Analyzing the Kelly Policy Memoranda

"Enforcement of the Immigration Laws to Serve the National Interest"

By Dan Cadman

Two of the first Executive Orders (EOs) that newly inaugurated President Trump issued were immigration-related (he has issued four to date; five, if one were to individually count the EO that was rescinded and later revised, a subject best left for another time).

An analysis of the president's "Border Security and Immigration Enforcement Improvement" order can be found here, and an analysis of "Enhancing Public Safety in the Interior of the United States" can be found here.

On February 17, Department of Homeland Security (DHS) Secretary Kelly fleshed out some of the details by which his department and its subordinate agencies will execute those two EOs by issuing policy memoranda covering each.

An analysis of the memorandum titled "Implementing the President's Border Security and Immigration Enforcement Improvements Policies" can be found here. It is a companion to the president's border security EO.

This document examines the second policy memo, "Enforcement of the Immigration Laws to Serve the National Interest", which is a follow-up of the EO relating to interior enforcement.

Section A of the policy memorandum lays out DHS interior enforcement priorities, but begins with a preface reminding employees of their constitutional duties, as well as their oath to "well and faithfully discharge the duties of the office". The memo states:

> *Except as specifically noted ... the Department no longer will exempt classes or categories of removable aliens from potential enforcement. In faithfully executing the immigration laws, Department personnel should take enforcement actions in accordance with applicable law. ... However, in order to maximize the benefit to public safety, to stem unlawful migration and to prevent fraud and misrepresentation, Department personnel should prioritize for removal those aliens described by Congress in Sections 212(a)(2), (a)(3), and (a)(6)(C) [excludable criminals and smugglers; national security threats,terrorists and war criminals; and immigration violators], 235(b) and (c) [ineligible applicants for admission, particularly those who represent threats] and 237(a)(2) and (4) [deportable criminals and security threats] of the Immigration and Nationality Act (INA).*

Seven specific categories of removable aliens are additionally mentioned for prioritization, regardless of the actual legal grounds used to remove such individuals:

1. Convicted of any criminal offense;
2. Charged with any criminal offense that has not been resolved;
3. Committed acts that constitute a chargeable criminal offense;

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4. Engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency;

5. Have abused any program related to receipt of public benefits;

6. Are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or

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

As was noted in our analysis of the EO on interior enforcement, items 2 and 3 are not 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." This is true whether or not a conviction exists. INA Section 237(a)(1) additionally provides that aliens who are inadmissible or present in violation of law are also deportable.

It's also worth noting the secretary's statement that the legal grounds used are less important than the fact of charging and removing such individuals. There will, of course, be a nexus between the severity of the charge and amenability to posting of a bond, or even whether or not a hearing before an immigration judge is required (no such hearing is needed to expeditiously remove aggravated felons). But, as we have described previously, this is an invocation of the perfectly valid "Al Capone theory of law enforcement." Capone was widely believed to be a bootlegging gangster and murderer, but in the end he was incarcerated for tax evasion. Why he was put in jail was less important than the fact that he was removed from the street and, in doing so, his racketeering reign of terror was terminated.

Section B reiterates the importance of faithful execution of the law:

> *Congress established a comprehensive statutory regime to remove aliens expeditiously from the United States in accordance with all applicable due process of law. I determine that the faithful execution of our immigration laws is best achieved by using all these statutory authorities to the greatest extent practicable. Accordingly, Department personnel shall make full use of these authorities.*

By this, the secretary is directing that various methods of removal that fell into disfavor under the prior administration — essentially, those that do not require a hearing before an immigration judge, such as the expedited removal of aggravated felons mentioned above, and reinstatement of prior final orders of removal for prior deportees who are apprehended once again in the United States to mention just two — are to be reinvigorated in order to ensure prompt removal of public safety and national security threats, as well as recidivist violators of the immigration laws.

Section B also ends the notoriously ineffectual Priority Enforcement Program put into place by the previous DHS secretary, and restores the Secure Communities electronic fingerprint matching program that was extremely effective at timely identification of alien criminal offenders, but spectacularly unpopular with open borders groups whose voices were heard so frequently in the upper reaches of the Obama White House.

Immigration and Customs Enforcement (ICE), the agency responsible for enforcement in the interior of the United States, and the primary audience for this memo, is also directed to expand other facets of its Criminal Alien Program, including particularly the Institutional Hearing and Removal Program, wherein alien convicts' deportation cases are heard while they are still incarcerated at federal, state, and local penal facilities, thus saving ICE detention funds and speeding actual removal from the United States on their release from prison.

Section B also notes how the cross-designation program known as 287(g), which provides authority to specially designated and trained police to exercise immigration powers in the course of their duties, withered under the Obama administration. The secretary directs its resuscitation by initiating agreements with willing police and sheriff's departments and, as noted in our prior analysis of the companion Kelly policy memo, both ICE and Customs and Border Protection (CBP), primarily through the Border Patrol, are now authorized to negotiate such agreements; previously the program was limited to ICE.

One other additional important mandate in this section is a directive to end the confusing proliferation of types of "requests for information" and detainers that were collectively produced as various versions of the form I-247 under the Obama administration in efforts to sidestep the showdown between the federal government and state and local governments over sanctuary policies (prior to the Obama administration, there was only one version of the form): "However, until such forms are updated they may be used as an interim measure to ensure that detainers may still be issued, as appropriate."

Section C visits the thorny issue of prosecutorial discretion, which is the exercise of discretion *not* to pursue charges against removable aliens. Under the Obama administration, whole categories of aliens became exempt from enforcement action, thus nullifying the notion that it was an individual act of discretion, of ministerial grace appropriate to the case at hand, and turning it instead into an egregious abuse of discretion.

