How Policy Changes by the Trump Administration Have Touched Every Major Area of Enforcement
Cogs in the Deportation Machine: How Policy Changes by the Trump Administration Have Touched Every Major Area of Enforcement

Since taking office, President Trump and his administration have implemented a series of policy reforms that touch every aspect of the enforcement and removal process. These policies have expanded the very definition of who is subject to enforcement and encouraged indiscriminate enforcement against anyone who is undocumented. On the ground, the administration has increased the use of aggressive enforcement tactics that are causing fear and intimidation in communities. The administration has also restricted the exercise of prosecutorial discretion that may be warranted in compelling cases and altered procedures in immigration court that will severely undermine due process and the integrity of the courts. Taken together, these reforms constitute a system-wide escalation of the federal government’s authority and capacity to apprehend, detain, and deport far more noncitizens, often at the expense of fundamental principles of due process and fairness.

At the administration’s disposal are massive amounts of resources already dedicated to immigration enforcement. The current budgets for Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) are nearly $20 billion—an all-time high that surpasses funding for all other federal law enforcement combined. With paltry attention paid to whether American taxpayer money is being spent wisely or effectively, the administration is now asking Congress for huge increases to enforcement funding for detention beds, ICE and Border Patrol agents, and for the border wall. As “Cogs in the Machine” demonstrates, the machinery of enforcement is not being used to pursue threats to national security or public safety but to deport as many people as possible.

Notably, the implementation of these policies has been done largely out of public view. These policies were generally not enacted through legislation or promulgated through regulation, which would have provided opportunities for public input and offered a semblance of transparency. Instead, most were executed by memoranda, orders, or other internal guidance, only some of which were announced publicly. Others were shielded from public scrutiny and have been revealed only through Freedom of Information Act requests or investigative reporting by the media.

“Cogs in the Deportation Machine” surveys a wide range of these new enforcement policies and practices, and examines five major areas:

A. The elimination of existing forms of protection from deportation
B. The expansion of indiscriminate enforcement
C. The escalation of aggressive enforcement tactics
D. The blanket prosecution of cases in immigration courts
E. The enactment of policies that threaten the independence and integrity of immigration courts
The threat of deportation is real for those whose protection has ended ... the Trump administration has expanded the universe of individuals subject to enforcement ... people are more reticent to report crimes or act as witnesses ... the administration is undermining available relief avenues ... policies that will undermine the independence of immigration judges and weaken due process ...
A. Eliminating Existing Forms of Protection from Deportation

Since taking office, President Trump has terminated the Deferred Action for Childhood Arrivals (DACA) program and ended Temporary Protected Status (TPS) for the nationals of several countries. The end of these humanitarian initiatives revokes employment authorization and legal protection for almost 938,000 people—nearly all of whom have lived in the country for years and have family, jobs, or other substantial ties to their communities. TPS holders and DACA recipients are among the noncitizens with the longest periods of residency in the United States and the strongest ties to the country. Both groups are thoroughly vetted by the government on a regular basis and contribute significantly to the economy.¹

In its first year, the administration has dramatically increased the undocumented population by shrinking the number of people who are protected from deportation. The threat of deportation is real for those whose protection has ended, especially when one takes into account that the Trump administration has also expanded enforcement to cover a far broader population of people (see discussion below).²

<table>
<thead>
<tr>
<th>Humanitarian Program</th>
<th>Population</th>
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<tbody>
<tr>
<td>DACA Rescission</td>
<td>689,800</td>
</tr>
<tr>
<td>TPS Terminations</td>
<td>248,000</td>
</tr>
<tr>
<td>Additional Immigrants Subject to Deportation</td>
<td>937,800</td>
</tr>
</tbody>
</table>

Source: USCIS 2018; CMS 2017

A.1. Dreams Denied: Mr. Martinez

The Trump Administration’s decision to rescind DACA means that Mr. Martinez—a terminally ill, 26-year-old DACA beneficiary from Mexico—will now lose DACA protections, but will have to make an impossible choice. He can travel to Mexico to say goodbye to his parents, forfeiting the ability to return to the U.S. for proper palliative care, more treatment to prolong his life, and the chance to be with his U.S. citizen wife during the last months of his life, or he can remain here and die without the opportunity to say goodbye to his parents. Martinez entered the U.S. (EWI) at the age of seven and has remained here ever since. In January 2007, he was diagnosed with acute lymphoblastic leukemia, a cancer that affects white blood cells. He was given a bone marrow transplant in July 2007 as treatment. However, he suffered complications following the bone marrow transplant and developed severe graft-versus-host disease. His condition is terminal and he has no chance of recovery. His doctor has predicted he may not survive 2018.

Martinez has not seen his mother in approximately five years and his father in a decade. Before he was able to apply for advance parole to visit his parents, the Trump Administration announced the termination of the DACA initiative, and along with it, the immediate end to advance parole for DACA beneficiaries. Without the possibility of DACA advance parole, his attorneys filed a request for humanitarian parole-in-place for Martinez, which might have allowed him to visit his parents before he dies. On March 8, 2018, Martinez and his family—including his U.S. citizen wife—learned that USCIS denied this request.

AILA Attorney, Detroit, Michigan

A.1. Dreamers Targeted: Osman, Jesus, and Jessica

While a temporary court order has allowed some Dreamers to renew their DACA applications for the time being, the threat of deportation looms for immigrant youth. Some DACA recipients have already been targeted for enforcement, including:

- Osman Aribo Enriquez, a Dreamer from Pennsylvania whose DACA was expired after the USPS failed to deliver his renewal application on time. Osman was pulled over for an expired vehicle...
held DACA at the time of the rescission. While a January 9, 2018 court order has temporarily allowed DACA recipients to continue applying for deferred action, without it, about 22,000 Dreamers would have lost deferred action by March 5, 2018. Importantly, the Trump administration’s rescission prevents young people who are now or will be eligible but have never applied, from filing new DACA applications. Approximately 1.2 million people are in this category, and the court injunctions do not require the administration to accept new DACA applications. Ultimately, the Trump administration’s rescission of DACA will increase the number of people who are undocumented by 690,000.

