

TRUMP EXECUTIVE ORDER AND DHS IMPLEMENTATION MEMO ON BORDER ENFORCEMENT: A BRIEF REVIEW

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	Executive Order 13767: Border Security and Immigration Enforcement Improvements (signed January 25, 2017)	Earlier and Current Policy/Practice and Context
SECTION 1. PURPOSE OF THE EXECUTIVE ORDER		
Border security as element of national security	<p>Border security is “critically important” to national security, the executive order says, adding that noncitizens who enter the country unlawfully “present a significant threat to national security and public safety.”¹ The executive order asserts that a “recent surge of illegal immigration at the Southern border has overwhelmed agencies charged with border security.” Moreover, it notes transnational criminal organizations operate on both sides of the border, and contribute to increased violent crime and deaths from dangerous drugs. Continued illegal immigration presents a “clear and present danger.”</p> <p>Executive agencies are directed to deploy all lawful means to secure the U.S.-Mexico border to prevent illegal immigration, and to repatriate apprehended individuals “swiftly, consistently, and humanely.”</p>	<p>There is broad public and governmental consensus that border security is important to national security and public safety, and is a key component of a well-functioning immigration system. Data on apprehensions and other measures of effectiveness at the U.S.-Mexico border demonstrate that sizeable investments in border security over several decades have succeeded in significantly strengthening and modernizing border control. Apprehensions at the Southwest border have fallen from a peak of nearly 1.65 million in fiscal year (FY) 2000 to 408,870 in FY 2016.² Since the end of the recession in 2009, more Mexican immigrants have left the United States than have arrived. In FY 2016, Central American apprehensions outnumbered those from Mexico. The reasons for migrant flows from Central America are both economic and humanitarian, calling for different enforcement responses in that many apply and may be eligible for political asylum in the United States. Overall, the size of the unauthorized population dropped by at least 1 million from a peak of more than 12 million in 2007 to approximately 11 million in 2014.³</p> <p>In FY 2016, the United States spent a record \$13.2 billion on border security.⁴ With illegal border crossings at their lowest level in four decades, major new expenditures for border security infrastructure, technology, and personnel can be expected to bring diminishing rates of return.</p>

1 White House, “Executive Order 13767 of January 25, 2017, Border Security and Immigration Enforcement Improvements,” *Federal Register* vol. 82, no. 18, 8793-97, www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02095.pdf. The executive order was supplemented by a memorandum entitled “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies” issued by Homeland Security Secretary John Kelly on February 20, 2017, providing clarifying guidance to the Department of Homeland Security (DHS) on implementation of President Trump’s executive order. See Memorandum from John Kelly, Secretary of Homeland Security, to Kevin McAleenan, Acting Commissioner, U.S. Customs and Border Protection; Thomas D. Homan, Acting Director, U.S. Immigration and Customs Enforcement; Lori Scialabba, Acting Director, U.S. Citizenship and Immigration Services; Joseph B. Maher, Acting General Counsel, DHS; Dimple Shah, Acting Assistant Secretary for International Affairs, DHS; and Chip Fulghum, Acting Undersecretary for Management, DHS, “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies” (memorandum, February 20, 2017), www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

2 The decline in apprehensions is generally attributed to three key factors: reduced labor demand in the United States in the wake of the 2008-09 recession; demographic and economic changes in Mexico, including a falling birth rate and improved economic and educational opportunities; and heightened immigration enforcement at the border and in the U.S. interior. For apprehension statistics, see U.S. Border Patrol, “Southwest Border Sectors, Total Illegal Alien Apprehensions by Fiscal Year, FYs 1920-2016,” accessed February 14, 2017, www.cbp.gov/sites/default/files/assets/documents/2016-Oct/BP%20Southwest%20Border%20Sector%20Apps%20FY1960%20-%20FY2016.pdf.

3 Ana Gonzalez-Barrera, *More Mexicans Leaving Than Coming to the U.S.* (Washington, DC: Pew Research Center, Hispanic Trends, 2015), www.pewhispanic.org/2015/11/19/more-mexicans-leaving-than-coming-to-the-u-s/; Migration Policy Institute (MPI) Data Hub, “Profile of the Unauthorized Population: United States,” accessed March 2, 2017, www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US.

4 The \$13.2 billion figure reflects the budget of U.S. Customs and Border Protection (CBP). See U.S. Department of Homeland Security (DHS), *Budget-in-Brief Fiscal Year 2017* (Washington, DC: DHS, 2016), www.dhs.gov/sites/default/files/publications/FY2017BIB.pdf.

