Analyzing the Kelly Policy Memoranda

"Implementing the President's Border Security and Immigration Enforcement Improvements Policies"

By Dan Cadman

Things have been happening so quickly with the Trump administration that it has been nearly impossible to keep up with developments from day to day. Among the first executive orders (EOs) that the president issued were two relating to immigration enforcement on the border and in the interior, of the United States. These, and others to follow, form the backbone and skeleton on which immigration policy will be based in this administration.

Recently confirmed Department of Homeland Security (DHS) Secretary Kelly has now issued two memoranda, both dated February 17, to subordinate agencies within DHS that put meat on the bones of the two EOs previously issued.

Following is a brief analysis of the memorandum titled "Implementing the President's Border Security and Immigration Enforcement Improvements Policies".

Section A of this memorandum makes clear to DHS employees that detention of aliens arriving illegally will be the rule, with certain exceptions. As the memo states, the policies of the former administration, "collectively referred to as 'catch-and-release' shall end."

It additionally provides that application of discretionary release by means of immigration parole will be exercised "only on a case-by-case basis, and only for urgent humanitarian reasons or significant public benefit", which is consistent with the requirements laid out in the Immigration and Nationality Act (INA). This is a significant departure from Obama administration policies, in which parole often seemed to be the rule and detention the exception, thus standing the statutory language of the INA on its head.

Section A lays out six circumstances in which release from detention may occur:

- Upon removal;
- When relief from removal has been granted;
- When an application for admission is withdrawn by the alien, who concurrently departs, and only provided that the relevant Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE) field chief concurs;
- When CBP or ICE field chiefs direct release, provided that they have received headquarters agreement (except in exigent circumstances such as health emergencies);
- In order to comply with the law or an outstanding court or tribunal directive; or

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- When aliens satisfy the "credible fear of return" test, provided they also provide proof of identity and present no public safety/national security risk, and little likelihood of absconding.

One final caveat is the secretary's recognition that "detention of all such individuals may not be immediately possible, and detention resources should be prioritized based upon potential danger and risk of flight."

Section B obliges the human capital officers of DHS and subordinate agencies to take all steps necessary to initiate the hiring of 5,000 additional border patrol agents and 500 additional air and marine officers, consistent with training standards and resources. To this end, they are to work with the undersecretary of management to "develop hiring plans that balance growth and interagency attrition by integrating workforce shaping and career paths for incumbents and new hires."

Section C directs the undersecretary of management to identify all direct or indirect aid and assistance (excluding intelligence activities) from departmental components to the government of Mexico for the last five fiscal years, and to quantify such aid or assistance.

Note that once this list is compiled and provided to the secretary, the original EO requires that this list be consolidated with similar information compiled by the secretaries of State, Defense, Justice, and other departments, and thereafter submitted to the president a total of no later than 60 days after the date of the initial EO (January 25).

Section D directs expansion of the cross-designation program authorized by Section 287(g) of the INA with particular focus on the southern border regions of the United States. The presidential EO directed expansion of the 287(g) program generally, but by means of this implementing policy memo, Border Patrol sector chiefs will have authority to engage in negotiated agreements to the same extent as ICE field office directors or special agents in charge. This is a new development, although in the past the Border Patrol did engage in coordinated agreements with police and sheriff's offices via Operation Stonegarden.

Section E delegates to the undersecretary for management responsibility for commissioning a comprehensive land, air, and marine southern border security study. The undersecretary is to coordinate his efforts with the commissioner of CBP, the Joint Task Force (Border), and the Coast Guard commandant. The study is to culminate in a document outlining vulnerabilities, and strategies for strengthening existing efforts. Note that the EO on which this section is predicated requires the secretary to submit his report to the president within six months.

Section F directs immediate initiation of planning for construction of a physical barrier on the southern border of the United States. The undersecretary for management is to identify all possible sources of funding, and the CBP Commissioner is directed to coordinate the effort with all relevant executive agencies. Note that the section also makes clear that, to the maximum extent possible, construction of the wall will be done using U.S. goods and services.

Section G implements and expands use of expedited removal to deal with cases of recent illegal border-crossers, in lieu of placing them into immigration court proceedings. This is significant, given the overwhelming and disastrous backlog currently facing immigration judges nationwide (well over half a million removal cases).

Heretofore, expedited removal was generally limited by executive decision to illegal crossers caught within 100 miles of the border and within 14 days of entry. However, in this section of the policy memo, the secretary directs the CBP commissioner and ICE director to confer and promulgate in the *Federal Register* changes to this policy that, while consistent with the statute, expand the reach of expedited removal proceedings — for instance, to recently arrived illegal alien border-crossers within the interior of the United States — in order to ensure that limited detention resources are preserved and that prompt removal is not defeated by inordinate waits for an immigration court hearing when one isn't required by law. (For a detailed explanation of expedited removal and other forms of expulsion from the U.S., see the July 2011 CIS *Backgrounder* "Deportaton Basics".)