2. Termination of Temporary Protected Status Designations

For two decades, Presidents have employed TPS to protect certain classes of undocumented individuals from deportation. If the U.S. Department of Homeland Security (DHS) determines a foreign country is experiencing armed conflict, natural disaster, or other extraordinary circumstances that would make the return of that country’s nationals dangerous or impractical, the Secretary can designate that country for TPS. TPS provides employment authorization and protection from deportation for the nationals from these designated countries who reside in the United States. Periodically, DHS must review and extend or terminate a country’s designation, with extensions usually lasting an additional 18 months. Since the creation of TPS, both Republican and Democratic administrations have designated and extended TPS for various countries, in some cases for several decades.

At the beginning of the Trump administration, ten countries had TPS designations, with countries such as El Salvador and Honduras repeatedly re-designated. Under the new administration, DHS significantly narrowed TPS protections by designating countries for shorter periods, failing to re-designate countries in a timely manner, or simply terminating designations. The Trump administration terminated the TPS designations for El Salvador, Haiti, Nicaragua, and Sudan. The terminations of these TPS designations will render approximately 248,000 people undocumented. Over the next two years, the Secretary will also review designations for all other TPS countries, including Honduras, Nepal, Somalia, South Sudan, Syria, and Yemen.

<table>
<thead>
<tr>
<th>Table B. Termination of TPS Designations</th>
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<tbody>
<tr>
<td>Population</td>
</tr>
<tr>
<td>El Salvador</td>
</tr>
<tr>
<td>Haiti</td>
</tr>
<tr>
<td>Nicaragua</td>
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<tr>
<td>Sudan</td>
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<tr>
<td>Additional Immigrants Subject to Deportation</td>
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</table>

Source: USCIS 2018; CMS 2017

- 23-year old DACA recipient Jesus Alonso Arreola, who was apprehended by CBP on February 12, 2017. He was surrounded by Border Patrol agents when he went to pick up a rideshare fare in San Diego. CBP accused him of smuggling the two people he picked up, who were undocumented, even though Mr. Arreola had never met them. Mr. Arreola – who is helping to support his parents, sister, and pregnant girlfriend – was never charged with any crimes in connection with the incident. But ICE still issued a Notice to Appear, automatically terminating his DACA, which also meant he lost his job.

- Jessica Colotl, a Dreamer from Georgia who – despite receiving DACA twice – had her latest renewal denied by the Trump administration, who also claimed she was a priority for deportation. Ms. Colotl came here when she was only 11 years old, and graduated from high school with honors. She is employed as a paralegal, and regularly volunteers for several charitable organizations. A federal court ordered her DACA be kept in place for the time being.

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B. Indiscriminate Enforcement Policies

In addition to shrinking the number of people who are protected from deportation, the Trump administration has expanded the universe of individuals subject to enforcement. U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) are now targeting people they can quickly identify and deport, going far beyond those who have criminal convictions or pose a threat to public safety. The administration has all but eliminated discretionary authority that previous administrations used to delay deportations. In addition, it has increased prosecutions of illegal entry and re-entry and expanded the constitutionally-suspect practice of lodging detainers with local law enforcement. Under these expanded enforcement policies, ICE and CBP are pursuing people who are eligible for immigration relief but have not received a decision or have not yet applied, as well as people who have compelling equities that weigh in favor of the exercise of prosecutorial discretion.

1. Enforcement Policies that Prioritize All Undocumented People

Prosecutorial discretion is a long-standing principle exercised by all law enforcement agencies that recognizes the authority of an official or agency to decide whether and to what degree to enforce the law in a particular case. Historically, prosecutorial discretion has been used to take into account compelling circumstances in an individual’s case, such as whether someone has family who are U.S. citizens or strong ties to the community, or has contributed significantly to the community through military service or in other ways. By exercising prosecutorial discretion, law enforcement is more able to focus its resources on its enforcement priorities, such as people who pose threats to public safety or national security.

Immigration enforcement agencies under both Republican and Democratic administrations have issued policies on prosecutorial discretion. A 1999 letter signed by 28 Republican and Democratic members of Congress called on the federal government to issue a prosecutorial discretion policy in immigration enforcement. The Board of Immigration Appeals (BIA) and federal courts have likewise recognized the agency’s prosecutorial discretion authority. These policies acknowledge the limited enforcement resources available, and the reality that if all removable people encountered are a priority, then no one is truly a “priority.”

During his first month in office, President Trump and his administration established new enforcement policies calling for enforcement against all removable individuals. The new priorities include not only people who have committed acts that constitute a chargeable criminal offense but also anyone with an outstanding order of removal. They also specifically state that that DHS will enforce the law against anyone who is removable. A February 21, 2017, ICE memorandum states that officers must “take enforcement action against all removable aliens encountered in the course of their duties.” A September 6, 2017, memorandum reminds CBP officers that anyone they encounter and believe to “have entered illegally or [be] out of status” must be processed accordingly. Trump administration officials have consistently stated that everyone who is in violation of immigration laws is subject to removal.

A. 2. TPS Recipients at Risk: Joanna

TPS holders are among the noncitizens with the strongest ties to the U.S. They have built their lives in the United States over the course of years, sometimes decades, and are long-established parts of their communities. That includes Joanna*, a 31-year-old mother from Haiti who was originally placed in removal proceedings when she was found ineligible to be a derivative on her father’s Haitian Refugee Immigration Fairness Act (HRIFA), a law enacted in 1998 that provided relief to certain Haitian nationals. Her father and four of her siblings are United States citizens, her mother has a green card. In 2010, following the earthquake in Haiti and the designation of that country for Temporary Protected Status (TPS), Joanna’s removal proceedings were administratively closed to allow her to apply for TPS, which she received in 2011. With the recent announcement that TPS will expire as of July 22, 2019, Joanna will soon find herself out of status, most likely with her removal proceedings re-calendered and no real relief available to her despite all her ties to the United States. She has two children, a newborn and a four-year-old. Her husband, Nico*, a 34-year-old citizen of El Salvador with TPS runs his own construction company but is facing a similarly dire situation with the recent announcement of the termination of TPS for nationals of El Salvador.

