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Legal Sidebar

The Biden Administration's Immigration Enforcement Priorities: Background and Legal Considerations

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Almost immediately after taking office, President Biden issued a series of directives on immigration matters. Some of these directives focused on altering the immigration enforcement priorities of the Department of Homeland Security (DHS), the agency primarily charged with the enforcement of federal immigration laws. Federal statute confers immigration authorities with "broad discretion" to determine when it is appropriate to pursue the removal of a non-U.S. national ("alien" under federal law) who lacks a legal basis to remain in the country. Resource or humanitarian concerns have typically led authorities to prioritize enforcement actions against subsets of the removable population (e.g., those who have committed certain crimes or pose national security risks). The Trump Administration made enforcement a touchstone of its immigration policy, and generally sought to enforce federal immigration laws against a broader range of aliens who had committed immigration violations than the Obama Administration.

President Biden rescinded some of the Trump Administration's immigration initiatives and directed DHS to review its immigration enforcement policies and priorities. In January 2021, DHS issued temporary immigration enforcement guidance that generally focused enforcement activities toward aliens who pose a threat to national security, border security, or public safety. Following legal challenges brought by Texas and Louisiana, a federal district court preliminarily enjoined DHS from implementing this policy. Although a panel of the U.S. Court of Appeals for the Fifth Circuit initially issued a partial stay of the injunction, the en banc Fifth Circuit vacated the panel's decision, effectively reinstituting the preliminary injunction.

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In the midst of these judicial developments, DHS announced new immigration enforcement guidelines in September 2021 that superseded its earlier guidance. Texas and Louisiana promptly amended their complaint in the lawsuit regarding the January 2021 guidelines to challenge the September 2021 guidelines. Separately, Arizona, Montana, and Ohio legally challenged the September 2021 guidelines. In March 2022, a federal district court in Ohio preliminarily enjoined DHS from implementing and enforcing certain aspects of its superseding guidelines, but the following month the Sixth Circuit stayed that injunction pending consideration of the government's appeal, allowing DHS to implement and enforce its September 2021 guidelines.

Apart from seeking to establish new immigration enforcement policies, President Biden announced an intent "to preserve and fortify" the Deferred Action for Childhood Arrivals program, which has been in place since 2012 and allows certain unlawfully present aliens who came to the United States as children to remain and work in this country for a certain period of time. A federal district court, however, subsequently ruled that the DACA initiative is unlawful, and the government has appealed that decision.

This Sidebar addresses the Biden Administration's immigration enforcement priorities and legal considerations that they raise. Legal developments surrounding the DACA program are addressed in other CRS products.

Prior Immigration Enforcement Policies

Over the past decade, DHS has adopted different approaches for prioritizing immigration enforcement actions against different classes of removable aliens. In 2011, DHS announced that it generally prioritized the removal of aliens who threatened national security (e.g., terrorists), most aliens who had committed crimes, recent unlawful entrants, aliens with outstanding removal orders, and aliens who fraudulently obtained immigration benefits. In 2014, the agency established a new policy that was largely similar, but limited the types of criminal offenses that were considered highest priorities (e.g., terrorist activity, participation in a criminal street gang, felony offenses). While the new policy continued to prioritize the removal of aliens with outstanding removal orders, this prioritization was limited to those with more recent final removal orders. The 2014 policy did not preclude immigration officers from pursuing the removal of aliens who were not "priorities," but required supervisory approval for such action. DHS also changed its policy regarding the issuance of detainers used to obtain custody of aliens believed to be removable who were held by state or local law enforcement. DHS replaced the earlier Secure Communities program, which had been used to secure the custody of aliens suspected of being removable who were held by federal, state, or local law enforcement authorities, with the Priority Enforcement Program (PEP), which authorized issuance of detainers to obtain custody of such aliens only when they had been convicted of certain enumerated crimes or posed a danger to public safety.