Although the secretary directs that enforcement agents focus on the priorities outlined in prior EOs, and within the scope previously laid out in Section A, he makes clear that

> *Department personnel have full authority to arrest or apprehend an alien whom an immigration officer has probable cause to believe is in violation of the immigration laws. They also have full authority to initiate removal proceedings against any alien who is subject to removal under any provision of the INA, and to refer appropriate cases for criminal prosecution. ... Except as specifically provided in this memorandum, prosecutorial discretion shall not be exercised in a manner that exempts or excludes a specified class or category of aliens from enforcement of the immigration laws.*"

Section D implements the portion of the president's interior enforcement EO that directs establishment of a Victims of Immigration Crime Engagement (VOICE) office. The secretary notes the inappropriate extension of the federal Privacy Act by the former administration to aliens not covered under its provisions, which resulted in "leaving victims feeling marginalized and without a voice."

The director of ICE is directed to reallocate resources previously used to advocate on behalf of illegal aliens, except as needed to comply with court orders, to VOICE and to provide victims with information about offenders, including immigration and custody status, and ensure that their concerns regarding immigration enforcement efforts are addressed. There is a proviso, however, that makes clear that the directive to provide information excludes classified and certain sensitive-but-unclassified types of information.

Although the focus of the new office is clearly on victims who have been killed, maimed, or injured and their surviving family members, it is to be hoped that VOICE will also routinely lend an ear and a hand to the victims of one-sided marriage fraud, who are sometimes physically abused but very frequently emotionally and financially devastated by such circumstances. This is an area in which these victims have indeed been left feeling marginalized and voiceless (see here, here, and here).

Section E obliges the director of ICE, in coordination with human capital officers of other agencies and the undersecretary of management for DHS to take all steps necessary to initiate the hiring of 10,000 additional enforcement and removal agents and officers, consistent with training standards and resources. To this end, they are to "develop hiring plans that balance growth and interagency attrition by integrating workforce shaping and career paths for incumbents and new hires."

Section F implements Section 6 of the president's interior enforcement EO by ordering the directors of ICE and U.S. Citizenship and Immigration Services (USCIS, the immigration benefits adjudication agency), as well as the commissioner of CBP, to collaborate on issuing guidance and promulgating regulations to ensure effective programs that assess and collect all relevant fines and penalties authorized under the law from aliens *and from those who facilitate unlawful presence of aliens in the United States.*

This is a very broad directive with a variety of avenues not in regular use. For instance, it is little noted that aliens who cross the border illegally are not only subject to criminal prosecution, if caught in the act, but also subject to civil fines and penalties (see 8 U.S.C. Section 1325(b)). While the fines are minimal, if they were collected in each and every case, the sum would be very tidy indeed. What's more, although criminal prosecution is limited to cases proximate to the border because it is not a "continuing violation," this does not appear to be the case with civil fines, as a result of which the penalty could be assessed against illegal border-crossers caught in the interior long after they cease to be prosecutable under the criminal portion of that statute.

Needless to say, the directive applies to those who facilitate the hiring of unlawful workers, but there are even civil penalties for failure to depart when-and-as ordered under 8 U.S.C. Section 1324d. There are hundreds of thousands of such aliens wandering the streets of America at present who have failed or refused to comply with outstanding orders of removal. To my knowledge, this civil penalty is rarely if ever assessed.

Section G amends existing DHS privacy policies to align them with federal law, specifically the Privacy Act, 5 U.S.C. Sec. 552a, which, at paragraph (a)(1) very clearly defines individuals within its scope as U.S. citizens and resident aliens. Under the previous administration, privacy policies were stretched out of recognition, to the point that they even were used to shelter illegal alien criminals from public and media view.

This section states: "The DHS Privacy Office will rescind the DHS Privacy Policy Guidance Memorandum, dated January 7, 2009, ... [and] the Privacy Office, with the assistance of the Office of General Counsel, will develop new guidance specifying the appropriate treatment of personal information DHS maintains in its records systems."

Section H is in some ways a continuation of Section G, in that it mandates standardization and transparency in the way ICE collects and maintains data on apprehensions and disposition of cases. The ICE director is ordered to establish such metrics using easily understood formats and uniform terminology, which will be amalgamated into monthly reports, and provided publicly at no charge:

> *At a minimum, in addition to statistical information currently being publicly reported regarding apprehended aliens, the following categories of information must be included: country of citizenship, convicted criminals and the nature of their offenses, gang members, prior immigration violators, custody status of aliens and, if released, the reason for release and location of their release, aliens ordered removed, and aliens physically removed or returned.*

Weekly reports are also ordered to be developed "using a medium that can be readily accessed without charge" of non-federal institutions and agencies that release alien criminals despite the existence of immigration detainers or requests by ICE to assume custody (sanctuary jurisdictions). Such weekly reports are to include as much data as possible surrounding an alien's immigration status and criminal history and, significantly, "all arrests, charges, or convictions occurring after the alien's release from the custody of that jurisdiction." One imagines this document will almost certainly come to be called the "Weekly Naming-and-Shaming Report" — as it should be, given the long history of harm that alien criminal recidivists have wreaked in various communities against numerous victims, after inappropriately being released by state and local police and sheriff's agencies instead of honoring the detainers.

Section I lays out the ending caveat so usual in such documents, to the effect that the policies it outlines do not create any substantive or procedural right or benefit under the law.

Like its companion border policy memo, it goes a step further than usual, though, in directing agency heads to ensure compliance with applicable law and regulations including, importantly, the Administrative Procedure Act, a federal statute that the Obama administration frequently abused or ignored. This is a welcome statement signalling the administration's intent to hew to the letter of the law.