—AILA Attorney, New York, New York

*BName changed to protect privacy.

B. The Face of Indiscriminate Enforcement: Katja and Ernst

In Denver, CO, Katja* and Ernst* have learned firsthand what indiscriminate enforcement can mean. After their asylum cases were denied, they were checking in with ICE regularly for 17 years on their orders of supervision, which was first granted in 2001 under the Bush administration. Meanwhile, they had been able to work lawfully with work authorization cards granted by the Department of Homeland Security. Neither has any criminal record. Both have utilized their employment authorization to forge careers caring for the elderly. Ernst works caring for elderly veterans through a state program. They have two U.S. citizen children, including a ten-year-old autistic son who is nonverbal and needs an extraordinary amount of care.
Data from fiscal year (FY) 2017 demonstrates that ICE is pursuing enforcement against more people who have no criminal background. In FY 2017, ICE apprehended almost 38,000 individuals who had no criminal convictions—more than double the number of non-criminals from the previous year. That represents a striking increase of 146 percent. The number of arrests of non-criminals represents 26 percent of all 143,470 noncitizens ICE apprehended in FY 2017. By contrast, the number of people apprehended who had criminal convictions increased only 12 percent. Moreover, of those with criminal histories, many were convicted only of minor crimes such as immigration-related crimes, traffic offenses, and other misdemeanors.

The Trump administration also increased the use of enforcement operations, often referred to as raids (defined as “at-large arrest[s] conducted in the community, as opposed to in a custodial setting”), which often lead to the apprehension of a large number of people who were not initially targeted. ICE and CBP agents have been given wide latitude to apprehend bystanders encountered during enforcement actions, and ICE Director Tom Homan even threatened to make more collateral arrests in cities that did not agree to collaborate with ICE. In FY 2017, the number of apprehensions stemming from immigration raids increased by 32 percent in comparison to FY 2016, with the number of apprehensions from these kinds of enforcement actions exceeding 40,000.

### Table C. Immigration Arrests by Trump Administration

<table>
<thead>
<tr>
<th></th>
<th>FY 2016</th>
<th>FY 2017</th>
<th>% Increase</th>
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<tbody>
<tr>
<td>Arrests - Raids</td>
<td>30,348</td>
<td>40,066</td>
<td>32%</td>
</tr>
<tr>
<td>Arrests - Other</td>
<td>79,756</td>
<td>103,404</td>
<td>30%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>110,104</td>
<td>143,470</td>
<td></td>
</tr>
<tr>
<td>People with Criminal Convictions</td>
<td>94,751</td>
<td>105,736</td>
<td>12%</td>
</tr>
<tr>
<td>People with No Criminal Convictions</td>
<td>15,353</td>
<td>37,734</td>
<td>146%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>110,104</td>
<td>143,470</td>
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</tbody>
</table>

*Source: ICE 2017*

The Trump administration is now targeting people for enforcement who previously had explicit permission from DHS to remain in the country, often due to compelling humanitarian equities. Federal regulations authorize ICE to grant a discretionary “stay of removal” delaying an individual’s deportation. ICE can also place people on orders of supervision (OSUP), which require them to regularly check-in with ICE. Individuals with stays of removal or orders of supervision are allowed to remain in the country—sometimes indefinitely—and are often granted work authorization. In granting stays of removal or orders of supervision, ICE typically considered whether the person had particularly compelling humanitarian equities, such as being the primary caregiver for a disabled individual, having U.S. citizen family dependents, suffering from severe health problems, or having long-term residency and community ties.

### B. 1. The Face of Indiscriminate Enforcement: John

ICE’s overly-broad enforcement “priorities” mean that officers use their limited resources to arrest people like John*, a nurse who entered the US legally with a student visa in 2001. He became active in a Christian church in New York State and met and married his wife Sarah* there in 2007. John had applied for asylum based on multiple attacks he suffered as a Christian in Indonesia, including one incident during which he was stabbed twice. His application was ultimately denied by an immigration judge who found that it was untimely and lacked sufficient corroborating evidence. John and Sarah are parents to a young United States Citizen, George*, who was diagnosed with developmental delay and autism at age 2. George received early intervention services and has required special education services throughout his schooling. John was apprehended and detained by ICE in the summer of 2017, during a particularly troubling time for his family because his wife recently suffered a stroke and was only released from rehab in late March of 2017. Though Sarah and the rest of the family all have legal status, and John is not only a valuable, long-term member of his community who has no criminal history, but also a vital member of his family who very much need his presence, he was detained. After being detained for weeks, John felt unable to continue and accepted deportation, despite the I-130 petition his step-son filed on his behalf.