In addition to taking steps to identify and apprehend aliens for removal, immigration authorities have sometimes granted temporary reprieves from enforcement action, either using authority conferred directly by statute, or granting reprieves as an exercise in general enforcement discretion. Perhaps the most large-scale reprieve premised on enforcement discretion is DACA, established in 2012 by the Obama Administration, which allows certain unlawfully present aliens who arrived in the United States as children to obtain deferred action (i.e., an assurance that they will not face removal) and work authorization, among other benefits, in renewable two-year periods. Then-DHS Secretary Janet Napolitano explained that the agency's enforcement resources should not be expended on "productive," low-priority individuals who lacked the intent to violate the law and have contributed to the United States.

Immigration enforcement priorities shifted under the Trump Administration. In a 2017 executive order, President Trump pledged "to employ all lawful means to enforce the immigration laws of the United States" and "to ensure the faithful execution of the immigration laws of the United States against all removable aliens." He directed DHS to prioritize the removal of aliens found to be removable on certain

criminal and national security-related grounds; aliens arriving at the border without valid documents and recent unlawful entrants; aliens who had committed *any* criminal offense; aliens who engaged in immigration-related fraud or "abused any program related to receipt of public benefits"; aliens subject to a final removal order who failed to depart as required; and aliens who posed "a risk to public safety or national security." In adopting this policy, then-DHS Secretary John Kelly announced that the agency "no longer will exempt classes or categories of removable aliens from potential enforcement."

In his 2017 executive order, President Trump also directed DHS to restore the Secure Communities program. President Trump also ordered DHS to enter into agreements with state or local authorities under Section 287(g) of the Immigration and Nationality Act (INA), authorizing those authorities to carry out certain immigration enforcement functions in cooperation with the federal government. The Obama Administration had generally limited the use of 287(g) agreements and terminated agreements in some states. Conversely, the Trump Administration expanded their use, with DHS signing 23 agreements with localities in Texas alone.

In addition to 287(g) agreements, DHS, on January 8, 2021, entered into a separate Memorandum of Understanding with Texas, whereby the state agreed to "provide information and assistance to help DHS perform its border security, legal immigration, immigration enforcement, and national security missions," including honoring detainer requests. In exchange, DHS agreed to "consult with Texas before taking any action or making any decision that would reduce immigration enforcement," including pausing or decreasing deportations. The agreement required DHS to provide 180 days' notice of any proposed action to reduce immigration enforcement, as well as an opportunity to comment on the proposal. Additionally, the agreement provided that, in the event of any breach of the agreement, an aggrieved party could bring a cause of action in a U.S. District Court in Texas.

Apart from these enforcement initiatives, DHS under the Trump Administration also moved to rescind the DACA program, relying on the conclusion of then-Attorney General Sessions that DACA lacked "proper statutory authority," as well as a 2015 decision by the U.S. Court of Appeals for the Fifth Circuit that held unlawful the Obama Administration's planned expansion of DACA to cover a broader category of persons, along with the planned implementation of a similar initiative aimed at parents of U.S. citizens and lawful permanent resident aliens. Federal district courts enjoined the Trump Administration's rescission of DACA following legal challenges. In 2020, the Supreme Court ruled that the DACA rescission was unlawful on procedural grounds, but the Court did not rule on the legality of DACA itself.

The Biden Administration's Immigration Enforcement Priorities

On January 20, 2021, President Biden revoked President Trump's 2017 executive order on immigration enforcement priorities and directed DHS to implement new policies intended to balance border security, public safety, and humanitarian considerations. Shortly afterward, then-Acting DHS Secretary Pekoske issued a memorandum directing DHS officials to review the agency's immigration enforcement policies. The memorandum, in conjunction with guidance issued by DHS's Immigration and Customs Enforcement (ICE), established "interim civil enforcement guidelines" pending that review. These guidelines generally limited immigration enforcement actions to cover certain aliens who pose a threat to national security, border security, or public safety. Under this framework, aliens prioritized for removal included those who engaged in activities related to terrorism or espionage, had entered the United States after November 1, 2020, were convicted of aggravated felonies, or were members of criminal gangs or transnational criminal organizations. The Pekoske memorandum also announced a "100-day pause" on the removal of any alien with a final order of removal, with limited exceptions.