SECTION 4. PHYSICAL SECURITY OF THE SOUTHERN BORDER OF THE UNITED STATES

Gaining operational control of the border and constructing a physical wall	<p>The Department of Homeland Security (DHS) is ordered to immediately take a number of steps to “obtain complete operational control” of the Southwest border. Operational control is defined as the prevention of <i>all</i> unlawful entries, including by terrorists and unauthorized border crossers, as well as narcotics and other contraband. The executive order mandates DHS must:</p> <ul style="list-style-type: none"> ▪ immediately plan, design, and construct a physical wall along the Southern border; ▪ identify and allocate available federal funds for planning, designing, and constructing a physical wall; ▪ develop long-term funding requirements, including congressional budget requests; ▪ produce a border security study within 180 days that includes the current state of Southern border security, the geographical terrain of the border, the availability of federal and state resources necessary to achieve operational control, and “a strategy to obtain and maintain complete operational control.” 	<p>Operational control is a term used to measure the effectiveness of border enforcement. The 2006 <i>Secure Fence Act</i> defines operational control as zero unlawful entries. In 2007, the Border Patrol adopted operational control as a goal of its national strategy, but defined it as the “ability to detect, respond, and interdict border penetrations in areas deemed as high priority for threat potential or other national security objectives.” The term has been criticized as shifting and not clearly defined. More importantly, there is broad agreement among border experts and law enforcement professionals that the prevention of all illicit crossings by people and contraband will never be achievable and thus is not a realistic policy goal.</p> <p>At present, there are 652 miles of physical barriers along the U.S.-Mexico border, including 353 miles of pedestrian fencing and 299 miles of vehicle fencing. U.S. Customs and Border Protection (CBP) has so far identified \$20 million in existing funds and resources that can be redirected toward construction of additional border barriers.⁵ With a recent internal DHS report estimating that the Trump wall plan could cost \$21.6 billion over three years, construction of a wall across the nearly 2,000-mile border would require substantial additional funding from Congress.⁶ President Trump has argued that Mexico will pay for the wall—a stance Mexico has rejected. The administration has not put forth concrete plans for acquiring payments from Mexico and included in its FY 2018 budget submission to Congress a request for \$2.6 billion for tactical infrastructure and border security technology, and to begin work on the wall.⁷</p> <p>DHS announced it will use existing funding to begin initial construction in locations near El Paso, Texas; Tucson, Arizona; and El Centro, California, where current fencing is “no longer effective.”⁸</p>
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SECTION 5. DETENTION FACILITIES

Expanding detention capacity at the border	<p>DHS will allocate resources or establish contracts for construction and operation of detention facilities at or near the U.S.-Mexico border. CBP will focus on expansion of short-term detention facilities and U.S. Immigration and Customs Enforcement (ICE) on standard detention. CBP and ICE are directed to explore options for joint temporary structures.⁹</p>	<p>ICE presently operates or contracts with more than 600 detention facilities across the United States, and is funded by Congress to maintain a daily minimum of 34,040 detention beds.¹⁰ However, in October 2016, ICE was detaining a record 40,000 individuals and estimated the number would rise as high as 47,000 in 2017.¹¹ A substantial expansion of ICE’s detention capacity would require additional appropriations by Congress. The Obama administration’s FY 2017 budget request, which pegged the average cost of adult detention at \$126.46 per day and family detention at an average \$161.36 daily, sought \$2.2 billion to maintain 31,000 beds.¹² Doubling the current bed mandate to 68,000 beds, for example, would cost an estimated additional \$2.6 billion per year.¹³</p>
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5 Julia Edwards Ainsley, “Trump Administration Has Found Only \$20 Million in Existing Funds for Wall,” Reuters, March 2, 2017, www.reuters.com/article/us-usa-immigration-funds-idUSKBN1685SY.

6 Julia Edwards Ainsley, “Trump Border ‘Wall’ to Cost \$21.6 Billion, Take 3.5 Years to Build: Internal Report,” Reuters, February 9, 2017, www.reuters.com/article/us-usa-trump-immigration-wall-exclusive-idUSKBN1502ZN.

7 White House, Office of Management and Budget (OMB), “America First: A Budget Blueprint to Make America Great Again” (Washington, DC: OMB, 2017), 23, www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf.

8 DHS, “Q&A: DHS Implementation of the Executive Order on Border Security and Immigration Enforcement,” February 21, 2017, www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-border-security-and-immigration-enforcement.

9 Kelly memorandum, “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies.”

10 Transactional Records Access Clearinghouse (TRAC), Syracuse University, “New Data on 637 Detention Facilities Used by ICE in FY 2015,” April 12, 2016, <http://trac.syr.edu/immigration/reports/422/>; U.S. Congress, “House Rept. 114-668 – DHS Appropriations Bill FY 2017,” July 6, 2016, www.congress.gov/congressional-report/114th-congress/house-report/668.

11 Devlin Barrett, “Record Immigrant Numbers Force Homeland Security to Search for New Jail Space,” *Wall Street Journal*, October 21, 2016, www.wsj.com/articles/record-immigrant-numbers-force-homeland-security-to-search-for-new-jail-space-1477042202.

12 DHS, *Budget in Brief 2017*.

13 This estimate was calculated based on the President’s fiscal year (FY) 2017 *DHS Budget-in-Brief*, which requested \$2.2 billion to maintain 31,000 beds.

