



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

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

President Biden [rescinded](#) some of the Trump Administration's immigration initiatives and directed DHS to review its immigration enforcement policies and priorities. In January 2021, DHS issued [temporary immigration enforcement guidance](#) pending that review. The interim guidance generally focused enforcement activities toward certain aliens who pose a threat to national security, border security, or public safety. Following legal challenges brought by Texas and Louisiana, a federal district court [preliminarily enjoined](#) DHS from implementing this policy. A panel of the U.S. Court of Appeals for the Fifth Circuit initially [issued a partial stay](#) of the injunction. However, the en banc Fifth Circuit [vacated](#) the panel's decision on November 30, 2021, effectively reinstating the preliminary injunction while litigation continues.

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In the midst of these judicial developments, DHS announced [new immigration enforcement guidelines](#) in September 2021 that supersede its earlier guidance. The district court’s preliminary injunction halting implementation of the January guidance does not affect DHS’s implementation of the September 2021 enforcement guidelines. Texas and Louisiana, however, have amended their complaint in the lawsuit against the January 2021 guidelines to challenge the September 2021 guidelines. Separately, the States of Arizona, Montana, and Ohio have [legally challenged](#) the September 2021 guidelines.

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

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

## Prior Immigration Enforcement Policies

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

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

Immigration enforcement priorities shifted under the Trump Administration. In a 2017 [executive order](#), President Trump pledged “to employ all lawful means to enforce the immigration laws of the United States” and “to ensure the faithful execution of the immigration laws of the United States against all removable aliens.” He directed DHS to prioritize the removal of aliens found to be removable on certain criminal and national security-related grounds; aliens arriving at the border without valid documents and recent unlawful entrants; aliens who had committed *any* criminal offense; aliens who engaged in

immigration-related fraud or “abused any program related to receipt of public benefits”; aliens subject to a final removal order who failed to depart as required; and aliens who posed “a risk to public safety or national security.” In adopting this policy, then-DHS Secretary John Kelly [announced](#) that the agency “no longer will exempt classes or categories of removable aliens from potential enforcement.”

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

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

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

## The Biden Administration’s Immigration Enforcement Priorities

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

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

Aliens falling within the “Threat to National Security” category [include](#) those who are engaged in activities relating to terrorism or espionage, or who otherwise pose a danger to national security. Aliens falling within the “Threat to Public Safety” category [generally include](#) those who engaged in “serious criminal conduct,” but the guidelines require consideration of aggravating and mitigating factors—rather than the mere fact of a criminal conviction—in assessing whether enforcement action is warranted. 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.

## Legal Challenges to Immigration Enforcement Policies

The Biden Administration’s immigration enforcement initiatives have been subject to legal challenge. A number of lawsuits were brought almost immediately following DHS’s issuance of interim enforcement guidelines in January 2021. In response to a [lawsuit](#) by the State of 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. (The court did not reach the question of whether DHS violated its January 8, 2021, [agreement](#) with Texas by failing to notify and consult with the state before altering its enforcement priorities. Nor did it reach the question of whether that agreement was legally valid.) The [court determined](#) that the 100-day pause [likely violated](#) INA § 241(a)(1)(A), which [provides](#) that an alien generally “shall” be removed within 90 days of a final removal order. While recognizing that the executive branch enjoys broad discretion over immigration enforcement, the court [declared](#) that such discretion still must be exercised “in the manner in which Congress has prescribed.” The court also ruled that the 100-day pause was likely unlawful because DHS [offered no reasoned justification](#) for changing its policy, and [failed to provide notice](#) and opportunity for the public to comment on the proposal.

In a separate case, the States of Texas and Louisiana sued in the U.S. District Court for the Southern District of Texas to challenge DHS’s interim enforcement guidelines directing agency components to focus enforcement efforts on those aliens who are a threat to national security, border security, or public safety. The district court in August 2021 [preliminarily enjoined](#) DHS from enforcing the guidelines. The court ruled they [likely violated](#) INA provisions that mandate the detention of a broader category of aliens who have [committed a wide range of enumerated criminal offenses](#) or who are [already subject to final orders of removal](#). Echoing its analysis in the 100-day pause litigation, the court [declared](#) that DHS “may not dispense with a clear congressional mandate under the guise of exercising ‘discretion.’” Additionally, the court ruled, DHS’s interim guidelines were [unsupported by reasoned decisionmaking](#) and issued [without notice and comment procedures](#).

Initially, a three-judge panel of the Fifth Circuit [partially stayed](#) the district court's injunction pending adjudication of the government's appeal. The court [determined](#) that the INA's mandatory detention provisions apply to aliens who are *already* arrested and placed in removal proceedings. On the other hand, the court [explained](#), these statutory mandates do not restrict DHS's ability to determine, in its discretion, who should be subject to investigative and enforcement action in the first place. The panel thus [stayed](#) the injunction to allow DHS to rely on the interim guidelines to decide whether to investigate or initiate formal removal proceedings against an alien, but [permitted](#) the injunction to go into effect to the extent it prevents DHS from relying on the guidelines with respect to those who are already placed in removal proceedings and subject to mandatory detention.

On November 30, 2021, the en banc Fifth Circuit [vacated](#) the panel's opinion issuing the stay, allowing the district court's preliminary injunction barring reliance on the interim enforcement guidelines to remain in place while the court of appeals considers the case. Significantly, the injunction does not address the [superseding enforcement guidance](#) issued by DHS that went into effect in November 2021. In the ongoing litigation concerning the interim guidelines, however, Texas and Louisiana have filed an amended complaint to challenge the newer guidelines as well, but no ruling has been made. In a separate case, the States of Arizona, Montana, and Ohio have also [legally challenged](#) the superseding guidelines.

## Legal Considerations

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

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

While policymakers' interest in immigration enforcement has primarily centered on executive action and litigation challenging those actions' lawfulness, Congress also may play a determinative role. Congress has regularly considered or [enacted legislation](#) that prioritizes the removal of [certain categories of aliens](#) (e.g., terrorists, criminal aliens, gang members), limits enforcement actions in [certain locations](#), [restricts the detention](#) of certain low-priority aliens, or [provides temporary or permanent relief](#) to some otherwise removable aliens. Congress, through the annual [appropriations process](#), can also have a profound effect on enforcement decisions that are premised on the availability of resources. Legislation has been introduced in the 117th Congress that responds to executive enforcement priorities, including bills that would, among other things, [confer lawful permanent resident status](#) on certain unlawfully present aliens. Most recently, a [provision of a House budget reconciliation bill](#), the Build Back Better Act (H.R. 5376), would enable 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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