More recently, on September 30, 2021, DHS Secretary Mayorkas announced new immigration enforcement guidelines. In a memorandum to DHS components, Secretary Mayorkas asserted that DHS lacks the resources to pursue the removal of every alien who is subject to removal, and that many otherwise removable aliens have been "contributing members of our communities for years." Secretary Mayorkas argued that "[t]he fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them." Accordingly, he announced that DHS would use its discretion and resources to prioritize the apprehension and removal of aliens who fall within three distinct categories: (1) Threat to National Security, (2) Threat to Public Safety, and (3) Threat to Border Security.

Aliens falling within the "Threat to National Security" category include those who are engaged in activities relating to terrorism or espionage, or who otherwise pose a danger to national security. Aliens falling within the "Threat to Public Safety" category generally include those who engaged in "serious criminal conduct," but the guidelines require consideration of aggravating and mitigating factors—rather than the mere fact of a criminal conviction—in assessing whether enforcement action is warranted (e.g., gravity of the offense, age, length of presence in United States). Finally, aliens are considered "Threat to Border Security" priorities if they are either (1) apprehended at the border or a port of entry while attempting to unlawfully enter the United States; or (2) apprehended within the United States after unlawfully entering after November 1, 2020. The guidelines note that other border security cases with "compelling facts" could warrant enforcement action, and the guidelines require consideration of mitigating or extenuating circumstances in border security cases.

The new immigration enforcement guidelines went into effect on November 29, 2021, replacing the interim guidelines issued at the beginning of 2021. On April 3, 2022, ICE issued guidance to ICE attorneys regarding the application of the enforcement guidelines in deciding, as a matter of prosecutorial discretion, whether to pursue or seek dismissal of removal proceedings in pending cases.

Legal Challenges to Immigration Enforcement Policies

The Biden Administration's immigration enforcement initiatives have been subject to legal challenge. A number of lawsuits were brought almost immediately following DHS's issuance of interim enforcement guidelines in January 2021, and then later against the superseding DHS guidelines issued in September 2021.

Challenges to Interim Enforcement Guidelines

Soon after the January 2021 interim enforcement guidelines were issued, legal challenges were brought to prevent their implementation. In a legal action brought by Texas, the U.S. District Court for the Southern District of Texas in February 2021 preliminarily enjoined DHS from implementing the 100-day pause on removals announced by the interim policy, ruling that it likely violated an INA provision generally requiring an alien's removal within 90 days of a final removal order. In a separate legal challenge by Texas and Louisiana, the court in August 2021 preliminarily enjoined DHS from enforcing the interim guidelines. The court held, among other things, that they likely violated INA provisions that mandate the detention of a broad category of aliens who have committed enumerated crimes or who are already subject to final orders of removal. The court declared that DHS "may not dispense with a clear congressional mandate under the guise of exercising 'discretion.'" A Fifth Circuit panel partially stayed that injunction pending the government's appeal, but the en banc Fifth Circuit in November 2021 vacated the panel's opinion, allowing the preliminary injunction to remain in place. The injunction did not affect DHS's superseding September 2021 enforcement guidance.

