



SUPPLEMENTAL COMMUNITY ADVISORY

DHS Implementation

Memoranda and Factsheets

March 7, 2017

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Background

On February 20, 2017, the Department of Homeland Security (DHS) issued two memoranda with the purpose of implementing the President's Executive Orders from January 25, 2016, titled *Implementing the President's Border Security and Immigration Enforcement Improvements Initiatives* ("Immigration and Border Enforcement Memo") and *Enforcement of the Immigration Laws to Serve the National Interest*, ("National Interest Memo").² In addition, on the same day, DHS published a number of Question and Answer Factsheets pertaining to its memoranda and immigration enforcement going forward.³ Taken together, the DHS memoranda, factsheets, and Q+A documents (herein "DHS Policies") represent a major shift and escalation in immigration enforcement.

¹ For any questions, please contact Paromita Shah at paromita@nipnlg.org or Julie Mao at julie@nipnlg.org.

² "Implementing the President's Border Security and Immigration Enforcement Improvements Initiatives," Department of Homeland Security, February 20, 2017, https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf (last visited March 9, 2017) and "Enforcement of the Immigration Laws to Serve the National Interest," February 20, 2017, https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (last visited March 9, 2017).

³ Factsheets, Q+As, and Press Releases available at <https://www.dhs.gov/executive-orders-protecting-homeland> (last visited March 9, 2017).

The purpose of this community advisory is to provide our legal and policy analysis on *key* changes in immigration enforcement resulting from these DHS policies. While we do provide some legal summary of the memoranda, this advisory is not intended to be a comprehensive summary of DHS policy changes.⁴ Instead, this advisory focuses on providing policy analysis on those topic areas that we believe will most impact **community defense strategies** and offers key tips and suggestions.

For our prior community advisory on the Trump Executive Orders, please see an original community advisory we co-wrote with Immigrant Justice Network titled, “*FAQ for Community Groups Immigration Enforcement Executive Actions: Interior Enforcement*,” (January 26, 2017).

(available at http://www.nationalimmigrationproject.org/PDFs/community/2017_25Jan-ijn-faq.pdf).

DHS Policies Confirm that ICE Can Target Anyone Who Is Removable for Detention and Deportation Even if They Fall Outside of the Broad “Priorities” of the President’s Executive Order

Under these new policies, immigration will consider deporting anyone who is “removable.”⁵ Being “removable” means that you have violated immigration law and are deportable. (There is a qualified exception for DACA – see below.)

Although DHS identified seven categories of “priorities” within their guidance, these categories are very broad, confusing, and undefined.⁶ Moreover, DHS repeatedly states throughout the DHS Policies documents that they can take action on anyone who is removable.⁷ This leads us to believe that the priority categories are more *suggestions* to field offices rather than real guidelines.

⁴ For more comprehensive list of changes on asylum and refugee law, see Human Rights First advisory: <http://www.humanrightsfirst.org/press-release/dhs-enforcement-memo-would-limit-access-protection-refugees-and-asylum-seekers>. Please note that this advisory does not deal with the changes to the asylum process for unaccompanied minors and adults.

⁵ National Interest Memo, page 2, Section A. “Effective immediately, and consistent with Article II, Section 3 of the United States Constitution and Section 3331 of Title 5, United States Code, Department personnel shall faithfully execute the immigration laws of the United States against all removable aliens.”

⁶ Id. These seven categories were also defined in the Executive Order. Please refer to our January 25, 2017 community advisory for a discussion of those priorities. It is available at: http://www.nationalimmigrationproject.org/PDFs/community/2017_25Jan-ijn-faq.pdf

⁷ For example, see “Q&A: DHS Implementation of the Executive Order on Enhancing Public Safety in the Interior of the United States,” Q5. “[u]nless otherwise directed, Department personnel may initiate enforcement actions against removable aliens encountered during the performance of their official duties.” <https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-enhancing-public-safety-interior-united-states> (last visited March 9, 2017).

It is difficult to predict how ICE will “target” certain classes or categories of people. We know of a number of cases of individuals with long continuous presence and no criminal convictions or immigration history who have been detained. Whether someone is arrested and detained may depend on local ICE office policy, practice, and their capacity (such as jail space and man power) to detain someone. Continuous monitoring and fact gathering of local ICE enforcement actions will be key to understanding ICE’s implementation of these policies.

