President Trump's Immigration-Related Executive Orders

Part 2: Enhancing public safety in the interior of the United States

By Dan Cadman

Newly inaugurated President Donald Trump wasted no time in making good on many of his campaign promises related to the divisive issue of immigration to the United States. He did this by issuing a series of Executive Orders (EOs). His first two, both issued on January 25, were "Border Security and Immigration Enforcement Improvements" and "Enhancing Public Safety in the Interior of the United States".

This analysis is the second in a series that examines the president's EOs, and considers the companion to the border control EO, "Enhancing Public Safety in the Interior of the United States", which deals with public safety in the interior of the United States.

Section 1 outlines the purpose of the executive order: "to direct executive departments and agencies ... to employ all lawful means to enforce the immigration laws [in the interior] of the United States."

As with its border security companion, Section 1 faults federal inactivity in failing to do so: "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 section outlines specific problem areas:

- Sanctuary jurisdictions across the United States that willfully violate federal law in an attempt to shield aliens from removal from the United States;
- Removable aliens who have been released into communities across the country, solely because their home countries refuse to accept their repatriation; and
- Willful failure to faithfully execute the immigration laws of the United States because various classes or categories of removable aliens were exempted from potential enforcement by prior executive actions.

The phrase "faithfully execute the [immigration] laws of the United States" is repeated several times throughout the document. The words are derived from Article II, Section 3 of the Constitution, which obliges the president (and consequently all his subordinates in the executive branch) to "take Care that the Laws be faithfully executed." This is variously known as the "Faithful Execution" or the "Take Care" clause.

The repetition is important because it reflects the president's view (as well as that of a number of observers, including the author's) that the prior president and his executive branch routinely violated the Take Care clause by deliberately exempting whole segments of the illegal alien populace in the United States from enforcement of the immigration laws.

Dan Cadman is a fellow at the Center for Immigration Studies.

Section 2 establishes national policy in five subsections:

a) Ensure the faithful execution of the immigration laws of the United States against all removable aliens;

b) Use all available systems and resources to ensure efficient execution of the immigration laws;

c) Withhold federal funds from jurisdictions that fail to comply with applicable federal law;

d) Ensure prompt removal of those ordered removed; and

e) Provide support for victims, and the families of victims, of crimes committed by removable aliens.

Section 3 specifies that the definition of terms used in the EO are those found in the Immigration and Nationality Act (INA), 8 U.S.C. Sec. 1101 et seq.

Section 4 reiterates the expectation that all agencies will faithfully execute the immigration laws i*n the interior of the United States*. This assertion is a direct nod to agents of Immigration and Customs Enforcement (ICE), a Department of Homeland Security (DHS) bureau that enforces immigration laws in the interior, signaling to those agents that they are being freed of the fetters imposed on them by various executive actions and policy memoranda issued by the prior administration and its DHS and ICE leaders.

Section 5 establishes the enforcement and removal priorities of the new president, including aliens:

a) Convicted of crimes;

b) Charged but not yet convicted, but who are nonetheless deportable for INA violations;

c) Who commit acts constituting the essential elements of a crime whether or not convicted;

d) Who have engaged in fraud or willful misrepresentations before a government agency;

e) Abusing public benefits programs;

f) Under outstanding orders of removal who fail to comply with their obligation to depart; or

g) Who pose a risk to public safety or national security in the judgment of the immigration officer.

Some of these priorities merit additional comment.

Items b) and c), for instance, are not inventions made up out of whole cloth, but are already provided for in law. INA Section 212(a)(2)(A)(i) asserts that "any alien ... who admits having committed, or who admits committing acts which constitute the essential elements of ... a crime involving moral turpitude ... or an attempt or conspiracy to commit such a crime, or ... a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance ... is inadmissible." INA Section 237(a)(1) provides that aliens who are inadmissible or present in violation of law are also deportable.

Item g) is also interesting in that it vests the determination on whether an alien poses a public safety or national security risk *with the immigration officer.* There is precedent for this within the visa-adjudication arena, which vests the decision as to whether or not to grant or deny a visa with the interviewing consular officer. It reflects a belief that the facts and circumstances that prevail are often best known by the involved field officer who is the "first responder" and as such is not extraordinary — except insofar as it reflects a latitude of discretion that has been denied field agents for the past eight years.

Section 6 requires the DHS secretary to promulgate regulations and directives within one year of the EO "to ensure the assessment and collection of all (civil) fines and penalties ... authorized under the law ... from aliens unlawfully present in the United States *and from those who facilitate their presence* in the United States." (Emphasis added.)

This short provision reflects a recognition that there are multiple fines and penalties established throughout the INA that in the past have almost never been levied. Collectively, these fines and penalties may or may not add up to a substantial amount (depending on the difficulty in actually collecting the amounts assessed), but they serve another purpose as well, in that they form an additional mechanism to demagnetize the attractiveness of violating U.S. immigration laws. What is more, the fines and penalties potentially affect a significant variety of players in the immigration system: the aliens themselves; smugglers; employers of unauthorized workers; and shipping lines, airlines, and ground transportation companies that are sloppy about their crew hiring or passenger boarding practices, to name just a few.