A caveat to the expedited removal policy is made for unaccompanied alien minors placed into the custody of the Health and Human Services Office of Refugee Resettlement (HHS ORR) because, in the language of the statute, they have no lawful immigration status in the United States, have not attained 18 years of age, and "with respect to whom ... there is no parent or legal guardian in the United States; or ... no parent or legal guardian in the United States is available to provide care and physical custody." (See 6 U.S.C. Sec. 279(g)(2).)

The problem here is that, under the prior administration, virtually every alien minor was obliged to be treated as an "unaccompanied alien child" (UAC) and turned over to ORR, which in turn later placed them into the hands of parents or other relatives (often illegally in the country, and often having paid smugglers to transport the minors across international boundaries in the first place). That a child had proven ultimately to have responsible parents or relatives capable of care — thus legally placing him or her outside the boundaries of the statutory definition of UAC — was blithely ignored. However, this problem brought on by the prior administration is addressed later in the memo, at Sections L and M.

Section H directs implementation of what in the past has been a selectively used provision of law that permits immigration authorities to return illegal entrants to the contiguous countries from which they crossed, pending disposition of their cases, particularly in those instances where they seek relief. While the United States and Canada have an outstanding bilateral agreement between their respective immigration authorities that makes this contiguous-country policy official, there is no such agreement between the United States and Mexico, which of course is the source of nearly all illegal border crossings into our country. Announcement of the change has aroused a great deal of ire in Mexico, with Mexican officials vowing to reject any such attempt. Failure (or, more accurately, refusal) to accept such a policy change may redound significantly to Mexico's detriment in the long term, but with a great deal of national pride at stake, it is difficult to say how this will play out in the short term.

The secretary's emphasis is a recognition of the fact that in recent years, asylum officers had been finding credible fear in as many as 90 percent-plus of the cases they reviewed, which itself stretched credibility beyond the breaking point. Asylum and refugee status were always intended to be extraordinary relief; not the norm.

Section I acknowledges the right of aliens to make asylum claims, but also notes the importance of accurate and timely credible fear adjudications for those who are otherwise subject to expedited removal. There is a subtle emphasis on the need for asylum officers to ensure that they are in possession of as many facts as is possible to elicit, as well as the importance of credibility assessments, when rendering judgment.

Significantly, the section directs U.S. Citizenship and Immigration Services (USCIS) to fully integrate fraud detection and analysis into the asylum, credible fear, and benefits adjudication processes. In addition, the heads of USCIS, CBP, and ICE are directed to examine overall fraud detection, deterrence, and prevention measures in their respective agencies, and to provide to the secretary a consolidated report of vulnerabilities and recommendations to deter and detect such fraud.

Section J reiterates the importance of deterrence through detention at the border, and frankly acknowledges the high chance, based on the historical and statistical record, that aliens who are released from custody will abscond rather than attend court or due process proceedings. Consequently, CBP and ICE are directed to strengthen their respective detention capabilities at locations proximate to the border. (CBP detention is limited to facilities appropriate for 72 hours or less, after which aliens are turned over to ICE for further confinement.)

The section also notes the importance of co-locating asylum officers and immigration judges at those facilities in order to expedite the resolution of cases and minimize the need to detain aliens any longer than necessary to complete their proceedings, and either remove them or grant relief as appropriate. In keeping with the emphasis on fraud detection of the prior section, Section J also instructs the USCIS director to co-locate officers from the Fraud Detection and National Security Unit (FDNS) in such field settings.

Finally, CBP and ICE are also to consider situations in which joint *temporary* facilities may be desirable — for instance to accommodate surges. It's worth observing that the challenge of temporary facilities is, and has always been, meeting the happy medium between "temporary" (and thus cheaper than permanent facilities) on one hand, and on the other, adequacy of treatment and care for those detained. One wonders if DHS might not benefit from the experience of the Pentagon in this regard. Modern U.S. military frontline medical triage facilities for the wounded are the finest in the world; and the capability of military engineers to quickly erect and deconstruct field headquarters and troop camps come immediately to mind as examples that might aid in this effort.

Section K focuses on limited and appropriate use of the immigration parole authority contained within the INA. The secretary's assessment could not be more succinct or more accurate:

> *The practice of granting parole to certain aliens in pre-designated categories in order to create immigration programs not established by Congress has contributed to a border security crisis, undermined the integrity of the immigration laws and the parole process, and created an incentive for additional illegal immigration.*

The secretary directs the heads of USCIS, CBP, and ICE to initiate across-the-board training for their respective employees on proper use of the parole power. Although the secretary retains in force an outstanding ICE policy memorandum having to do with parole in cases involving claims of credible fear and asylum (pending development of further guidance and regulations), he also makes clear that "In every case, the burden to establish that his or her release would neither pose a danger to the community, nor a risk of flight remains on the individual alien, and ICE retains ultimate discretion whether it grants parole in a particular case."