<p>Assigning asylum officers and immigration judges to detention facilities</p>	<p>DHS is directed to assign asylum officers to immigration detention facilities to conduct credible fear determinations and reasonable fear determinations.</p> <p>The Department of Justice is directed to assign immigration judges to detention facilities to conduct removal proceedings.</p>	<p>Migrants apprehended at the border, placed in expedited removal, and who express to Border Patrol agents a fear of persecution if returned to their home country are subject to special humanitarian procedures.¹⁴ They are given a “credible fear” interview, conducted by U.S. asylum officers who are part of U.S. Citizenship and Immigration Services (USCIS). Asylum officers determine whether migrants requesting political asylum have a “significant possibility” of qualifying for it under U.S. law. Those found to have a credible fear of persecution are placed in formal immigration court proceedings where an immigration judge decides their eligibility for asylum.</p> <p>Migrants who previously had been ordered deported are given a similar “reasonable fear” interview with an asylum officer. Those who pass the interview may apply for withholding of removal (another form of immigration relief) in immigration court.¹⁵</p> <p>Political asylum claims at the border have surged in recent years with the shift from predominantly Mexican flows to mixed flows of economic and humanitarian migrants from Central America’s Northern Triangle countries of El Salvador, Guatemala, and Honduras. Between FY 2011 and FY 2016, credible fear cases rose from 11,000 to a record 94,000, and reasonable fear claims rose from 3,000 to 10,000.¹⁶ In response to the rising caseload, 40-50 percent of USCIS’s 530 asylum officers have been assigned to conduct credible fear interviews,¹⁷ either by telephone or at detention centers. USCIS is also in the process of hiring permanent asylum officers for several border detention facilities.¹⁸</p> <p>The immigration court system employs 300 judges in 58 courts across the United States.¹⁹ Immigration judges typically conduct hearings remotely by videoconference for individuals in detention. The new directives do not specify whether judges will be physically assigned to detention facilities to process claims.²⁰</p> <p>The immigration courts had a record backlog of more than 542,000 cases as of February 2017, with wait times reaching up to three to four years.²¹ Reassigning judges to detention facilities could expedite deciding cases for some detained asylum seekers while exacerbating delays for others in removal proceedings who already have pending asylum applications or are seeking other forms of immigration relief.²²</p> <p>Although timeliness is an essential characteristic of deciding political asylum claims and conducting court proceedings that deter specious claims, neither the political asylum nor the immigration court systems have received resources in recent years commensurate with those of front-line CBP and ICE enforcement functions.²³ The administration’s budget proposal for FY 2018 requests \$80 million for 75 additional immigration judge teams but does not call for additional asylum officer resources.</p>
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14 Expedited removal authority covers foreign nationals who are inadmissible because they have no entry documents or because they have used counterfeit, altered, or otherwise fraudulent or improper documents. It also covers those who arrive in, attempt to enter, or have entered the United States without having been admitted or paroled by an immigration officer at a port of entry. DHS has the authority to order the removal, and the individual is not referred to an immigration judge except under certain circumstances after he or she makes a claim to lawful status in the United States or demonstrates a credible fear of persecution if returned to the country of origin. See DHS, “Definition of Terms,” last updated November 3, 2016, www.dhs.gov/immigration-statistics/data-standards-and-definitions/definition-terms#4.

15 The reasonable fear standard is defined as a “reasonable possibility” that an individual would be persecuted in the future on account of race, religion, nationality, membership in a particular social group, or political opinion. The legal standard is the same standard used to establish a well-founded fear of persecution in an asylum case.

16 U.S. Citizenship and Immigration Services (USCIS), “Asylum Division Quarterly Stakeholder Meeting Statistics,” multiple years, accessed February 14, 2017, www.uscis.gov/outreach/notes-previous-engagements.

17 Author’s notes based on remarks by John Lafferty, Chief of the USCIS Asylum Division, during the 2017 Q1 Asylum Division Quarterly Stakeholder Meeting, February 7, 2017. For more information, see USCIS, “Asylum Division Quarterly Stakeholder Meeting,” February 7, 2017, www.uscis.gov/outreach/asylum-division-quarterly-stakeholder-meeting-6.

18 Ibid.

19 U.S. Department of Justice, Executive Office for Immigration Review (EOIR), “Executive Office for Immigration Review Swears in 12 Immigration Judges” (EOIR news release, February 6, 2017), www.justice.gov/eoir/pr/executive-office-immigration-review-swears-12-immigration-judges.

20 The DHS implementation memo calls for a joint plan with the Department of Justice “to surge the deployment of immigration judges and asylum officers to interview and adjudicate claims asserted by recent border entrants.”

21 TRAC, “Immigration Court Backlog Tool,” data through December 2016, http://trac.syr.edu/phptools/immigration/court_backlog/.

22 Ibid.

23 Between FY 2003 and 2013, EOIR funding increased about 70 percent, at a time the U.S. Immigration and Customs Enforcement (ICE) and CBP budgets rose an estimated 300 percent. See Marc R. Rosenblum and Doris Meissner with Claire Bergeron and Faye Hipsman, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement* (Washington, DC: MPI, 2014), www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement.