Section 7 directs the DHS secretary to expeditiously hire, train, and station 10,000 additional ICE enforcement and removal agents, subject to funds appropriated by Congress for that purpose. The additional agents will be charged with immigration enforcement responsibilities in the interior of the United States, and form a parallel to the Border Patrol augmentation ordered by the president's border control executive order.

Note that the order specifically directs the hiring of "enforcement and removal agents", as opposed to agents within the other major division of ICE: Homeland Security Investigations (HSI). This is a recognition that the HSI agents (the majority of whom emanated from the former Customs Service) have, since the very formation of ICE, steadfastly resisted doing any significant proportion of Title 8 (INA enforcement) work, often considering it "demeaning". One imagines, though, that at this juncture, the HSI managers are no doubt doing a significant amount of pondering and perhaps scheming on just how to get their hands on a portion of those 10,000 new resources — even though, given the 13 years of past history since ICE was created, there is every reason to doubt that, once apportioned to HSI, the new resources would result in any meaningful immigration enforcement efforts.

Section 8 is the parallel to Section 10 of the EO on border control, asserting that it is the president's intention 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."

The section 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 of law permits delegation of immigration enforcement powers to state and local law enforcement officials. The section also provides that such agreements should be structured in a way that best fits the needs of the particular agency with which it is being negotiated.

The program is an effective force multiplier for federal agents, who cannot be everywhere all the time; there will never be enough of them. But it also aids state and local officers in the performance of their duties.

Consider one example: State police officers patrolling a busy interstate observe a van headed north. It is riding low, suggesting it's heavily laden, and it's in poor condition. The driving is erratic, and when they pull abreast of the driver, his facial expression and body motions strongly suggest nervousness. They pull over the van for a broken taillight and discover 20 aliens packed in the back, elbow-to-elbow. With 287(g) delegation, these state officers are clearly empowered to take custody of everyone, including the driver-smuggler, and to hold the scene until backup can arrive to aid in transporting the driver and passengers to a highway patrol station. Meanwhile, ICE is alerted so that agents can take possession of the aliens and do what is necessary to process the illegal border crosser passengers for removal, and initiate an alien smuggling prosecution against the driver (and any confederates who may also be in the van, "riding shotgun").

The 287(g) program was highly successful until it was dismantled by the Obama administration. Breathing new life into the program is an excellent step. 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, but it will be welcomed by many other enforcement organizations.

What is more, the statutory delegation of authority under Section 287(g) specifies that state and local officers enjoy the same immunities that cover 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 fearing fallout from full cooperation with federal immigration authorities, recedes with the negotiation of such an agreement.

Section 9 tackles the thorny issue of "sanctuary" jurisdictions. It states that "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." This provision of law is one of two that prohibits governments at any level from forbidding employees to communicate with federal immigration authorities about the status of an alien. (The other statute is 8 U.S.C. Sec. 1644, but Sec. 1373 is most frequently cited in the context of sanctuary jurisdictions' obstruction of immigration law enforcement efforts.)

This section of the EO directs the DHS secretary and the attorney general to withhold funds from jurisdictions in violation of 8 U.S.C. 1373. To this end, the secretary is authorized to designate such jurisdictions, and the Office of Management and Budget (OMB) is directed to prepare comprehensive information on all federal monies that are provided to DHS-designated sanctuary jurisdictions. The attorney general is additionally directed to take "appropriate enforcement action" against such jurisdictions, presumably including at minimum federal lawsuits to enjoin sanctuary rules and policies.

State and local reactions to this portion of the EO have been widespread, and in some cases extreme. A few state and local governments are promising to sue to retain their funds despite their willful impedance of immigration law enforcement efforts, particularly as regards turning over alien criminals to ICE on filing of an immigration detainer. Others have begun to deny that they are sanctuaries, despite clear evidence to the contrary.

Section 10 directs revitalization of the Secure Communities program and dismantling of the Priority Enforcement Program that replaced it by order of the prior DHS secretary as a part of the infamous series of "pen-and-phone" executive actions on immigration undertaken by the Obama administration. (See here and here.)

This section also directs the DHS secretary to undertake a comprehensive review of additional regulations, executive actions, and policies with an eye toward annulling them when they are inappropriate and inconsistent with enforcement of the law and of the EO.

The requirements of this section will undoubtedly entail a close examination of the previously issued series of "prosecutorial discretion" memoranda that have resulted in the failure to initiate, as well as the suspension or closure of, many thousands of removal cases.

However, along the way, one hopes the administration will also reconsider the series of ill-considered policy decisions that have led ICE to retreat nearly wholesale from the arena of worksite enforcement (see here and here), leaving the field clear to employers to brazenly hire illegal aliens in a variety of occupations that would provide decent wages and steady work to citizens and authorized workers — building and highway construction jobs come immediately to mind — with little fear of government sanctions or penalties.

