



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. citizen or national (alien) 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. The Trump Administration also [sought to rescind](#) the [Deferred Action for Childhood Arrivals \(DACA\)](#) program, which 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.

President Biden has [rescinded](#) some of the Trump Administration's immigration measures, and also has directed DHS to reexamine its immigration enforcement policies and priorities. DHS has sought, during the pendency of that review, to [temporarily restrict](#) immigration enforcement actions to cover only certain aliens, and to [suspend](#) the execution of most removal orders for a period of 100 days. However, a federal district court has [enjoined](#) the agency's “100-day pause” on deportations while it considers a legal challenge to this action. President Biden has also [announced](#) an intent “to preserve and fortify” DACA, though that policy also is subject to legal challenge. This Sidebar addresses the Biden Administration's immigration enforcement priorities and legal considerations that they raise.

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](#)

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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. And it 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 significantly 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 then-Attorney General Jeff Sessions's [conclusion](#) 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. However, 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 that protect national and border security, address "humanitarian challenges at the southern border," ensure public health and safety, and safeguard the "dignity and well-being of all families and communities." On that same day, then-Acting DHS Secretary David Pekoske issued a [memorandum](#) directing DHS officials to conduct a "Department-wide review" of the agency's immigration enforcement policies, including those relating to detention, prosecutorial discretion, and cooperation with state and local law enforcement. The memorandum also established "[interim civil enforcement guidelines](#)" pending DHS's review that generally limited immigration enforcement actions to cover only certain categories of aliens.

On February 18, 2021, DHS's Immigration and Customs Enforcement (ICE) issued [guidance](#) implementing the interim enforcement guidelines (the interim guidance is in effect until DHS Secretary Alejandro Mayorkas issues new enforcement guidelines, expected within 90 days of issuance of the ICE guidance). The ICE guidance memorandum identifies the following [categories of aliens](#) as priorities for enforcement and removal:

- individuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension or detention is otherwise necessary to protect the security of the United States;
- individuals apprehended at the border or ports of entry while trying to unlawfully enter the United States on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020; and
- individuals who pose a threat to public safety, and either (1) have been convicted of an [aggravated felony](#), or (2) have been convicted of an offense for which an element was active participation in a [criminal street gang](#), or (if they are not younger than 16 years of age) have participated in an organized criminal gang or transnational criminal organization.

The ICE guidance [provides](#) that the priorities are to be applied to a wide range of enforcement decisions, including whether to initiate or pursue [removal proceedings](#); whether to stop, question, or arrest an alien; whether to detain or release an alien; whether to issue a detainer; whether to grant deferred action; and when to execute a final removal order. The ICE guidance [permits](#) enforcement actions against aliens who do *not* meet the criteria for priority cases (taking into account certain aggravating and mitigating factors), but only with advance supervisory approval. If there are exigent circumstances (e.g., the alien poses an

imminent threat to life or an imminent substantial threat to property), and securing preapproval is impracticable, the enforcement action [is permitted](#) so long as the officer conducting the action requests approval within 24 hours.

In addition to setting interim enforcement guidelines, then-Acting Secretary Pekoske, on January 20, 2021, [ordered](#) a “100-day pause” on the removal of any alien with a final order of removal pending DHS’s review of its immigration enforcement policies. He claimed that “unique circumstances” resulting from the Coronavirus Disease 2019 (COVID-19) pandemic have created “operational challenges” at the southern border, and that the agency’s limited resources should be directed toward its “highest enforcement priorities.” The 100-day pause, however, does not apply to (1) an alien whom the ICE Director determines or suspects to have engaged in terrorism or espionage, or who poses a danger to national security; (2) an alien who was not physically present in the United States before November 1, 2020; (3) an alien who has knowingly and voluntarily agreed to waive any rights to remain in the United States; or (4) an alien for whom the ICE Director determines removal is required by law.

In conjunction with this recalibrating of immigration enforcement priorities, President Biden in a [January 20, 2021, memorandum](#) instructed the DHS Secretary “to preserve and fortify” DACA, noting that program “reflects a judgment that these immigrants should not be a priority for removal based on humanitarian concerns and other considerations.”