Challenges to September 2021 Enforcement Guidelines

Some states have also brought legal challenges to DHS's superseding September 2021 enforcement guidelines. In the litigation originally brought over the interim guidelines, Texas and Louisiana amended their complaint to also challenge the newer guidelines, and moved for an injunction barring their implementation, as well. The court has not yet issued a ruling on that motion. In a separate case, Arizona, Montana, and Ohio challenged the new guidelines in the U.S. District Court for the Southern District of Ohio. In March 2022, the court preliminarily enjoined implementation of the guidelines with respect to making custody determinations during removal proceedings, releasing aliens who have final removal orders, and delaying the execution of removal orders (but not barring implementation of the guidance for other purposes). The court held that the guidance's requirement that officials consider aggravating and mitigating factors to decide whether an alien is a public safety priority unlawfully "displaces" INA provisions that mandate the detention of those who have committed certain crimes, and which require the detention and removal of those with final removal orders except in specified circumstances.

In April 2022, the Sixth Circuit granted the government's motion to stay the injunction pending adjudication of its appeal. The court held, among other things, that the states failed to show they were sufficiently harmed by DHS's policy for purposes of establishing standing to challenge the agency's action; that DHS's enforcement guidelines were likely not subject to judicial review; and that the guidelines were not unlawful because the INA's detention and removal mandates do not eliminate DHS's "longstanding discretion in enforcing the many moving parts of the nation's immigration laws." The Sixth Circuit's ruling thus enables DHS to continue its implementation of the September 2021 guidelines. (In April 2022, Alabama, Florida, and Georgia also sued to challenge the September 2021 guidelines. The district court in that case has not yet issued any ruling on the merits.)

Legal Considerations

The Biden Administration's attempt to reprioritize immigration enforcement efforts prompts questions of perennial interest to lawmakers regarding the scope of executive discretion in enforcing immigration laws, and the extent to which resource limitations and policy preferences may inform enforcement priorities. Based on previous estimates of the impact of similar immigration enforcement guidelines, the Biden Administration's new immigration enforcement guidelines could exempt many removable aliens from enforcement efforts. DHS's ability to apprehend and detain all removable aliens in the United States, however, is limited by resource constraints. For that reason, DHS argues, it must focus its enforcement resources mainly on those aliens who pose a threat to public safety, border security, or national security.

The Supreme Court has recognized that the INA confers on the executive branch "broad discretion" over immigration enforcement, including the authority to prioritize some cases over others. Further, courts and immigration authorities sometimes have construed statutes providing that agencies "shall" take enforcement action as still allowing some degree of enforcement discretion. There are, however, arguable limits to the scope of that discretion. Typically, immigration authorities have exercised their discretion on an individualized, case-by-case basis. Thus, plaintiffs challenging DHS's enforcement priorities during the Biden Administration have argued that the agency's discretion is not so broad as to allow "sweeping categorical rules" that exempt "the vast majority" of removable aliens from immigration enforcement. When reviewing not only legal challenges to DHS's immigration enforcement priorities generally, but also the ability of the executive branch to implement DACA or similar programmatic reprieves from removal for large segments of the unauthorized population, lower courts have reached conflicting views on where to draw the line between permissible exercises of enforcement discretion and the unlawful violation of statutorily prescribed immigration enforcement responsibilities.

While policymakers' interest in immigration enforcement has primarily centered on executive action and litigation challenging those actions' lawfulness, Congress also may play a determinative role. Congress has regularly considered or enacted legislation that prioritizes the removal of certain categories of aliens (e.g., terrorists, criminal aliens, gang members), limits enforcement actions in certain locations, restricts the detention of certain low-priority aliens, or provides temporary or permanent relief to some otherwise removable aliens. Congress, through the annual appropriations process, can also have a profound effect on enforcement decisions that are premised on the availability of resources. Legislation has been introduced in the 117th Congress that responds to executive enforcement priorities, including bills that would, among other things, confer lawful permanent resident status on certain unlawfully present aliens. Additionally, a provision of a House budget reconciliation bill, the Build Back Better Act (H.R. 5376), would have enabled many otherwise removable aliens to remain in the United States temporarily under "parole" status (a discretionary authorization to be physically present in the United States for "urgent humanitarian reasons or significant public benefit" without being granted lawful admission).

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