SECTION 6. DETENTION FOR ILLEGAL ENTRY

<p>Ensuring detention pending removal proceedings</p>	<p>DHS is directed to ensure that noncitizens apprehended for immigration violations are detained pending the outcome of their removal proceedings or their removal. The executive order describes detention as the most “efficient means by which to enforce the immigration laws at our borders.” ICE agents and officers must prioritize detention resources for those subject to expedited removal or removable on any criminal, national security or related grounds, or for fraud or material misrepresentation.</p> <p>DHS is directed to issue policy guidance expanding detention in order to end “catch and release,” the practice of releasing subjects pending their removal hearings.</p> <p>According to the DHS memo, pending implementation of new plans to deploy immigration judges and asylum officers to process asylum cases of recent border entrants, and the establishment of new detention facilities, some individuals may be released on a case-by-case basis, including individuals granted relief or protection from deportation; those who withdraw an application for admission and depart the country; in cases of medical emergencies; or for those found to have a credible fear of persecution.</p>	<p>Currently, the majority of migrants apprehended at the border have been detained pending swift removal to their country of origin via expedited removal, reinstatement of a prior removal order, or voluntary return—three administrative forms of deportation that do not require a hearing before an immigration judge.²⁴ Expedited removal and reinstatement both involve formal removal orders, while voluntary return allows migrants to depart the country without a formal removal order being issued. Entering the country illegally after having been formally removed constitutes a felony. In recent years, almost all migrants apprehended at the Southwest border have been formally removed, and only a small share—mostly children under age 18—are voluntarily returned. By statute, migrants due for expedited removal must be detained.²⁵</p> <p>“Catch and release” is a term dating to the 1990s that refers to the practice of releasing some of those apprehended at the border, pending a hearing before an immigration judge. As used in this executive order, the term likely refers to the fact that unaccompanied children (UACs), many asylum seekers, and families seeking asylum—three groups arriving at the border at elevated levels in recent years—are generally not detained during their removal proceedings, under a variety of laws and agency policies.</p> <p>Under the 2008 <i>Trafficking Victims Protection Reauthorization Act</i>, unaccompanied minors from countries other than Canada and Mexico are transferred into Office of Refugee Resettlement (ORR) custody and released to a U.S. relative or sponsor pending their removal proceedings.²⁶ Asylum seekers found by USCIS officers to have a credible fear of persecution may also be released on a case-by-case basis.</p> <p>Family detention, scaled up by the Obama administration after Central American family flows began surging in 2014, has been curbed by federal courts. In July 2015, a U.S. district judge found that DHS family detention practices violated <i>Flores v. Reno</i>, a 1997 settlement governing detention and requiring release of unaccompanied children, because accompanied children are also covered by the settlement. In response, DHS reduced the length of time most families are held in detention to less than 20 days.²⁷</p> <p>Although the executive order directs DHS to detain a larger number of border crossers, including asylum seekers, until immigration court hearings are completed or until they are removed, the ongoing federal litigation over detention of families may make it difficult to significantly expand family detention.</p>
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24 Reinstatement of removal is the repatriation of a migrant to his or her country of origin with formal removal charges based on a pre-existing removal order, without a hearing before an immigration judge. Voluntary return is the repatriation of a migrant to his or her country of origin without being subject to a formal order of removal. See ICE, “FY 2016 Immigration Removals, Definition of Key Terms,” accessed March 27, 2017, www.ice.gov/removal-statistics/2016#keyTerms.

25 *Immigration and Nationality Act*, Section 236(c), “Apprehension and Detention of Aliens,” www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-5570.html.

26 As explained later, unaccompanied children (UACs) from Mexico are treated differently under the *Trafficking Victims Protection Reauthorization Act* (TVPRRA); they are screened for trafficking concerns and asylum after being apprehended and are generally detained until swiftly returned to Mexico.

27 DHS, “Statement by Secretary Johnson on Southwest Border Security” (news release, October 17, 2016), www.dhs.gov/news/2016/10/17/statement-secretary-johnson-southwest-border-security.

SECTION 7. RETURN TO TERRITORY		
Returning border crossers	DHS is directed to take action to return individuals seeking U.S. admission and arriving via land from Mexico or Canada to the territory from which they came pending their removal proceedings.	<p>Under current practice, individuals in removal proceedings remain in the United States for the duration of their immigration court cases. However, U.S. immigration law allows for the return of Mexican or Canadian migrants while their deportation cases are being heard. This provision does not apply to those who are administratively removed through expedited removal or reinstatement of removal, for example, and hence do not go before immigration judges.</p> <p>The new guidance would permit the return to Mexico or Canada of nationals—and non-nationals—of those countries while their cases are under review. This stance is highly controversial, for Mexico in particular. This would most directly affect Central Americans applying for asylum, sending them back to Mexico to await their hearings—something DHS officials have said would take place in “limited fashion.”²⁸ DHS has said it is working with the Mexican government and the State Department to implement this provision, which would require cooperation from Mexico.²⁹ The country is not required to accept the repatriation of non-Mexican nationals, and government officials have said they do not intend to do so.³⁰ Were the policy to be implemented, it could result in Central American asylum seekers waiting for months or years in Mexico for a hearing in U.S. immigration court.</p>
SECTION 8. ADDITIONAL BORDER PATROL AGENTS		
Hiring more Border Patrol agents	The executive order directs DHS to hire 5,000 additional Border Patrol agents, subject to available appropriations.	The Border Patrol receives appropriations to fund 21,370 agents. ³¹ The FY 2016 staffing level of 19,828 agents was below the appropriated level due to high turnover rates and difficulty recruiting and hiring qualified candidates. ³² The Border Patrol doubled in size during the 1990s and again after the 9/11 attacks. Hiring an additional 5,000 agents would take five years and cost an additional \$2.2 billion, according to internal DHS estimates. ³³
SECTION 9. FOREIGN AID REPORTING REQUIREMENTS		
Quantifying U.S. government assistance to Mexico	Agencies across the U.S. government are tasked with identifying and quantifying all sources and levels of direct and indirect aid or assistance to the government of Mexico over the past five years, including development aid, economic assistance, humanitarian aid, and military aid.	<p>According to the U.S. Agency for International Development (USAID), the United States directed \$586 million in foreign assistance to Mexico in FY 2015, including \$531 million in economic assistance and \$55 million in military assistance.³⁴</p> <p>This reporting requirement comes as President Trump has asserted that Mexico will pay for the proposed border wall.</p>