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*AILA Attorney, Denver, Colorado*
AILA members regularly report that the Trump administration is refusing to renew OSUP grants and stays of removal, even in cases where the person has been in the country decades and reporting to ICE for years.\footnote{Orders of supervision and stays of removal are often granted in cases where there are particularly compelling equities, including:} Reporting requirements also appear to be growing more burdensome in cases where the OSUP remains in place, with ICE requiring check-ins weekly, for example. ICE is also detaining people at scheduled check-ins—without giving them any warning or the opportunity to develop travel plans or family arrangements—and deporting them quickly thereafter.\footnote{Orders of supervision and stays of removal are often granted in cases where there are particularly compelling equities, including:}

3. Increased Criminal Prosecutions for Illegal Entry and Re-entry

The Trump administration has also increased the number of prosecutions for immigration-related crimes, specifically for illegal entry and re-entry into the country, pursuant to 8 U.S.C. §1325 and §1326. As part of his executive order on interior enforcement, President Trump directed the U.S. Department of Justice (DOJ) and DHS to “implement a program that ensures adequate resources are devoted to the prosecution of criminal immigration offenses.”\footnote{Orders of supervision and stays of removal are often granted in cases where there are particularly compelling equities, including:} Subsequently, Attorney General Jeff Sessions issued a memorandum directing federal prosecutors to prioritize prosecution of noncitizens for non-serious immigration offenses\footnote{Orders of supervision and stays of removal are often granted in cases where there are particularly compelling equities, including:} and provided increased training for prosecutors in these cases.\footnote{Orders of supervision and stays of removal are often granted in cases where there are particularly compelling equities, including:} From the beginning of the fiscal year through July of 2017, immigration offenses constituted over half of all federal convictions, far surpassing prosecutions for drug-smuggling and weapons-related offenses and other violent crimes.\footnote{Orders of supervision and stays of removal are often granted in cases where there are particularly compelling equities, including:} This increased emphasis on illegal entry and re-entry prosecutions has increased the incarceration rates of noncitizens in federal prison.\footnote{Orders of supervision and stays of removal are often granted in cases where there are particularly compelling equities, including:} American taxpayers are paying for the detention of far more people for immigration status-related crimes.

While the administration claims that it is targeting “criminal aliens” and people who pose national security and public safety threats,\footnote{Orders of supervision and stays of removal are often granted in cases where there are particularly compelling equities, including:} in fact, the individuals prosecuted for illegal entry and re-entry are often fleeing from persecution and danger in their home countries.\footnote{Orders of supervision and stays of removal are often granted in cases where there are particularly compelling equities, including:} The Trump administration dismisses international obligations by referring these asylum seekers for prosecution even after they’ve clearly stated a fear of return, and families are regularly separated at the border to begin the criminal proceedings against the parents.\footnote{Orders of supervision and stays of removal are often granted in cases where there are particularly compelling equities, including:} Moreover, prosecutions for illegal entry and re-entry frequently take place in large group hearings where the cases are heard and sentenced in a matter of minutes, giving rise to significant concerns of due process violations.\footnote{Orders of supervision and stays of removal are often granted in cases where there are particularly compelling equities, including:}

4. Expanded Use of Detainers

As part of its effort to employ state and local resources to enforce federal immigration law, the Trump administration has re instituted the practice of lodging immigration detainers. Detainers are voluntary requests issued by federal immigration authorities to state and local law enforcement to detain people after the time when they would normally be released. ICE issues such detainer requests hoping the locality will detain a person in its custody beyond the release date, affording ICE additional time to physically take custody and detain the immigrant. The Trump administration has increased the number of detainers issued by ICE by 65 percent from 86,026 in FY 2016 to 142,356 in FY 2017.\footnote{Orders of supervision and stays of removal are often granted in cases where there are particularly compelling equities, including:}

As the number of detainers continues to increase under this administration, many legal challenges against detainers have been successful with several courts across

the nation ruling against their use on statutory and constitutional grounds. Through litigation, courts have established that detainers are merely requests and compliance cannot be mandated. Courts have also ruled that localities may not provide that probable cause. ICE’s detainer practice also routinely violates federal immigration law; courts have found detainers themselves exceed ICE’s inherent statutory authority to make warrantless arrests under 8 USC §1357(a)(2), and continuing detention based solely on the reasonable belief that an “alien [is] subject to removal” is not constitutionally sufficient. Independent of any federal or constitutional infirmities in ICE’s detainer practice, Massachusetts’ highest court, in a unanimous decision, found detainers do not provide local law enforcement with the state authority they need to undertake a detainer arrest; instead law enforcement must identify a collateral, criminal ground and probable cause for an arrest. Finally, a multitude of courts have held that police must have probable cause that a crime has been committed—and not only probable cause of a noncitizen’s deportability—to detain a noncitizen, even when ICE issues a detainer.

C. Aggressive Enforcement Tactics

The Trump administration has expanded the geographic locations where ICE conducts enforcement actions to include apprehensions at or near sensitive locations, and increased apprehensions at courthouses. ICE has also targeted vulnerable populations for enforcement, including people who are victims of crime and adults who step forward to sponsor and take care of unaccompanied children fleeing persecution.

1. Enforcement at Sensitive Locations

As early as 1993, ICE and legacy Immigration and Naturalization Service published guidance discouraging or prohibiting conducting enforcement actions at certain “sensitive locations,” such as schools, places of worship, health care facilities, churches, and religious ceremonies. The stated purpose of such policies is to build the public’s confidence and ensure safe enforcement of immigration laws. The guidelines also recognize the unique vulnerabilities of noncitizens in certain locations.

While the Trump administration has stated that these longstanding policies remain in effect, in practice, ICE and CBP officers are conducting enforcement actions at or near sensitive locations. ICE policy explicitly states that it will disregard the policies when deemed appropriate. While ICE has historically not treated courthouses as sensitive locations, this administration is increasing enforcement actions at courthouses. In January of 2018, ICE apprehended a man whose DACA status had briefly lapsed as he left the traffic court division of a courthouse.