TIPS FOR PEOPLE WITH DACA:

According to the DHS policies, people granted DACA are exempted from this plan generally.⁸ An analysis of the new DHS Policies suggests that people granted DACA can also be enforcement priorities. In at least one instance, a DACA grantee who had not timely re-applied for DACA was apprehended by ICE in a home raid. As stated in the earlier advisory, a DACA recipient should consult with an attorney quickly if you have a criminal record (arrest or conviction) or believe that you might be in a gang database. The attorney should be familiar in deportation defense and should have a history of dealing with the local ICE office.

DHS Has Made Key Changes in Order to Make it Easier to Arrest and Deport Individuals

Here are Some of the Key Changes:

- **DHS announced it will expand expedited removal.** Expedited removal is a fast track deportation process currently used against people at the airport or near the border. A person subject to expedited removal does not get to appear before an Immigration Judge, unless the person expresses a “credible fear” of returning to their home country. Expedited removal is currently used against people arrested within 100 miles of the border who could not prove they were here for 14 days.
 - DHS has not yet provided any specific information about when or how they plan to expand expedited removal. DHS could decide to expand expedited removal to noncitizens anywhere in the country who cannot prove that they have been here up to **2 years** before they are arrested.⁹ Once the program is enacted, people will be deported very quickly from the United States, especially if they live in states near a United States

⁸ “Q&A: DHS Implementation of the Executive Order on Border Security and Immigration Enforcement,” Q28, February 21, 2017, <https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-border-security-and-immigration-enforcement> (last visited March 9, 2017).

⁹ “Immigration and Border Enforcement Memo,” page 5-6, Section G.

border, like Arizona, Texas, Michigan, or Illinois. (DHS is also planning to create new detention facilities and increase the number of beds near the border, the majority of which operate under terrible conditions, to help speed up deportations.¹⁰)

- This expansion might be challenged in court.

TIPS:

Please note that these proceedings should not apply to individuals who entered the United States through parole or through admission (like a visa) more than 2 years ago. (It should also not apply to people with final orders of removal or people who are undocumented who are convicted of aggravated felonies. They are subject to different fast track deportation procedures called reinstatement of removal and administrative removal.) *Those who are most vulnerable are individuals who entered without inspection, do not have pending removal proceedings or final order, and cannot show more than 2 years presence.*

Once the program goes into effect, we suggest that people who could be covered by expedited removal carry documents demonstrating they have been here for more than 2 years. The best types of documents are those that **do not** reference place of birth, country of origin, or home address. People who carry documents with identifying information risk giving up defenses to challenging expedited removal.

- **Deportations to Mexico even if you are not a Mexican citizen:** Under the new DHS policies and the executive orders, people ordered deported may be physically deported to the country from which they entered by land (“contiguous”).¹¹ In many cases, this could mean that immigration will attempt to deport people back to Mexico, even though they are not Mexican nationals.
- **Make it very difficult for ICE or USCIS to grant humanitarian parole to noncitizens, especially those who try to come in as asylum seekers or seek advance parole.**¹² Under the memo, DHS is encouraged to keep people in detention until their case is concluded, with release only considered on a “case-by-case” basis.¹³ It also requires that CBP or ICE leadership sign off on the requests for parole. DHS has also announced they will start limiting grants of advance parole. (This advisory does not discuss the major impacts on children and unaccompanied minors under the new DHS Policies.)

¹⁰ Immigration and Border Enforcement, Memo, page 9, Section J.

¹¹ Immigration and Border Enforcement Memo, pages 7-8, Section H.

¹² Immigration and Border Enforcement Memo, Page 9, Section K.

¹³ Immigration and Border Enforcement Memo, page 1-3, Section A.

TIPS:

DACA recipients should consult with an attorney before leaving the United States, even if they have advance parole.