28 Michael D. Shear and Ron Nixon, “New Trump Deportation Rules Allow Far More Expulsions,” *New York Times*, February 21, 2017, www.nytimes.com/2017/02/21/us/politics/dhs-immigration-trump.html.

29 DHS, “Q&A: DHS Implementation of the Executive Order on Border Security and Immigration Enforcement.”

30 David Agren and Doug Stanglin, “Mexico Says No to Trump’s New Deportation Rules,” *USA Today*, February 22, 2017, www.usatoday.com/story/news/world/2017/02/22/foriegn-minister-mexico-immigrations-proposals/98252710/.

31 U.S. Congress, “Department of Homeland Security Appropriations Bill, 2017, Report 114-xx, 114th Cong., 2nd session,” <http://appropriations.house.gov/uploadedfiles/hrpt-114-hr-fy2017-hsecurity.pdf>.

32 Border Patrol, “Border Patrol Agent Nationwide Staffing by Fiscal Year (as of October 1, 2016),” accessed March 15, 2017, www.cbp.gov/sites/default/files/assets/documents/2016-Oct/BP%20Staffing%20FY1992-FY2016.pdf.

33 Molly O’Toole, “Trump Administration Seeks to Loosen Hiring Requirements to Beef Up Border Patrol,” *Foreign Policy*, February 25, 2017, <http://foreignpolicy.com/2017/02/25/trump-administration-seeks-to-loosen-hiring-requirements-to-beef-up-border-patrol/>.

34 U.S. Agency for International Development (USAID), “Aid Dashboard, Mexico,” accessed February 14, 2017, <http://explorer.usaid.gov/aid-dashboard.html>.

SECTION 10. FEDERAL-STATE AGREEMENTS

<p>Expanding local ability to enforce immigration laws and 287(g) models</p>	<p>DHS is asked to engage with state and local governments to enter into agreements under section 287(g) of the INA allowing them to perform the functions of federal immigration enforcement officers in the investigation, apprehension, or detention of noncitizens. DHS may structure 287(g) agreements to provide “the most effective model for enforcing federal immigration laws” for the participating jurisdiction, under a program seen as a force multiplier for ICE.</p>	<p>INA 287(g) allows the federal government to enter into agreements with state or local governments, under which state or local law enforcement officers or government employees may be authorized and trained to assist with immigration enforcement. According to the DHS memorandum, 32 law enforcement agencies in 16 states now participate in the 287(g) program.</p> <p>The 287(g) program has had three models: (1) the jail model, in which officials screen for immigration status when booking individuals on criminal (i.e. nonimmigration) charges; (2) the task force model, in which state and local officials screen for status in the field; and (3) the hybrid model, in which jurisdictions exercise both jail and task force authority.³⁵ In all three models, participating officers may issue detainers that require holding potentially removable noncitizens pending transfer to ICE custody.</p> <p>All of the agreements as of January 2017 were jail models in which individuals can only be asked their immigration status after they have been booked into jail and convicted of a crime. Thus, under the current agreements, police officers do not have authority to ascertain immigration status during routine policing operations.</p> <p>The task force model allowed 287(g) officers to inquire about immigration status during policing operations outside jails. This model generated widespread public criticism, focusing especially on accusations of racial profiling. In locations such as Maricopa County, Arizona, a task force agreement was used by the sheriff’s office to conduct significant enforcement operations in immigrant neighborhoods. As a result, the Obama administration terminated all task force agreements in 2012.³⁶</p> <p>The executive order states that DHS may enter into agreements for task force and hybrid models, as well as jail models, in future 287(g) agreements. In addition, 287(g) activities will likely broaden to include anyone who is booked into a state or local jail, regardless of whether they have been convicted of a crime.</p>
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SECTION 11. PAROLE, ASYLUM, AND REMOVAL

<p>Changing asylum system policies</p>	<p>The executive order says it is the policy of the executive branch to “end the abuse of parole and asylum provisions currently used to prevent the lawful removal of removable aliens.”</p>	<p>The number of asylum seekers from Central America arriving at the U.S.-Mexico border has raised concerns that the U.S. asylum system is being misused by individuals who lack valid humanitarian claims. Critics argue migrants are exploiting loopholes in the asylum system and parole provisions to enter and remain in the United States.</p> <p>Research suggests that a large share of those who claim asylum have valid fears of persecution in their home countries. A 2015 UN High Commissioner for Refugees (UNHCR) study found 64 percent of Central American and Mexican migrant women who were interviewed reported direct threats and attacks by members of criminal armed groups as a primary reason they left their home countries.³⁷ This is consistent with credible fear claims, which asylum officers approved at a rate of 78 percent in FY 2016.³⁸</p>
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35 For more on the different 287(g) models, see Randy Capps, Marc R. Rosenblum, Muzaffar Chishti, and Cristina Rodríguez, *Delegation and Divergence: 287(g) State and Local Immigration Enforcement* (Washington, DC: MPI, 2011), www.migrationpolicy.org/research/delegation-and-divergence-287g-state-and-local-immigration-enforcement.