C. 1. Apprehended Seeking Medical Attention: Rosa

Immigration enforcement at sensitive locations hurts some of the most vulnerable among us. In October of 2017, immigration agents arrested 10-year old Rosa Maria Herndon during transport from a hospital to her parent’s home after undergoing surgery for her cerebral palsy. In that same month, ICE arrested two immigrants as they left a church shelter in Virginia, having


In February 2017, ICE apprehended 33-year old Irvin González, a transgender woman seeking a protective order at a courthouse in Texas.\(^74\)

The negative consequences of arresting noncitizens at courthouses and violating these sensitive location policies are far-reaching for immigrants and U.S. citizens alike. People are more reticent to report crimes or act as witnesses, particularly when it involves a visit to a courthouse.\(^75\) A recent survey of immigration advocates and legal services providers stated that “[j]immigrant victims are expressing heightened fears and concerns about immigration enforcement, with 78 percent of advocates and attorneys reporting that victims are describing fear of contacting the police; 75 percent reporting that victims are afraid of going to court; and 43 percent reporting that immigrant victims are choosing not to move forward with criminal charges or obtaining protective orders.”\(^76\) Some reports have even indicated that noncitizens are less likely to seek medical care.\(^77\)

### 2. Targeting Vulnerable Populations

DHS also started targeting vulnerable populations for apprehension and deportation, including undocumented individuals who serve as sponsors for unaccompanied children. When children fleeing their home countries without a parent are apprehended by CBP or ICE, they are initially transferred to the U.S. Department of Health and Human Services’ Office of Refugee Resettlement (ORR).\(^78\) ORR houses and cares for the child until it can identify a sponsor—often a parent, relative, or close family friend—to take custody of the child while his or her immigration case moves forward.\(^79\) These sponsors serve as guardians for the child and are responsible for feeding, housing, and caring for the child, as well as for ensuring the child’s presence at immigration court proceedings.\(^80\)

The Trump administration systemically targeted the undocumented sponsors of these unaccompanied children for questioning and placement in removal proceedings, also stating it would refer them for criminal prosecution.\(^81\) AILA members began reporting such incidents in August 2017, and, in a single nationwide operation, ICE apprehended over 400 undocumented sponsors.\(^82\) Apprehensions of sponsors can lead to the lengthy and unnecessary detention of both the sponsors and the unaccompanied children while they await their immigration proceedings in custody. Targeting sponsors is inhumane, sending more children into detention, which a DHS advisory committee concluded was “never in the best interest of children.”\(^83\) This policy is also costly because of the resources required to detain the sponsors and children and because it will deter undocumented individuals from coming forward to sponsor unaccompanied children. In the case of mixed-status families, these operations risk removing undocumented guardians from their U.S. citizen children, leading to the placement of these children into the nation’s child welfare system.

### 3. Targeting People Who Are Eligible for Relief

ICE has also targeted noncitizens who are eligible for some form of immigration relief, including victims of crime. Under current immigration law, an individual is eligible for U nonimmigrant status (colloquially known as a “U visa”) if she or he has suffered from substantial physical or mental abuse as a result of being a victim of a specified crime. The visa was created to “strengthen the ability of law enforcement agencies to investigate and prosecute serious crimes

spent the night to avoid hypothermia.\(^8\) ICE has also targeted schools, arresting a father as he dropped off his son at school in Virginia\(^1\) and two immigrants as they dropped off their children at a school in New Jersey.\(^1\)

#### C. 2. Child Sponsor Detained: Jorge

When ICE targets sponsors of unaccompanied children, it is targeting people like Jorge,\(^2\) a police officer who initially fled El Salvador with his wife in 2005 after he was threatened by gang members because of his law enforcement role. Jorge provided his address to immigration officials at the border and he and his wife were released, yet Jorge never received a hearing notice. Trying to do the right thing, he attempted to present himself at an immigration office and spoke with an attorney. Despite never receiving the information necessary to attend any hearing on his case, an in absentia removal order was issued because he never received notice about when and where to appear. Jorge became a sponsor to his nephew, an unaccompanied minor child, in 2014, again providing the federal government with his address and information. In June 2017, ICE came to Jorge’s house and arrested him although he has no criminal history. Jorge’s motion to reopen his case was denied but he is currently pursuing an appeal because he fears he will be killed if forced to return to El Salvador. He has been detained for almost 8 months in Colorado.

—Immigration Justice Campaign, Aurora, Colorado

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… while offering protections to victims of such crimes without the immediate risk of being removed from the country.” To qualify for the visa, applicants must submit a sworn statement from an authorized official—often a law enforcement officer—that they have cooperated with law enforcement in their investigation or prosecution of that crime. U visa applications often take years to be processed due to backlogs in processing and a cap on the number of U visas available per year.

In October of 2017, ICE informed AILA that it will take enforcement action against immigrants with final orders of removal and pending U visa applications if USCIS does not, within five days, issue a determination that the application will likely be approved. Previously, ICE would generally wait until a prima facie determination was issued by USCIS to approve or deny the stay of removal, which often took longer than five days given USCIS’ workload. ICE also indicated that it would remove immigrants who are victims of crime and eligible for U visas, but who have not yet had an opportunity to file an application. This policy is likely to deter immigrant victims of crime from reporting the crime and cooperating with law enforcement.

4. Broadly Employing Gang Allegations

The Trump administration is identifying individuals as gang members based on overly broad and vague criteria. ICE has declared that “a person can be identified as a gang member if they meet two or more criteria, including having gang tattoos, frequenting an area notorious for gangs and wearing gang apparel.” ICE is exercising its authority to label an individual as a gang member unilaterally, and its use of overbroad gang criteria allows it to detain noncitizens and deny them immigration benefits based only on unsubstantiated allegations of gang affiliation. In many cases, these individuals do not have convictions or even arrests. The consequences of being wrongfully labeled as a gang member are severe. An immigration judge is more likely to require detention for someone who is labeled as a gang member, and an immigration officer is less likely to grant discretionary relief or protection to someone considered a gang member.

D. Blanket Prosecution Policies

The Trump administration has curtailed several procedures previously used by ICE and CBP to temporarily suspend lower priority cases scheduled for court. Past administrations have used these mechanisms when an individual is eligible for relief or has compelling equities. By requiring courts to review these low priority cases, the administration will increase the number of cases on the court docket at a time when immigration court backlogs are already at an all-time high.