Legal Challenge in *Texas v. United States*

The State of Texas filed a [lawsuit](#) in the U.S. District Court for the Southern District of Texas challenging DHS’s 100-day pause on deportations. Texas [argued](#) that the 100-day pause (1) violated the January 8, 2021, [agreement](#) between the state and DHS because the agency failed to notify and consult with Texas before announcing the 100-day pause; (2) violated [INA § 241\(a\)\(1\)\(A\)](#), which provides that DHS “shall remove” an alien subject to a final order of removal within a period of 90 days (excepted in limited circumstances); (3) violated the Constitution’s command that the President (and by extension executive agencies) “[take care that the Laws be faithfully executed](#)”; and (4) violated [provisions of the Administrative Procedure Act](#) (APA) because the agency departed from previous policy without adequate justification, and failed to provide public notice and opportunity to comment on the proposed change.

Initially, the court issued a [Temporary Restraining Order](#) (TRO) against the “100-day pause,” providing immediate relief while the court considered Texas’s motion for a more lasting, preliminary injunction pending a final ruling in the case. Several weeks later, the court [issued](#) a preliminary injunction. The court [declined](#) to consider whether DHS violated the January 8, 2021, agreement with Texas, reserving judgment on that question for later, and concluding that Texas had standing to bring the challenge even in the absence of that agreement. The court [determined](#) that the 100-day pause [likely violates](#) [INA § 241\(a\)\(1\)\(A\)](#), which the court construed as a “[mandatory command](#)” that an alien “shall” be removed within 90 days of a final removal order. The court [disagreed](#) with the government’s contention that its broad discretion over immigration enforcement restricted the court’s ability to review its decision to suspend deportations. While recognizing that the executive branch enjoys broad discretion over many aspects of immigration enforcement, the court [determined](#) that such discretion still must be exercised “in the manner in which Congress has prescribed.” Noting that [INA § 241\(a\)\(1\)\(A\)](#) permits the government to exceed the 90-day removal period only in limited circumstances, the court [stated](#) that the statute “does not imply total discretion to pause or suspend a statutory mandate” for nearly all aliens with final removal orders, as the court deemed would occur if the 100-day pause went into effect.

The court further [ruled](#) that DHS’s suspension of removals likely violates the APA’s requirement that agencies [offer reasoned explanations](#) for policy changes. The court concluded that DHS failed to articulate how an expansive 100-day pause on the deportation of most aliens is “[logically and reasonably connected](#)” to the agency’s need to reassess its immigration enforcement priorities and resources. The

court also [held](#) that the 100-day pause likely violates the APA’s [separate requirement](#) that agencies must generally provide the public with advance notice and an opportunity to comment on proposed agency rules. Finally, in the court’s [view](#), Texas would suffer irreparable harm without an injunction because the 100-day pause would lead to increased costs for detention facilities, public education, and other public benefits and services for unlawfully present aliens.

The court thus [enjoined](#) DHS from implementing the 100-day pause pending the outcome of Texas’s legal challenge to that policy. The court ordered that the injunction would apply on a [nationwide basis](#). The court relied on its [previous determination](#), when granting a TRO, that the nationwide scope of injunctive relief would ensure the application of uniform immigration policies throughout the United States. Of note, the preliminary injunction does not bar DHS from reviewing its immigration enforcement priorities, implementing its [“interim civil enforcement guidelines”](#) pending that review, or exercising discretion whether to pursue removal of aliens [in individual cases](#).

Legal Considerations

The Biden Administration’s 100-day pause prompts questions about the extent to which the federal government may decline to enforce federal immigration laws. The pause would suspend action against most of the [over 1.19 million aliens](#) subject to final orders of removal. On one hand, DHS is [tasked with immigration enforcement](#), including the removal of unlawfully present aliens. And [INA § 241\(a\)\(1\)\(A\)](#) generally requires removal of an alien with a final removal order within a period of 90 days (subject to limited exceptions, such as if the alien prevents removal). On the other hand, the Supreme Court has recognized that the executive branch has [“broad discretion”](#) over immigration enforcement, including the authority to prioritize some cases over others. And courts and immigration authorities sometimes have construed statutes providing that agencies “shall” take enforcement action as still [allowing some degree](#) of enforcement discretion. Still there are arguably limits to the scope of that discretion. Typically, immigration authorities have exercised their discretion on an individualized, [case-by-case basis](#). But some contend that such discretion cannot be similarly applied on a large, programmatic scale without constituting an abdication of an agency’s statutory duties. Thus, Texas argues that DHS cannot create [“sweeping, categorical rules”](#) that exempt [“the vast majority of illegal aliens.”](#) In granting a preliminary injunction, the federal district court ruled, among other things, that the 100-day pause violates [INA § 241\(a\)\(1\)\(A\)](#)’s clear and [“unambiguous”](#) command that DHS must execute final removal orders. While recognizing DHS’s broad discretion over immigration enforcement in individual cases, the court [determined](#) that the agency does not have unfettered discretion to issue [“a blanket pause on removal.”](#)