36 ICE, “FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources” (news release, December 20, 2012), www.ice.gov/news/releases/fy-2012-ice-announces-year-end-removal-numbers-highlights-focus-key-priorities-and#statement.

37 UN High Commissioner for Refugees (UNHCR), *Women on the Run* (Washington, DC: UNHCR, 2015), www.unhcr.org/en-us/about-us/background/56fc31864/women-on-the-run-full-report.html.

38 USCIS, “Asylum Division Quarterly Stakeholder Meeting Statistics,” February 7, 2016, www.uscis.gov/outreach/notes-previous-engagements.

<p>Changing standards and procedures for credible fear and reasonable fear determinations</p>	<p>DHS is directed to ensure, including by issuing new regulations, that individuals seeking asylum are given credible fear and reasonable fear interviews in accordance with the “plain language of the law.”</p> <p>The implementation memo instructs asylum officers to take into account all relevant information from the interviewee to make a legally sufficient determination, in addition to deciding on the credibility of the individual’s statements.</p> <p>USCIS is also ordered to increase the operational capacity of the Fraud Detection and National Security (FDNS) Directorate to detect and prevent fraud in the asylum and benefits and adjudication processes.</p>	<p>Immigration law and regulations lay out numerous requirements for the credible fear and reasonable fear interview process. For example, interviews must be conducted by a USCIS asylum officer in a nonadversarial manner away from the general public. The provisions also stipulate when an interviewee is entitled to an interpreter, and who can be consulted prior to, or present during, an interview. They further establish the standards and information asylum officers are to use when making credible fear and reasonable fear determinations.</p> <p>The DHS guidance emphasizes eliciting relevant information from interviewees and assessing credibility during interviews. DHS also states that determinations should include consideration of the statistical likelihood that the claim would be granted by an immigration judge. Asylum grant rates for Central Americans in immigration court are among the lowest of any national-origin group, at 15 percent for Guatemala, 12 percent for Honduras, and 14 percent for El Salvador.³⁹ This, in addition to enhanced antifraud measures, indicates that credible fear and reasonable fear determination standards will be tightened, making it more difficult for asylum seekers to lodge claims after they are apprehended at the border.</p>
<p>Extending use of expedited removal to those anywhere in the United States for less than two years</p>	<p>DHS may apply expedited removal, which is an administrative form of deportation without a hearing before an immigration judge, to foreign nationals who are designated under statute (those who have entered within the prior two years regardless of whether they are apprehended at the border or within the U.S. interior).</p>	<p>U.S. immigration law allows expedited removal to be applied to foreign nationals apprehended throughout the United States who entered the country unlawfully and cannot establish continuous U.S. presence for the prior two-year period (in effect, recent entrants). However, since enacted in 1996, expedited removal has been applied only to those apprehended at the border. The most recent DHS regulations, issued in 2004, limit the use of expedited removal to individuals apprehended within 100 miles of the border who entered the United States unlawfully within the previous 14 days.⁴⁰</p> <p>Expedited removal is a common procedure in border enforcement, used in 45 percent of apprehensions in FY 2014.⁴¹ It has not been used in the U.S. interior. The Migration Policy Institute estimates 835,000 unauthorized immigrants have resided in the United States for less than two years; of those, an estimated 260,000 to 440,000 entered the country illegally or through the Visa Waiver Program and could therefore, under the executive order, be subject to removal without appearing before an immigration judge.⁴²</p> <p>The DHS memorandum does not immediately extend expedited removal. Instead, it states that the agency will publish new expedited removal regulations which “may, to the extent the [Secretary of Homeland Security] determine[s] is appropriate, depart from the limitations” in current policy and practice.</p>

39 EOIR, “Asylum Statistics,” 2011-2015, accessed February 7, 2017, www.justice.gov/eoir/file/asylum-statistics/download.

40 USCIS, “Designating Aliens For Expedited Removal,” 69 *Federal Register* 48877, FR 28-04, August 11, 2004, www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-94157/0-0-0-94177/0-0-0-94493.html.