1. Increasing the Number of Cases on the Docket

Administrative closure is one of several mechanisms that DHS and the Executive Office for Immigration Review (EOIR) uses to increase efficiency, reduce case backlogs, and shift resources towards cases that serve the national interest in the immigration court system. Administrative closure removes a case from the BIA

C. 3. Eligible for Relief: Noe

In October of 2017, ICE arrested and deported Noe Lopez-Mulato, who was eligible for U nonimmigrant status because he testified against a man who pulled out a gun and fired shots at a soccer match. Noe Lopez-Mulato’s brother, Jose Lopez-Mulato, was shot trying to help subdue the offender. The prosecutor’s office stated that both men were "most helpful" during the investigation, and the police officer who worked on the case said the two men were “were hardworking brothers — working six days a week, paying their houses” and that they “wouldn’t hurt a fly.” ICE later arrested and placed Jose Lopez-Mulato into removal proceedings, even though he had an application for U nonimmigrant status pending.
Motions to terminate, another tool available to DHS, allow respondents to request that their cases be dismissed altogether. Finally, motions to reopen allow respondents to reopen a case, often to apply for additional forms of relief. While an immigration judge makes the ultimate decision regarding these procedural mechanisms, ICE’s recommendation to oppose or agree to these motions factor into a judge’s decision.

Prior to January 2017, ICE attorneys often agreed to administratively close cases that were not considered enforcement priorities under guidance in effect at the time and would also consider motions to terminate or reopen a case in compelling situations. Under the Obama administration, immigration judges administratively closed a large number of cases: 4,088 cases in FY 2015 and 5,239 cases in FY 2016 (up from 3,828 in FY 2014). The Trump administration, however, directed DHS to oppose these types of motions, including motions to administratively close cases with compelling equities. While the ICE Office of Principal Legal Advisor (OPLA) has confirmed that ICE attorneys still have discretion in individual cases, they have also stated that, “[i]n general, OPLA’s role is to litigate cases that have been placed into the stream of litigation by an NTA issuing office as long as the NTA is legally sufficient.”

Additionally, ICE is requesting previously administratively closed cases be reopened and recalendared, resuming the deportation of people who were already found to warrant prosecutorial discretion. ICE has informed AILA that it will file motions to recalendare in cases where there was an arrest or conviction after the administrative closure. While ICE has stated that it will not recalendar cases with arrests or convictions from before administrative closure, AILA received reports from members of this practice in some jurisdictions. The decreased use of administrative closure and recalendaring of previously closed cases has contributed to the substantial growth of the immigration court backlog by over 117,000 cases since the Trump administration came into office.

2. Undermining Available Relief Avenues

The Trump administration has made it almost impossible for individuals in removal proceedings who are eligible for relief to use the provisional unlawful presence waiver program. Under immigration law, close family members being sponsored for lawful permanent residence through the family-based immigration system are sometimes required to return to their home country to complete the process. People who lived in the United States without legal status may be barred from re-entering the country under what are known as the three- or ten-year bars. To return to the United States and complete their family visa process, these people would have to apply for and receive a waiver of the bars. In 2013, DHS established the provisional unlawful presence waiver, which allows beneficiaries to apply for and receive the waiver before they leave the country, reducing the amount of time they have to spend separated from their families. Under the previous administration, ICE agreed to administratively close proceedings in these cases so that the family member could apply for the waiver.

In 2017, ICE reversed course, however, stating that it will no longer agree to motions to administratively close to allow someone to apply for a provisional...
waiver. Instead, ICE has stated it will only permit individuals to agree to voluntary departure and consular process abroad. People in this situation will still be eligible to apply for a waiver of the three- and ten-year bars, but will likely have to wait outside of the country to obtain the waiver. This policy decision will result in longer periods of separation for families and make the process less efficient for the Department of State and USCIS.

E. Immigration Court Policies that Undermine Due Process

The Trump administration has implemented policies that will undermine the independence of immigration judges and weaken due process in the immigration court system. Immigration courts play a key role in affording noncitizens an opportunity to present claims for relief and stay in the United States. The changes adopted by DOJ since last year—including steps to impose numerical quotas on immigration judges and attempts to curtail procedural safeguards—threaten the integrity of immigration courts.

1. Undermining Judicial Independence

Historically, immigration judges were exempt from performance evaluations altogether because of concerns that supervisors’ evaluations would improperly influence judges’ decisions and potentially affect the outcome of cases. In 2009, after assurances were made to preserve judicial independence, EOIR established a system to evaluate the performance of individual immigration judges. Importantly, a central component of the new system was a provision that prevented DOJ from evaluating immigration judges based on numerical case completion quotas. In 2017, at the direction of the new administration, EOIR reopened the Collective Bargaining Agreement with the National Association of Immigration Judges (NAIJ). During this process, EOIR eliminated the provision preventing the use of numeric quotas, and it now plans to add quotas to the judge’s performance evaluations. These measures will essentially tie the number of cases judges complete to their performance evaluation, putting more pressure on judges to rule under tight deadlines.

NAIJ publicly opposed the numerical quotas, arguing that it would represent the “death knell for judicial independence” and undermine adjudications where life or death often hinge on a correct decision. This new policy will pressure judges to deny continuances to respondents who are attempting diligently to find legal counsel but have not been successful. Judges will also be more likely to move forward in cases where the individual has not had adequate time to prepare. Importantly, previous efforts to establish judicial quotas were quickly abandoned in light of serious concerns that quotas would improperly influence decisions and negatively affect the outcome of a case. Mandatory quotas will erode judicial independence; lower the quality of adjudications and compromise due process; and facilitate more deportations—not fair decisions.
DOJ has taken other steps to undermine the independence of the courts and strip judges of their ability to exercise discretion in certain circumstances. In a December 5, 2017 memorandum, the attorney general called on immigration judges and their staff to expedite cases. The memorandum also called on judges to prioritize the identification of “any and all suspected instances of fraud,” without specifying how strong the evidence of fraud should be. The attorney general stated that he “anticipate[s] clarifying certain legal matters in the near future that will remove recurring impediments to judicial economy and the timely administration of justice,” which in all likelihood means DOJ will publish additional regulations and guidance that will continue to chip away at the availability of justice in immigration courts. On January 17, 2018, James McHenry, Director of EOIR, implemented some of the principles outlined by the attorney general by issuing a memorandum to all EOIR staff outlining new performance measures for immigration courts. The outlined measures include case priorities, case benchmarks, and performance metrics that will be tracked by EOIR.