- **Loss of protections for domestic violence survivors and other victims of crimes:** In the past, DHS provided a special prosecutorial discretion policy for victims of crimes, including domestic abuse and labor violations, nursing mothers, and elderly individuals. While DHS has not specifically revoked this memorandum, it appears as if they will disregard them because they will not exempt classes of individuals from the new enforcement priorities. However, it is possible that domestic violence victims arrested at places where they have sought protection (such as a domestic violence shelter, family court) might be able to take advantage of laws that protect them.

TIP:

Consult with a lawyer if a person is arrested by ICE near or at a place that provides services to domestic violence victims.

- **Uncertainty of the “Sensitive Locations” Memorandum:** It is difficult to predict whether ICE or CBP will comply with the “Sensitive Locations Memo.” Although DHS states the sensitive locations memo remains in effect,¹⁴ several stories of ICE officers near schools and shelters suggest that this guidance is not being applied. Moreover, the DHS policies do not provide a method to raise violations of the policy.
- **Mass collaboration with local police:** See below for a longer discussion.

Prosecutorial Discretion as We Know it Will Largely Be Exercised at the Field Office Level

During the Obama Administration, organizers from grassroots collectives, like Not1More, sought prosecutorial discretion from ICE Field Offices and if denied, sought headquarters’ review of those denials. There was no discussion of a DHS Headquarters (HQ) process to review local decisions. Most importantly, we anticipate that DHS HQ and ICE HQ will not reverse the decisions of local ICE Field offices on immigration arrests and detention.

¹⁴ “Q&A: DHS Implementation of the Executive Order on Border Security and Immigration Enforcement,” Q26, February 21, 2017, <https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-border-security-and-immigration-enforcement> (last visited March 9, 2017).

The new DHS policies provide that ICE officers and agents will handle requests prosecutorial discretion, such as a stay of removal or deferred action, on a case-by case-basis.¹⁵ The DHS policies documents do not provide a process for DHS HQ review of local immigration decisions.

This could mean that people who are detained will have to advocate before the local Field Office. High profile cases may reach DHS HQ or ICE HQ but would likely require significant campaign and political support with little guarantee on a positive outcome.

DHS Plans to Increase Collaboration Between Police and ICE In Order to Create “Deportation Police Force”

- **DHS will expand 287(g) programs, especially in border areas:** DHS will pressure towns, police departments, and sheriffs to sign 287(g) agreements. The memos claim they will expand both jail and taskforce models. These agreements will turn more police officers into immigration agents. A 287(g) agreement undermines attempts to build sanctuary city policies.

TIPS:

People should find out whether their local jail or police have decided to sign a 287(g) agreement.

- **Secure Communities is back:** With Secure Communities, police officers or departments will get a notice from DHS about a person who is in an immigration database. A foreign last name could also trigger an immigration inquiry by police. This means that more ICE will try to arrest you if you show up on a Secure Communities list. DHS announced they are in the process of creating a new detainer (“ICE hold”) form, and will not use the old detainer forms any longer (I-247D, I-247X) or notification forms. This means that people will likely see more people being over-detained for a period of 48 hours (or longer) after their criminal custody ends.
- **The “Criminal Alien” Program (CAP) will be expanded:** Under CAP, immigration agents will visit jails more frequently in order to interview people detained in the jail. Through the interview and by talking with jail staff, the CAP agents will collect information about a person that will be used against him or her in a deportation case or even in a criminal prosecution.

TIPS:

Do not talk to ICE agents in a jail, no matter how much they threaten you, before speaking to an advocate or a lawyer. Alert

¹⁵ National Interest Memo, page 4, Section C.

the public defender and see whether there is a plan to stop your deportation or transfer to immigration custody.

- **Gang-database and Task Force programs:** We expect that DHS will revive and expand local task forces, surveillance programs, and database interoperability. For example, we anticipate a resurgence of gang task forces that are comprised of ICE officers and gang units from police departments using state and federal gang databases to identify and arrest gang members through big ICE operations, like Operation Community Shield. Operation Community Shield is a national yearly ICE operation targeted at suspected gang members that has already deported twenty thousand people since it began in 2005. DHS also created a new taskforce called Border Enforcement Security Task (BEST) Force to apprehend noncitizens engaged in identity theft, fraud, and other crimes related to immigration identity.