41 Data provided to MPI by the U.S. Border Patrol.

42 Estimates produced by MPI, using U.S. Census Bureau data from the 2010-14 American Community Survey (ACS).

<p>Granting parole for asylum seekers on a case-by-case basis</p>	<p>DHS will ensure that parole into the United States is exercised only on a case-by-case basis, in accordance with current statute, and “when an individual demonstrates urgent humanitarian reasons or a significant public benefit derived from such parole.”</p>	<p>Parole is temporary permission to enter the United States. Under U.S. law, DHS may grant parole only on a case-by-case basis for “urgent humanitarian reasons” or “significant public benefit.” Asylum seekers who are in expedited removal and are determined to have a credible fear are eligible for parole.</p> <p>In 2009, the Obama administration issued a policy directive to generally grant parole to arriving asylum applicants found to have a credible fear of persecution and who pose no security, safety, or flight risk. ICE granted parole to 47 percent of arriving asylum seekers who passed a credible fear interview in FY 2015.⁴³ The DHS implementation memo states that the 2009 policy memo will remain in effect, pending review and regulations clarifying the appropriate use of parole.</p> <p>In the memo, DHS argues that the practice of granting parole to individuals in predesignated categories has contributed to a border security crisis and created an incentive for illegal immigration. This may signal an intention to reduce grants of parole to arriving asylum seekers. At the same time, potentially stricter credible fear and reasonable fear standards and procedures may result in fewer positive determinations and preclude the need for policy guidance that narrows the exercise of parole.</p>
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⁴³ Human Rights First, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers* (New York: Human Rights First, 2016), www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown.pdf. According to the report, this information was provided by ICE to the American Civil Liberties Union and the Center for Gender and Refugee Studies in response to a *Freedom of Information Act* request. The data covered the first nine months of calendar year 2015.

<p>Defining unaccompanied children</p>	<p>DHS is directed to provide training on how to implement statutes governing the definition and treatment of unaccompanied children apprehended at the border to ensure that minors are properly processed, receive appropriate care and placement while in DHS custody, and when appropriate are safely repatriated in accordance with the law.</p> <p>The DHS implementation memo states that under current policy, minors determined to be “unaccompanied alien children” at the border maintain their UAC status even after they no longer meet the statutory definition (because they are placed in the custody of a parent in the United States who can care for them). UAC status entitles a minor to special protections, including placement in a suitable care facility, access to social services, and removal proceedings before an immigration judge rather than expedited removal. The memo further says that in developing guidance and training, DHS will establish standardized procedures to confirm that minors initially determined to be UACs continue to fall within the statutory definition as they go through the removal process.</p> <p>The DHS memo also states that approximately 60 percent of minors determined to be UACs are released to one or more parents residing unlawfully in the United States. It says that parents and family members frequently pay smugglers several thousand dollars to bring their children into the United States. DHS agencies are directed to, in certain circumstances, place such parents or family members who are removable into removal proceedings, or refer these individuals for criminal prosecution.</p>	<p>Under the 2002 <i>Homeland Security Act</i>, UACs are defined as children who have no lawful immigration status in the United States, are under the age of 18, have no U.S.-based parent or legal guardian, or no parent or legal guardian available to provide care and physical custody in the United States. However, DHS has historically determined that a minor is a UAC if he or she is apprehended by the Border Patrol without a parent or guardian present, even if the child has a parent or other relative elsewhere in the United States.</p> <p>The executive order directs DHS to make UAC determinations based on a narrower interpretation of the <i>Homeland Security Act</i>. This shift would allow DHS to detain and deport children who have parents or other legal guardians present in the United States (which an estimated 85 percent do) without providing them with protections afforded under the <i>Trafficking Victims Protection Reauthorization Act</i>. The implementation memo suggests that such children will instead be subject to expedited removal. Changing procedures in this way for minors apprehended at the border would likely result in much swifter deportation of large numbers of mostly Central American children. It would also inhibit the ability of minors who may have valid asylum claims from advancing them without legal representation or parents and relatives to assist them.</p> <p>The role of smugglers and associated criminal networks is pervasive in the movement of Central Americans from the region through Mexico to the U.S.-Mexico border. However, as with analogous criminal enterprises, law enforcement efforts to combat them are seen to be most effective when the organizations themselves are dismantled and disrupted as business operations, rather than when the “customers” for their services are sanctioned.</p>
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SECTION 12. AUTHORIZATION TO ENTER FEDERAL LANDS

<p>Allowing the Border Patrol and other law enforcement personnel to enter federal lands</p>	<p>DHS, the Interior Department, and other relevant agencies are directed to take action to authorize access to all federal lands for federal, state, and local officers, and to enable such officers to perform actions necessary to implement the executive order.</p>	<p>More than 40 percent of the U.S.-Mexico border (820 linear miles) is managed by U.S. Interior Department land management agencies and the U.S. Forest Service (based in the U.S. Department of Agriculture).⁴⁴ Cooperation on border security between DHS and these agencies is chiefly guided by a 2006 memorandum of understanding (MOU) addressing activities such as information sharing, installing surveillance equipment, road usage, mitigating environmental impacts, and access to wilderness areas.⁴⁵ The policy has come under criticism for hindering border security efforts on federal lands.⁴⁶ The executive order could supersede parts of the 2006 MOU. The Border Patrol will still be required to comply with existing federal land management laws, including the <i>National Environmental Policy Act of 1969</i>, <i>Wilderness Act of 1964</i>, and <i>Endangered Species Act of 1973</i>. However, U.S. law permits the Homeland Security Secretary to waive “all legal requirements,” including environmental and federal land management laws, deemed necessary for expeditious construction of security barriers along the border.”⁴⁷</p>
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SECTION 13. PRIORITY ENFORCEMENT

