



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President Biden [rescinded](#) some of the Trump Administration's immigration initiatives and directed DHS to review its immigration enforcement policies and priorities.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 September 2021, DHS announced [new immigration enforcement guidelines](#) that generally focused its enforcement activities on aliens who pose a threat to national security, border security, or public safety. As discussed below, courts have considered legal challenges to the Biden Administration's immigration enforcement policies. Following a lawsuit brought by Texas and Louisiana, a Texas federal district court [vacated](#) the guidelines in June 2022, and the U.S. Court of Appeals for the Fifth Circuit [declined to stay that ruling](#) pending consideration of the government's appeal. The Supreme Court [granted](#) the government's request to review the case and is scheduled to hear arguments in the matter on November 29, 2022.

In a [separate lawsuit](#) brought by Arizona, Montana, and Ohio, an Ohio federal district court in March 2022 [preliminarily enjoined](#) DHS from implementing and enforcing certain aspects of its enforcement guidelines. The Sixth Circuit, however, [reversed](#) the district court's decision, lifting the injunction. Despite the Sixth Circuit's ruling, DHS remains barred from implementing its enforcement guidelines given the Texas district court's June 2022 ruling, which remains in force pending the Supreme Court's review of that case.

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This Sidebar addresses the Biden Administration’s immigration enforcement priorities, as reflected in DHS’s new immigration enforcement guidelines, and the legal considerations that they raise. Legal developments surrounding the [Deferred Action for Childhood Arrivals \(DACA\)](#), a separate immigration-related initiative that has also been the subject of recent litigation, 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 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 on 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.

Along with 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. 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 to be 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 David Pekoske issued a [memorandum](#) directing DHS officials to review the agency’s immigration enforcement policies. The memorandum, along with [guidance](#) issued by DHS’s Immigration and Customs Enforcement (ICE), initially established “[interim civil enforcement guidelines](#)” pending that review that generally limited the scope of aliens who were subject to enforcement actions. The Pekoske memorandum also [announced](#) a “100-day pause” on the removal of any alien with a final order of removal, with limited exceptions.

On September 30, 2021, DHS Secretary Mayorkas announced more permanent [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.” He thus 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 about 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 faced legal challenge. 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

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 district court in August 2021 [preliminarily enjoined](#) DHS from enforcing the interim guidelines, [ruling](#) that they conflicted with INA provisions that mandate the detention of a [broader category of aliens](#) than what was permitted under the interim guidance. 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. The litigation has led to conflicting federal court decisions about DHS’s authority to exercise discretion over immigration enforcement.

Texas v. United States

In the litigation originally brought over the interim guidelines, Texas and Louisiana amended their complaint to challenge the newer guidelines. On June 10, 2022, the district court [vacated](#) Secretary Mayorkas’s September 2021 memorandum establishing the enforcement guidelines. The court [held](#) that the guidelines’ directive that immigration officials weigh “extra-statutory” factors when deciding whether an alien convicted of a crime is subject to enforcement action “flatly contradicts” INA provisions that mandate the detention of those who have [committed specified crimes](#) or who [have final orders of removal](#). The court [also held](#) that the guidelines are “arbitrary and capricious” under the [Administrative Procedure Act](#) (APA) because, according to the court, (1) DHS failed to consider recidivism and abscondment rates among aliens who have committed serious crimes or have final removal orders; and (2) the agency failed to consider the costs its policy would impose on the states and how much those states have relied on the statutorily mandated detention of criminal aliens. The court also [ruled](#) that the guidelines’ issuance violated [notice-and-comment requirements](#) generally applicable to agency rules under the APA.

On July 6, 2022, the Fifth Circuit [denied](#) the government’s motion to stay the district court’s decision pending adjudication of its appeal. The Fifth Circuit agreed with the lower court that DHS’s enforcement guidance [violates](#) the INA’s “[incontrovertibly mandatory](#)” detention provisions and fails to meet the APA’s [standards](#) and [procedures](#). On July 21, 2022, the Supreme Court [denied](#) the government’s motion to stay the Fifth Circuit’s ruling but construed the motion as a petition to review that decision. The Court [granted](#) the petition and scheduled oral argument for November 29, 2022.

Arizona v. Biden

In a separate case, Arizona, Montana, and Ohio [challenged](#) DHS’s enforcement guidelines in the U.S. District Court for the Southern District of Ohio. On March 22, 2022, the court [preliminarily enjoined](#) implementation of the guidelines to make custody determinations during removal proceedings, to release aliens who have final removal orders, and to delay the execution of removal orders (but not barring implementation of the guidance for other purposes). Like the Texas district court, the court held that requiring immigration officials to consider “[factors outside the statute](#)” to decide whether an alien convicted of a crime should be prioritized for enforcement [unlawfully “displaces”](#) the INA’s mandatory detention and removal requirements.

On April 12, 2022, the Sixth Circuit [granted](#) the government’s motion to stay the injunction pending adjudication of its appeal. Then, on July 5, 2022, the court [reversed](#) the district court’s decision. The court held that the states likely [failed to identify](#) any concrete, non-speculative injury caused by DHS’s enforcement policy to establish [standing](#) to sue, and that DHS’s policy was likely [not subject to judicial review](#). On the merits, the court held 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 court also ruled that the guidelines [are not “arbitrary or capricious”](#) and [did not have to go through](#) notice-and-comment procedures. Although the Sixth Circuit’s ruling would have enabled DHS to implement the September 2021 guidelines, as noted above, the district court in the *Texas* litigation had vacated those guidelines and both the Fifth Circuit and Supreme Court declined to stay that decision pending the government’s appeal. Ultimately, the Supreme Court’s forthcoming decision in the *Texas* case [is to consider](#) the legality of the enforcement guidelines.

Legal Considerations

The Biden Administration’s attempt to reprioritize immigration enforcement efforts prompts questions of perennial interest to lawmakers on the scope of executive discretion in enforcing immigration laws, and how much 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 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 who pose a threat to public safety, border security, or national security.

The Supreme Court has recognized that the INA grants the executive branch “[broad discretion](#)” over immigration enforcement, including the authority to prioritize some cases over others. 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](#). Additionally, the states challenging the Biden Administration’s enforcement guidelines argue that DHS’s discretion cannot supplant statutory mandates providing that the agency “shall” detain and remove specified categories of aliens. The Fifth Circuit has [agreed](#) that “the Executive is not able to use its discretion in order to thwart the boundaries of its authority.” Conversely, the Sixth Circuit has [stated](#), despite these mandates, that “the Executive Branch has considerable enforcement discretion in deploying limited resources to address its policy challenges.”

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 similarly 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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