



Summary of Executive Order on “Sanctuary” or Enhancing Public Safety in the Interior of the United States

Drafted by: Lauren Picciallo, 3L Clinic Student

This summary is selective and describes the purpose, enforcement priorities, Section 287 of the INA, Sanctuary Cities, and Termination of the Priorities Enforcement Program. This document should not be a substitute for legal advice nor should it be construed to mean that each provision of this Order is lawful or feasible.

Purpose (Section 1)

The Executive Order begins with an explanation of the reasons for the new policies. It states “many” who enter unlawfully or violate their visas are threats to “national security and public safety.” Sanctuary jurisdictions have caused “immeasurable harm” to the people and the “very fabric of our Republic.” Lastly, it suggests that the United States has exempted people from removal and by doing so has not “faithfully executed” the laws of the United States. The purpose of the Executive Order is to “employ all lawful means to enforce the immigration laws of the United States.”

Enforcement Priorities (Section 5)

The Executive Order also lists which noncitizens are prioritized for removal. Noncitizens who are prioritized for removal include those noncitizens described by INA § 212(a)(2) [criminal grounds for inadmissibility], § 212(a)(3) [security and related grounds for inadmissibility], §212(a)(6)(C) [related to misrepresentation by entrants or prospective entrants into the United States] § 235 [expedited removal], § 237(a)(2) [criminal grounds for deportability], and § 237(a)(4) [security related grounds of deportability]. Remarkably, the Executive Order also prioritizes removable noncitizens who:

- (a) were convicted of a crime,
- (b) were charged with an unresolved criminal charge,
- (c) have committed acts which constitute a chargeable offense,
- (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,”
- (f) are present in the United States, but have an order of removal, or
- (g) “in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.”

Additionally, Section 6 sets forth that the Security of Homeland Security should provide guidance and regulations to ensure that fines and penalties are collected from noncitizens present in the United States. Notably, this list of priorities includes not only convicted noncitizens, but also those who have unresolved charges against them and those who have committed the acts of a crime. Thus, basic guarantees of due process to determine whether the noncitizen committed the alleged conduct is not necessary to be considered an enforcement priority. While this Executive Order does expand upon which noncitizens may become a priority for removal, it is important to note that no prior policy has been rescinded by this Executive Order besides Priority Enforcement Program; thus, the applicability of prior policies such as those concerning victims

and witnesses is undetermined. For more information about the enforcement priorities, see: http://www.nipnlg.org/PDFs/practitioners/practice_advisories/gen/2017_26Jan-trump-enforce.pdf.

Section 287(g) of the INA (Section 8)

The Executive Order encourages the creation of agreements under INA § 287(g) with local authorities and Governors. Section 287(g) of the INA creates a program which allows any officer or employee of the State as determined by the Attorney General to be qualified to perform the functions of an immigration officer, such as the “investigation, apprehension, or detention” of noncitizens. Such immigration functions are at the expense of the state or political division.

“Sanctuary” Cities (Section 9)

The Executive Order sets forth that “Sanctuary Jurisdictions” will not receive federal grants, “except as deemed necessary for law enforcement purposes by the Attorney General or Secretary.” Sanctuary has not been defined; however, the Executive Order sets forth that the Attorney General should take enforcement action against “any entity” who willfully violate 8 USC § 1373 or “which has in effect a statute, policy, or practice that prevents or hinders the enforcement of federal law.” Section 1373 of 8 USC provides that state and local authorities cannot prohibit any government entity or official from “sending to, receiving from, [federal immigration authorities] about the citizenship or immigration status, lawful or unlawful, of any individual.”

Section 1373 contains no language which affirmatively mandates that state or local municipalities hand over information about an individual’s immigration status. Further, the Tenth Amendment prohibits the federal government from “compel[ling] the States to enact or administer a federal regulatory program.” *Printz v. United States*, 521 U.S. 898, 935 (1997). Thus, the reach of 8 USC § 1373 is limited.

Termination of the Priority Enforcement Program (PEP) (Section 10)

This Executive Order terminates the Priority Enforcement Program (PEP), and reinstates the Secure Communities program. As described by [ICE](#), the difference between Secure Communities and PEP include:

- PEP did not permit ICE to transfer individuals with civil immigration offenses alone. PEP also did not allow those charged, but not convicted of criminal offenses, to be transferred. Secure Communities, on the other hand, allowed officers to transfer custody when the immigration officer had “reason to believe.”
- PEP required local law enforcement officials to provide a copy of the noncitizen’s subject to the detainer for the detainer to be effective; whereas, Secure Communities only requested that law enforcement officials provide a copy of the detainer request.
- PEP required that “probable cause” that the noncitizen is removable be indicated on the detainer request; whereas, Secure Communities requested “reason to believe” the noncitizen was removable, which was not indicated on the detainer request.
- PEP did not issue detainers for foreign born individuals who did not have records which match ICE databases; whereas, Secure Communities does issue detainers who did not have records that match with ICE databases.

For more information about policy concerns over the Secure Communities Program, see: <https://www.aclu.org/other/aclu-statement-secure-communities?redirect=immigrants-rights/aclu-statement-secure-communities>.