Section L further speaks to the issue of unaccompanied minor aliens crossing the border illegally that was first addressed in Section G. That a minor arrives unaccompanied is not the proper threshold for a final determination as to whether he or she meets the statutory definition of a UAC.

As previously mentioned, under the prior administration, virtually every alien minor was treated as a UAC and turned over to ORR, which in turn later placed them into the hands of parents or other relatives illegally in the country (those parents or relatives more often than not having been the ones who paid smugglers to transport the minors across international boundaries in the first place). This was done notwithstanding the clear language of the statute that the designation of UAC only applies *when there are no parents or responsible guardians to be found in the United States.*

Section L points out the fallacy of this position, and notes that such a policy in fact exacerbates smuggling and trafficking in minors, because the net consequence of that policy was that the U.S. government found itself in the position of acting as middle man in illegal smuggling transactions. Federal officials were directed not to inquire into the status of those taking custody of the children. (Worse, on more than one occasion, it later turned out that the individual wasn't even a relative; see here and here.)

This is why it is significant that Secretary Kelly has now issued supplementary guidance making clear that a minor is not truly "unaccompanied" in the context of the statute when that minor has parents or close relatives in the United States, without regard to their immigration status. A failure to do so would be to continue to invite an uninterrupted flow of children across our borders, with all the attendant risks involved in them being placed into the hands of unscrupulous and unsavory criminal cartels for the purpose of being smuggled.

Secretary Kelly has directed training of employees in the subordinate DHS immigration agencies (USCIS, CBP, and ICE) to aid in understanding and detecting the difference between true UACs and those who are en route to be "reunited" with parents or other relatives already here.

What remains to be seen is how HHS will follow up with collateral instructions to its subordinates at ORR to ensure, first, that they only tender minors into the hands of people who are in fact parents or responsible close relatives, and second, whether they will fully cooperate with DHS in sharing information on those who ultimately assume custody of the minor(s) so that, if they are illegally in the United States, and if they have been complicit in a smuggling venture to move the minor across international borders at the hands of criminals and transnational gangs, they do not feel immune to the consequences of their actions or their status.

Section M speaks to the issue of parental involvement in the smuggling of minors:

> *Tragically, many of these children fall victim to robbery, extortion, kidnapping, sexual assault, and other crimes of violence by the smugglers and other criminal elements along the dangerous journey through Mexico to the United States. Regardless of the desires for family reunification, or conditions in other countries, the smuggling or trafficking of alien children is intolerable.*

ICE and CBP leaders are directed by the secretary to enforce the immigration laws against any person, including relatives, who are complicit by referring the individual for prosecution, or placement into proceedings.

This approach is long overdue, and something that we at the Center have suggested on more than one occasion (see, for instance, here and here), and in fact constituted an entire section of our April 2016 *Backgrounder*, "A Pen and a Phone: 79 immigration actions the next president can take". We applaud the secretary for this responsible approach.

Section N highlights prosecution in appropriate border-related immigration crimes as an important method of deterrence: "[V]iolent transnational criminal organizations have established sophisticated criminal enterprises on both sides of the border. ... These criminal organizations have monopolized the human trafficking, human smuggling, and drug trafficking trades in the border region." To this end, the secretary directs the various task forces to coordinate their focus on disrupting both the criminal activities and the transnational organizations behind them.

Significantly, ICE is also directed to augment its presence in "Northern Triangle" countries (the Central American nations of Guatemala, Honduras, and El Salvador, which contribute so substantially both to the tide of illegal entrants and to the criminal smuggling and trafficking activities of the region); and to increase its efforts to vet and partner with trustworthy police and border units in that area. This will require the full cooperation of the State Department as well as its ambassadors/chiefs of mission in each of those countries, because under existing directives the chief of mission has final say over whether or not to permit expansion of the U.S. diplomatic presence in each country. It is worth noting that in the past, chiefs of mission have acted as obstacles to expanding ICE visa security units in certain countries. We hope that will not be the case with this effort.

Section O picks up on a theme laid out in the president's executive orders mandating transparency, including the reporting of apprehension details that are adequate to inform the public about matters with an impact on community safety such as adverse immigration and criminal histories, gang affiliations, confinement status, removals vs. absconders, and the like.

After the forced obfuscation and routine imposition of faux privacy rights of illegal aliens by the prior administration (see here and here), it may take some time for this new regimen to settle into the consciousness of the various agencies' media spokespersons and Freedom of Information Act specialists. There have already been some instances of resistance to providing information about aliens in circumstances that suggest the "transparency mandate" has not yet penetrated all the DHS bureaucracies.

Section P lays out the ending caveat so usual in such documents, to the effect that the policies it outlines do not create any substantive or procedural right or benefit under the law.

It goes a step further than usual, though, in directing agency heads to ensure compliance with applicable law and regulations including, importantly, the Administrative Procedure Act, a federal statute that the Obama administration frequently abused or ignored. This is a welcome statement signalling the administration's intent to hew to the letter of the law.