DHS Threatens Deportation and Federal Prosecutions of People Who Assist Family Members, Including Children, Who Attempt to Rejoin their Families by Crossing the Border or Staying with Family Members

- **The DHS polices threaten parents and family members who try to help immigrant family members, especially children travelling to the United States, with federal prosecution and deportation.**¹⁶ Immigration agents will usually get this information through interviews and interrogations they have with adults and children arrested by Customs and Border agents at the border. In the past, CBP, USCIS and ICE usually asked questions about the names of the smugglers and the money exchanged for crossing the border. Disclosing this information to an immigration agent could lead to federal prosecution and deportation.

TIPS:

Family members may face risks of prosecution or being placed into deportation or detention if they accompany friends or family members to their ICE check-ins or supervision visits, even if it is at the Office for Refugee Resettlement (ORR).

Additionally, those who are undocumented could face risks of deportation or prosecution if they plan to be a “sponsor” on a person’s request for parole, bond or release.

¹⁶ Immigration and Border Enforcement Memo, Page 11, Section M.

Expanding Illegal Re-entry Prosecutions and other Federal Prosecutions

- **DHS will use a three-pronged approach to expand prosecution of immigration related federal crimes.**¹⁷ The most relevant criterion is that ICE will coordinate with local US Attorneys to lower the threshold to prosecute federal immigration crimes. Each U.S. Attorney Office has a general policy on prosecution priorities which they use to make decisions on which cases to prosecute. Although these laws will remain the same, it means that ICE will coordinate with US Attorneys to prosecute more reentry cases.

Public Release of Names of People with a Criminal Record and the Creation of VOICE

- **Under the new guidelines, ICE will create a new office called “Victims of Immigration Crime Engagement” (VOICE) Office,** which will work with individuals who are “victims of crimes committed by noncitizens.”¹⁸ This office is not yet open because ICE needs to find more money to set it up. VOICE will focus their advocacy efforts on people who claim to be victimized by immigrants by informing the complainant about the immigration status of the person, their crime, their date of release and any immigration enforcements taken against them.¹⁹ It is possible this office will assist in their removal efforts. Outreach and advocacy services on behalf of immigrants have been “immediately terminated.”
- **ICE also plans to publish, on a weekly basis, information about noncitizens who have a criminal record in sanctuary cities.**²⁰ They will name the “sanctuary” jurisdiction, the citizenship and immigration status of the noncitizen, the arrest, charge, or conviction for which each alien was in the custody of that jurisdiction, the date on which the ICE detainer or similar request for custody was served on the jurisdiction by ICE, the date of the alien's release from the custody of that jurisdiction and the reason for the release, an explanation concerning why the detainer or similar request for custody was not honored, and all arrests, charges, or convictions occurring after the person’s release from criminal custody. It is clear that ICE will use this information to attack sanctuary cities. This means the public will know the names and very personal information about the noncitizen.

¹⁷ “Q&A: DHS Implementation of the Executive Order on Enhancing Public Safety in the Interior of the United States,” Q16, <https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-enhancing-public-safety-interior-united-states> (last visited March 9, 2017).

¹⁸ National Interest Memo, Page 4-5, Section D.

¹⁹ “Fact Sheet: Enhancing Public Safety in the Interior of the United States,” DHS, February 21, 2017. <https://www.dhs.gov/news/2017/02/21/fact-sheet-enhancing-public-safety-interior-united-states> (last visited March 9, 2017).

²⁰ National Interest Memo, Page 6, Section H.

- **The executive orders and other DHS policy do away with the privacy protections the Obama administration set up for noncitizens, like DACA grantees.** This means noncitizens (except for legal permanent residents) will have virtually no privacy protections UNLESS they are separately protected under federal or state law. For example, people granted VAWA might be able to argue that ICE broke a law by publishing these names. An example of state law protections is California where there are strong confidentiality protections for young people who went through the delinquency process. This could mean that the federal government might violate state law by disclosing juvenile delinquency records or arrests.

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They are based on legal research and may contain potential arguments and opinions of the author. Community Advisories are intended to alert readers of legal developments, assist with developing strategies, and/or aid in decision making. They are NOT meant to replace independent legal advice provided by an attorney familiar with a client's case.

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