granted some kind of relief, such as asylum), or until removed if so ordered.

This is a welcome step. For at least three years now, our southern border has been confronted with a tsunami of Central American and other non-Mexican entrants, including minors and family units. The Obama administration's mishandling of the situation through resettlement of these individuals, ostensibly under orders to appear in immigration court sometime in the distant future, has put the federal government in the position of fulfilling the aim of smuggling and transportation, indifferent to the recognition that by doing this, they were encouraging thousands of others to follow suit. Worse, it rewarded illegal alien parents in the United States for the dubious act of placing their vulnerable children into the hands of cartels and criminal gangs to move them through Mexico and into the United States to be dropped off for U.S. agents to find and deliver. Some of those parents were extorted for additional monies; some of the women and children were physically or sexually abused along the way; and some never made it due to indifferent smugglers who abandoned them amidst the harsh geographic conditions in the cross-border deserts of Mexico and the United States.

Section 7 is a kind of parallel to the end of "catch and release" in that it ends the practice of paroling into the United States aliens who approach inspectors at ports of entry in order to seek entry without possessing the requisite visas or permits, usually by means of claiming asylum.

A prime example: Up until the last days of the Obama administration, Cuban nationals who made their way to U.S. land ports of entry bordering with Mexico could approach a Customs and Border Protection (CBP) officer, and be paroled into

the United States pending a hearing, which in fact then never took place because once paroled, the "Cuban Adjustment Act clock would begin ticking, and after one year in the U.S. in a parole status, that alien was entitled to apply for his green card as a matter of law (see here and here.)

However, other non-Mexican nationals seeking asylum were also routinely paroled into the country, notwithstanding the fact that they were approaching the United States from Mexican soil unhindered by Mexican officials (and often, in fact, granted "transit" permits to allow them to get as far as the ports of entry), and despite the fact that Mexico, like the United States, is a signatory to the international convention on refugees and asylees and has no lesser burden than we do to provide safe haven to individuals truly seeking refuge from persecution. (Those same protocols oblige the individuals themselves to seek safe haven at the first opportunity, which logically would imply doing so in Mexico — an obligation that both the individuals and Mexican officials have ignored.) Section 7 will require U.S. inspectors to turn such individuals back after scheduling a hearing for them to return and attend, at which they may make their claim.

Section 8 directs the DHS secretary to expeditiously hire, train, and station 5,000 additional Border Patrol agents, subject to funds appropriated by Congress for that purpose. The additional agents will presumably be a part of the human force whose job will be to reinforce the new barrier and track down those who manage nonetheless to penetrate the border.

Section 9 directs all departments (including, but not limited to DHS, and the Defense, Justice, and State Departments) to identify and quantify both *direct and indirect* foreign aid given to Mexico in the past five years and provide that information to the secretary of State within 30 days. The secretary of State has another 30 days to consolidate that information into a single list and provide it to the president for consideration. Although the EO stops short of saying so, it takes little deductive reasoning to conclude that withholding items on the list may form one way in which Mexico "pays" for construction of the wall, consistent with the president's repeated campaign promise.

Section 10 authorizes and directs the DHS secretary to engage in discussions with state and local governments to negotiate agreements conducted under Section 287(g) of the Immigration and Nationality Act (INA). This provision permits delegation of immigration enforcement powers to state and local law enforcement officials.

The 287(g) program was highly successful until, for all intents and purposes, it was dismantled by the Obama administration. Breathing new life into the program is an excellent step in the right direction. While it will not budge those state or local police and sheriff's agencies who, by choice or by political direction of their leaders, fall into the sanctuary side of the equation, it will be welcomed by many other enforcement organizations. This is because the statutory delegation of authority under Section 287(g) specifies that state and local officers enjoy the same immunities covering federal officers, when they are performing immigration functions. Thus, the threat of lawsuits from various migrant advocacy groups, which has kept many state and local agencies from full cooperation with federal immigration authorities, recedes with the negotiation of such an agreement.