<p>Expanding federal prosecutions of migrants apprehended at the border</p>	<p>The Justice Department must establish prosecution guidelines and allocate resources to make offenses having a nexus to the southern border a high priority for federal prosecution.</p> <p>The DHS implementation memo indicates a focus of this section will be domestic and international efforts to dismantle transnational criminal organizations involved in human smuggling. It directs CBP and other DHS components to plan, implement, and support enhanced operations, and instructs ICE to expand its work in the Northern Triangle.</p> <p>It also instructs that task forces target individuals and organizations for offenses related to alien smuggling or trafficking, drug trafficking, illegal entry and re-entry, visa fraud, identity theft, unlawful possession or use of official documents, and acts of violence committed against persons or property at or near the border.</p>	<p>Offenses with a nexus to the southern border generally include immigration, smuggling, and fraudulent document-related crimes. Illegal entry, illegal re-entry, and similar immigration violations made up 52 percent of all federal prosecutions in FY 2016.⁴⁸ They represent the single largest category of criminal offenses handled by federal district courts today.⁴⁹</p> <p>The vast majority of these prosecutions (87 percent) originated with CBP, while ICE accounted for 10 percent. The most common border-related crime is misdemeanor improper entry (35,367 prosecutions in FY 2016), followed by felony re-entry after deportation (28,930 prosecutions), and transporting and harboring certain aliens (3,794 prosecutions).⁵⁰ However, fewer than 20 percent of migrants apprehended at the border are prosecuted for border-related crimes.⁵¹ The priorities of U.S. Attorneys and the capacity in their offices and the federal courts have limited the number of migrants who can be prosecuted for these crimes.</p> <p>The Attorney General could direct U.S. Attorneys to accord an even higher priority and greater resources to prosecution of border-related crimes, resulting in a higher share of convictions and federal prison sentences for these offenses.</p>
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44 Testimony of Anu K. Mittal, Director, Natural Resources and Environment, Government Accountability Office (GAO), before the U.S. House Committee on Natural Resources Subcommittee on National Parks, Forests, and Public Lands; and the Committee on Oversight and Government Reform Subcommittee on National Security, Homeland Defense, and Foreign Operations, *Southwest Border: Border Patrol Operations on Federal Lands*, 112th Cong., 1st sess., April 15, 2011, <http://trac.syr.edu/immigration/library/P5576.pdf>.

45 DHS and Departments of Interior and Agriculture, “Memorandum of Understanding Among U.S. Department of Homeland Security and U.S. Department of the Interior and U.S. Department of Agriculture Regarding Cooperative National Security and Counterterrorism Efforts on Federal Lands along the United States’ Borders,” March 2006, <http://cis.org/sites/cis.org/files/articles/2010/mou.pdf>.

46 House Committee on Natural Resources, “Securing our Border on Federal Lands: Problem Overview,” accessed February 22, 2017, <http://naturalresources.house.gov/info/borderoverview.htm>.

47 U.S. Congress, House Report 109-72, “Making Emergency Supplemental Appropriations for the Fiscal Year Ending September 30, 2005, and for Other Purposes,” 109th Cong., 1st Sess., 170-72, <https://www.congress.gov/congressional-report/109th-congress/house-report/72>.

48 TRAC, “Immigration Now 52 Percent of All Federal Criminal Prosecutions,” November 28, 2016, <http://trac.syr.edu/tracreports/crim/446/>.

49 TRAC, “Federal Criminal Prosecutions Down Sharply in July 2016,” August 31, 2016, <http://trac.syr.edu/tracreports/crim/436/>.

50 TRAC, “Immigration Now 52 Percent of All Federal Criminal Prosecutions.”

51 Data provided to MPI by the U.S. Border Patrol.

SECTION 14. GOVERNMENT TRANSPARENCY

<p>Reporting statistics on border apprehensions frequently and consistently</p>	<p>DHS will publicly report monthly statistical data on individuals apprehended at or near the Southern border. The reporting method must be uniform across all DHS components and “in a format that is easily understandable by the public.”</p>	<p>For several years, DHS has provided monthly statistics on overall apprehensions at the border, including unaccompanied children, family units, and individuals from countries other than Mexico. The reports also include Border Patrol sector-level breakdowns of apprehensions of unaccompanied children and family units, and several months ago introduced a range of port of entry figures. The Trump administration has continued reporting of these statistics and has increased the detail of information released. Beginning in March 2017, for example, CBP began publishing Border Patrol recidivism rates and apprehensions of individuals with criminal convictions at and between ports of entry.⁵²</p>
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SECTION 16. HIRING

<p>Hiring new personnel</p>	<p>The Office of Personnel Management (OPM) will take appropriate action to facilitate hiring personnel to implement this order.</p>	<p>On January 23, 2017, President Trump issued a presidential memorandum titled, “Hiring Freeze,” to be applied to all vacant positions in the executive branch. The order does not apply to military personnel, and states that the “head of any executive department or agency may exempt from the hiring freeze any positions that it deems necessary to meet national security or public safety responsibilities.” The OPM Director may also grant exemptions where necessary. Hiring of Border Patrol agents, asylum officers, and immigration judges will require exemptions under the hiring freeze.</p>
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⁵² CBP, “CBP Enforcement Statistics,” accessed March 27, 2017, www.cbp.gov/newsroom/stats/cbp-enforcement-statistics.

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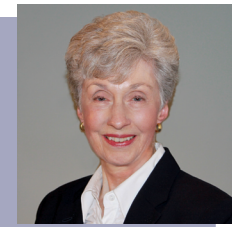


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