2. Restricting Procedural Safeguards and Threatening Access to Counsel

In July 2017, EOIR released a memorandum, which pressures immigration judges to deny multiple continuances, including continuances to find an attorney or for an attorney to prepare for a case. The guidance emphasized that there is not “right to a continuance” and that judges should give weight to “administrative efficiency” when deciding whether to issue a continuance. In particular, the memorandum claims that respondents may use continuances as a “dilatory” practice in an “abusive” manner.

In immigration court, legal representation is of paramount importance to the success of a respondent’s case, with represented individuals being significantly more likely to be released from detention, identify and apply for immigration relief, and successfully obtain that relief. Continuances represent a critical docketing management tool for immigration judges and are a necessary means to ensure that due process is afforded in removal proceedings. The number one reason a continuance is requested by a respondent is to find counsel. Other reasons include allowing respondents to prepare their case, secure evidence, and maximize the chance of eventually winning relief. Continuances are particularly important to recent arrivals, vulnerable populations (such as children), and non–English speakers—all of whom have significant difficulties navigating an incredibly complex immigration system.

The guidance also encourages immigration judges to refer for disciplinary proceedings lawyers who take on “more cases than he or she can” handle. This portion of the memo may discourage reputable attorneys and organizations from taking on additional clients—clients who need representation and may be unable to secure other counsel—for fear of being unfairly referred for disciplinary proceedings. It may also discourage attorneys from asking for multiple continuances in cases that have legitimate and persuasive reasons for needing additional continuances, such as if an attorney discovers previously unavailable evidence or is waiting on information from a foreign government.
Conclusion

This report presents what is now an undeniable truth: The Trump administration has created an incredibly powerful machine that has every cog and gear churning relentlessly to detain and deport the maximum number of people from this country. No longer is enforcement being exercised in a smart, sensible way that distinguishes between people who are contributing members of our communities from those who pose actual threats to public safety. It is a shame and an injustice that Dreamers, families with children, and people who have jobs and own businesses and are contributing to this country now must look constantly over their shoulders out of fear that they could be picked up any day. These people should not be targeted for enforcement.

The President’s fiscal year 2019 budget calls for huge increases to the DHS budget that would fund 52,000 immigration detention beds, 2,000 additional ICE personnel and 750 additional border patrol agents, and $1.6 billion for the border wall.127 These funds would enable the administration to implement the policies described in this report and additional policies promised in the President’s 2017 Executive Orders. Congress and the American public should reject these increases as excessive and unnecessary. Instead we need a sensible immigration enforcement plan that is based on clearly articulated goals and priorities and that is accountable to the public—elements that are lacking in the administration’s current plan. Finally, America’s immigration system cannot advance the nation’s prosperity unless it safeguards the principles of due process, the bedrock of our legal system.

See AILAs map illustrating the types of enforcement actions ICE has undertaken nationwide since January 2017.  
www.aila.org/enforcementmap

TOTAL ENFORCEMENT ACTIONS REPORTED: 1,834

*As Of March 8, 2018

San Francisco, CA area: 261*  
Los Angeles, CA area: 322*  
Philadelphia, PA area: 119*  
San Antonio, TX: 104*  
Grand Rapids, MI: 60*  
Denver, CO area: 69*
Endnotes


4 Id.


6 Faye Hipsman, Bárbara Gómez-Aguñaña, and Randy Capps, DACA at Four: Participation in the Deferred Action Program and Impacts on Recipients, Migration Policy Institute, Aug. 2016, available at https://www.migrationpolicy.org/research/daca-four-participation-deferred-action-program-and-impacts-recipients [hereinafter “MPI DACA Statistics”] (“What is clear, however, is that the vast majority of those who received an initial two-year DACA grant have applied for renewal.”).


9 In response to the rescission of DACA, multiple parties filed legal challenges to enjoin the rescission. In January of 2018, the District Court in Regents of Univ. of Cal. v. Dept of Homeland Security enjoined a portion of the rescission and directed USCIS to resume adjudicating requests for renewal. Regents of Univ. of Cal. v. United States Dept of Homeland Sec., No. C 17-05211 WHA (N.D. Cal. Jan. 9, 2017), cert. denied, 583 U.S. _ (2019). As of the date of this report, USCIS resumed accepting applications for renewal of DACA after the Supreme Court rejected the Trump administration’s request to directly appeal the injunction and bypass the Ninth Circuit.


11 Tom Jawetz and Nicole Pchal Svajlenka, Thousands of DACA Recipients Are Already Losing Their Protection From Deportation, Center for American Progress, Nov. 9, 2017, https://www.americanprogress.org/issues/immigration/news/2017/11/09/442502/thousands-daca-recipients-already-losing-protection-deportation/ (“Each day that Congress delays acting on the Dream Act from now until March 5, 2018, approximately 122 people will lose their Deferred Action for Childhood Arrivals (DACA) protection. That is 851 people each week, and more than 7,900 since the announcement. The logic behind this number is straightforward: The 22,000 eligible DACA recipients who did not successfully apply to renew their DACA will, as a result, see their DACA protections expire in the 181 days between September 5, 2017 and March 5, 2018.”); David Bier, What Will Happen If Trump Kills DACA: A Timeline of Expiration, Cato Institute, Aug. 16, 2017, https://www.cato.org/blog/what-will-happen-trump-kills-daca-timeline-expiration.