Section 11 mirrors Section 13 of the EO on border control. It directs the attorney general to ensure that United States attorneys dedicate a high priority to prosecuting immigration- and border-related offenses. As noted in my prior analysis of that EO, 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".

Significantly, though, this section goes further than the border control EO provision, because it also directs the attorney general and the DHS secretary "to develop cooperative strategies to reduce violent crime and the reach of transnational criminal organizations into the United States." There are many opportunities for interagency cooperation in this area, given the expansive reach of Mexican cartels across our border, the explosion of gang-related violence, and the flooding of our country with cheap, toxic heroin — not to mention the flow of illicit money and guns southward.

Section 12 directs the secretaries of DHS and State to work cooperatively to implement sanctions against recalcitrant countries that decline to accept, or that slow-walk repatriation processing of their citizens when being removed from the United States. Such sanctions, involving the withholding of visas, are provided for by law in INA Section 243(d), but have rarely been used.

The failure of prior administrations to make use of Section 243(d) has not gone unnoticed. There is at least one bill pending in the House that would add additional sanctions for such recalcitrant nations, by directing the withholding of foreign aid. Whether that, or similar bills, will pass remains to be seen, but it is past time for the law that is on the books be used as the tool it was intended to be.

Section 13 directs the establishment in ICE of an Office for Victims of Crimes Committed by Removable Aliens. The office is to provide timely assistance to such victims (or their survivors) and to provide quarterly reports "studying the effects of the victimization by criminal aliens present in the United States".

The section can be seen as logically related to the section on sanctuaries, in that a number of high-profile homicides have been committed by illegal aliens released to the streets by police in jurisdictions that refuse to cooperate with ICE. It also reflects the concern exhibited by candidate Trump during the presidential campaign for the families of individuals killed by illegal aliens. He is making good on his promise to them that the federal government will be responsive to their concerns.

This section is both welcome and long overdue. The position of ICE public advocate was a disgrace in that it became notorious as the last retreat for aliens and their advocates seeking to escape the consequences of removal, while blithely ignoring the concerns of citizens and lawful residents over their treatment by aliens. (See here and here.)

Let us hope that in the fullness of time, the new administration turns its eye to the USCIS Ombudsman, which has been equally ineffectual and unwilling to aid citizens (such as those victimized by one-sided marriage fraud), while going out of its way to ensure that aliens are given full service.

Section 14 requires that "[a]gencies" hew to the letter of the law where the Privacy Act is concerned. The Privacy Act makes clear that its protections only apply to "U.S. persons" who are defined as American citizens and resident aliens; thus illegal aliens and even nonimmigrants are not entitled to protection under that act.

One might think that an EO requiring agencies to abide by the law is unnecessary or redundant, but the reality is that during the Obama administration, elastic, made-to-order policies were developed out of whole cloth, which resulted in agencies, particularly but not exclusively at DHS, routinely refusing to divulge information about illegal aliens who had no claim to privacy protection under federal law.

Note that use of the phrase "agencies" without further restriction clearly suggests that this provision of the EO is intended to be applied among *all* executive agencies, and not simply at the Justice, State, or Homeland Security departments, although one wonders how those other departments and agencies — for instance, Health and Human Services, which oversees the Office of Refugee Resettlement — will be made aware of the existence of this section of the EO.

Section 15 requires the DHS secretary and the attorney general to submit to the president a progress report within 90 days of issuance of the EO, and a follow-up 90 days after that.

Section 16 is a parallel to Section 14 in the border control EO. Both establish governmental transparency requirements for the DHS secretary to publicly report clear statistical data on apprehension of immigration violators. However, the border EO focuses (appropriately) on border-related arrests, whereas Section 16 is more relevant to interior enforcement work.

By contrast with Section 14 of the border control EO, this section requires the DHS secretary and the attorney general to work jointly to produce data on the immigration status of aliens incarcerated or detained by the Federal Bureau of Prisons and U.S. Marshals Service; and by state and local prisons and detention centers nationwide.

The comprehensive and ongoing collection of such data is important, and could form the backbone of a viable national alien criminal identification-and-removal strategy. But it will be labor-intensive, and may in many instances be obstructed by state and local officials in sanctuary jurisdictions who refuse to share data on their inmates and detainees unless the anti-sanctuary provisions of this EO are aggressively pursued.

Section 17 directs the Office of Personnel Management to facilitate the hiring of the ICE enforcement and removal agents previously referred to in Section 7.

Section 18 contains various provisos asserting that nothing in the EO will be construed to impair the legal authorities of federal agencies, or the functions of OMB, and that it will be implemented consistent with congressional appropriations. Finally, it states that the provisions of the EO do not establish any substantive right or claim by any party against the United States.

* * *

Part 3 of this series of analyses will focus on the revised version of the executive order "Protecting the Nation from Foreign Terrorist Entry into the United States".