Section 11 directs the DHS secretary to end the systematic abuse of immigration parole and asylum as mechanisms to defeat removal and repatriation of illegal aliens. He is instructed to ensure that regulations and policy follow the "plain language" of the law, rather than being used creatively to sidestep statutory requirements, and to use the expedited removal processes to repatriate aliens who enter the United States illegally, without referral to the immigration courts, when they have no statutory basis to stay.

The secretary is also directed to ensure that all officers are trained to understand the distinction between aliens who have been smuggled into the United States vs. those who have been "trafficked"— a legal term that entitles trafficked aliens to protections unavailable to aliens who have simply been smuggled. This is a significant directive, in that the provisions of law covering trafficked aliens have been routinely and inappropriately applied to nearly every unacompanied minor arriving at the southern border.

The section focuses on abuses that grew to quantum proportions under the prior administration. For instance, Section 212(d)(5) of the INA makes clear that grants of parole are to be limited, and only on "case-by-case basis for urgent humanitarian reasons or significant public benefit"; yet the Obama administration used parole as a catch-all granted by the thousands. It was even used to authorize entry of hundreds of individuals under the so-called Central American Minors program (many of whom were in fact adults) when they failed to meet the legal requirements for refugee status.

Similarly, in recent years the "credible fear" test used to pre-screen aliens as to their eligibility for asylum has been so abused that the number of aliens found to have such a credible fear has hovered in the 90th percentiles. Needless to say the number of applicants for asylum, particularly at U.S. land borders, skyrocketed.

Section 12 directs the DHS and Interior secretaries to ensure that federal immigration agents, as well as state and local officers delegated to perform immigration enforcement functions, are given access to federal lands for the purpose of performing their border-related mission and duties.

One might question why this would be needed, but in fact in recent years Border Patrol agents have been denied access to various national parks and monuments deemed environmentally sensitive. Of course, this had the lopsided result of only illegal aliens and cartels using those lands — nothing being so attractive to smugglers and criminals as a law enforcement no-go zone — leaving along the way trash, human feces, discarded personal items, drug paraphernalia, shell casings, and sometimes, ominously, pieces of underclothing suggestive of rape or other sexual abuse of the aliens being smuggled, not to mention the occasional corpse of someone who succumbed to the elements en route. Section 12 rights the balance on access to federal lands for purposes of patrolling the border.

Section 13 directs the attorney general to assure that United States attorneys dedicate a high priority to prosecuting immigration- and border-related offenses. This is an important directive given the prior administration's deliberate de-emphasis on prosecution of crimes. For instance, Syracuse University's Transactional Records Access Clearinghouse recently reported: "ICE Referred Criminal Prosecutions Down 41 Percent Over Last Five Years".

Section 14 establishes governmental transparency by requiring DHS to publicly report, monthly, "statistical data on aliens apprehended at or near the southern border using a uniform method of reporting ... that is easily understandable by the public."

After years of phony and misleading reporting, and "book-cooking" by officials at DHS and its component agencies, this is long overdue, and something that even scholars, researchers, and analysts on the left will welcome.

One only hopes that future EOs will extend the requirement to U.S. Citizenship and Immigration Services, which has played similar games in its publication of statistics relating to the relative rates of grants and denials across the range of benefits it administers.

Section 15 requires the DHS secretary to submit to the president a progress report within 90 days of issuance of the EO, and the attorney general to submit a similar report within 180 days.

Section 16 directs the Office of Personnel Management to facilitate the hiring of the Border Patrol agents previously referred to in Section 8.

Section 17 contains various provisos asserting that nothing in the EO will be construed to impair the legal authorities of federal agencies, or the functions of the Office of Management and Budget, and that it will be implemented consistent with congressional appropriations. Finally, it states that the provisions of the EO do not establish any claim or right by any party against the United States.

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Part 2 of this series of analyses will focus on the executive order "Enhancing Public Safety In The Interior of The United States".