The district court found it unnecessary to consider whether DHS’s January 2021 agreement with Texas is a [“binding and enforceable commitment”](#) that limits the agency’s ability to exercise enforcement discretion without first consulting with Texas. As mentioned above, the agreement enables Texas to seek injunctive relief in the event that DHS does not give 180 days’ notice and consult with the state before taking any actions covered by the agreement. This [includes](#) any action that [“could reduce immigration enforcement, increase the number of removable or inadmissible aliens in the United States, or increase immigration benefits or eligibility for benefits for removable or inadmissible aliens.”](#) Regardless of the outcome of this case, it seems likely that a court may be required to assess the legal force of the agreement in the event that DHS alters immigration enforcement policies in a way that [“could reduce immigration enforcement”](#) without notifying and consulting with Texas.

While the litigation preventing implementation of the 100-day “pause” on deportations has had some immediate effect on the Biden Administration’s immigration enforcement plans, a potentially more consequential court decision is looming on the legality of DACA. Since its inception in 2012, DACA has provided a legal reprieve to [hundreds of thousands](#) of otherwise removable aliens who arrived in the United States as children. As mentioned above, while the Trump Administration attempted to rescind the

program, the Supreme Court **ruled** that the Administration did not take the appropriate procedural steps to end the program. And a lower court **subsequently ordered** DHS to resume processing new DACA applications, which had been halted by the Trump Administration. Upon taking office, President Biden **instructed** immigration authorities “to preserve and fortify” DACA, which has shielded many unlawfully present aliens from removal. The U.S. District Court for the Southern District of Texas is now poised to rule on the legality of DACA. In 2018, Texas and a number of other states **challenged** the program as an unlawful exercise of the executive branch’s authority. That same year, the federal district court hearing that challenge concluded that the plaintiffs had not demonstrated the **type of harm** and certain **other factors** that would support a preliminary injunction blocking DACA pending a final ruling in the case. But the court did **opine** that DACA was likely unlawful, **reasoning** that while DHS may defer removal in specific cases, exercising that discretion to grant relief to a large class of aliens contravenes the INA’s statutory scheme. Almost three years later, the district court will likely rule again on DACA’s legality on the state’s **motion for summary judgment**. In the years between, **some lower federal courts** reviewing the Trump Administration’s attempted rescission of DACA opined that the program was a lawful exercise of DHS’s enforcement discretion (the Supreme Court did not reach this issue when holding that the DHS’s rescission violated the procedural requirements of the APA). But given the Texas court’s prior ruling, there is reason to believe that it may view the DACA initiative as unlawful. Regardless, the court’s ruling seems certain to prompt further litigation at the appellate level.

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. And Congress, through the annual **appropriations process**, can have a profound effect on enforcement decisions that are premised on the availability of resources. Legislation already has been introduced in the 117th Congress that responds to executive enforcement priorities. The Biden Administration, for instance, has **announced support** for companion bills (**S. 348, H.R. 1177**) that would, among other things, **confer lawful permanent resident (LPR) status** on certain aliens who had entered the United States as children and meet other requirements (including DACA recipients). The bill would also **provide temporary protections** to aliens physically present in the United States who meet specified requirements (e.g., not being subject to disqualifying criminal bars), and **would enable** them to pursue LPR status after a period of time. The bill would also **prohibit** the detention and removal of certain alien victims of human trafficking, domestic violence, and other specified criminal activity who have pending applications for immigration benefits. And the bill **would expand** the use of **Alternatives to Detention** programs for removable aliens.

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