12 MPI DACA Statistics, supra note 6. The injunctions in Regents and Batalla Vidal do not re-open the ability of this population to request DACA.

13 8 USC § 1254a.

14 Id.

15 Id.


33 Interior Enforcement EO, supra note 2.

34 Id.

35 Id.


38 Elise Foley, ICE Director To All Undocumented Immigrants: ‘You Need To Be Worried’, HUFFINGTON POST, June 13, 2017, https://www.huffingtonpost.com/entry/ice-arrests-undocumented_us_5940270b490b445314f043fdh (“If you’re in this country illegally and you committed a crime by entering this country, you should be uncomfortable,” Acting Director Thomas Homan told the House Appropriations Committee’s Homeland Security Subcommittee. ‘You should look over your shoulder, and you need to be worried.’”).

39 Robert Planas, ICE Chief Will Never Back Down From Telling Undocumented Immigrants To Be Afraid’, HUFFINGTON POST, June 13, 2017 https://www.huffingtonpost.com/entry/ice-thomas-homan-immigrants-afraid_us_5a723134e4b09a544b562913 (“I’ll never back down on those words,” Homan said at the Border Security Expo in San Antonio, a conference that connects law enforcement with companies looking to win contracts. ‘If you violate the laws of this country, if you enter illegally [which is a crime] it’s not going to be OK anymore.’


41 Note, FY 2017 includes four months of enforcement statistics under the Obama administration. ICE, however, does provide enforcement statistics specifically for the Trump administration, which compares a similar period under the Trump and Obama administrations. These statistics demonstrate corresponding increases in enforcement, reflected in the FY 2017 and FY 2016 comparisons.

42 Id.; See also Nick Miroff and Maria Sacchetti, Trump takes ‘shackles’ off ICE, which is slapping them on immigrants who thought they were safe, WASHINGTON POST, Feb. 11, 2018, available at https://www.washingtonpost.com/world/national-security/trump-takes-shackles-off-ice-which-is-slapping-them-on-immigrants-who-thought-they-were-safe/2018/02/11/4bd5164-083a-11e8-b48c-b07fea957bd5_story.html.

43 ICE Removal Statistics FY 2017, supra note 39 (“ERO arrested 105,736 criminal aliens in FY2017, resulting in a 12 percent (10,985) increase over FY 2016, as seen in Figure 4.”). See also Nick Miroff and Maria Sacchetti, Trump takes ‘shackles’ off ICE, which is slapping them on immigrants who thought they were safe, WASHINGTON POST, Feb. 11, 2018, available at https://www.washingtonpost.com/world/national-security/trump-takes-shackles-off-ice-which-is-slapping-them-on-immigrants-who-thought-they-were-safe/2018/02/11/4bd5164-083a-11e8-b48c-b07fea957bd5_story.html.

44 Id.
Nicholas Kulish, Caitlin Dickerson, and Ron Nixon, Immigration Agents Discover New Freedom to Deport Under Trump, N.Y. Times, Feb. 25, 2017, https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html (“Bystanders are now being taken in if they are suspected to be undocumented, even if they have committed no crime, known within the agency as ‘collateral arrests.’ While these arrests occurred under the Obama administration, they were officially discouraged, to the frustration of many agents.”); Press Release, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, Statement from ICE Acting Director Tom Homan on California Sanctuary Law (Oct. 6, 2017), available at https://www.ice.gov/news/releases/statement-ice-acting-director-tom-homan-california-sanctuary-law (“ICE will have no choice but to conduct at-large arrests in local neighborhoods and at worksites, which will inevitably result in additional collateral arrests, instead of focusing on arrests at jails and prisons where transfers are safer for ICE officers and the community.”).


8 CFR §241.6.

8 CFR §241.5.

Id.


Interior Enforcement EO, supra note 2.


Federal Criminal Prosecutions Fall Under Trump, TRAC, Sept. 1, 2017, http://trac.syr.edu/tracreports/crim/480/ (“Total convictions were classified by


Lunn v. Commonwealth, 78 N.E.3d 1143 (Mass., 2017) (“The United States acknowledged at oral argument in this case that a detention like this, based strictly on a Federal immigration detainer, constitutes an arrest.”).


Memorandum from Marcy M. Forman, Director, Office of Investigations, U.S. Immigration and Customs Enforcement on Enforcement Actions at Schools (Dec. 26, 2007); Memorandum from James A. Puleo, Acting Associate Commissioner, Immigration and Naturalization Service on Enforcement Activities at Schools, Places of Worship, or at funerals or other religious ceremonies HQ 807-P (May 17, 1993) (Immigration agents were directed to “[A]ntempt to avoid apprehension of persons and to tightly control investigative operations on the premises of schools, places of worship, funerals and other religious ceremonies.”).


Id.


77 Ike Swetlitz, Jonathan Blitzer, Ashlee Rezin, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, "They were undocumented and, as a result of recent developments, they were unwilling to continue with the cases,” she told Denver7 local news (“They were treated like animals”).

76 National Taskforce Statement, supra note 75.


69 Id. (“Gang allegations made by law enforcement agents frequently prevent undocumented immigrants from gaining legal status for which they would be otherwise eligible. These allegations, made without any of the hallmarks of due process, also increase the likelihood an undocumented immigrant will be prioritized for deportation or held in immigration detention” and “A detainee who is erroneously alleged to be a gang member may be unnecessarily detained for long periods of time and foreclosed of the opportunity to be released out on bond because of the gang allegations.”).
104 INA §212(a)(9)(B).


Id.


Sacchetti, supra note 113 (“People’s lives are at risk in immigration court cases, and to force judges to complete cases under a rapid time frame is going to undermine the ability of those judges to make careful, thought-out decisions,” said Gregory Chen, Director of Government Relations for the American Immigration Lawyers Association, which has 15,000 members.)

AILA Numeric Quotas, supra note 110.

Id.


Id.

Id.


GOVERNMENT RELATIONS

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