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A Civil Rights Lawyer Explains Why Obama's Immigration Order Is an Even Bigger Deal Than It Seems

By Margo Schlanger

Photo: Getty Images

If you've read or heard anything about President Obama's immigration orders last week, then you've probably heard that he's giving millions of undocumented residents a three-year reprieve from deportation and legal working papers.

You probably haven't heard that he's also rewriting the priorities for the federal government's immigration enforcement agencies. These changes are more complicated but for the tens of thousands of affected people, annually, they are probably even more important.

Two changes are particularly significant. First, the administration has announced that it will *not* routinely deport out-of-status immigrants based either on their very minor criminal history or on their prior deportation orders, as long as those orders

are from earlier than 2014. Second, the administration is (for the first time) including Customs and Border Protection (CBP) in its prosecutorial discretion plan.

Both changes will please immigration advocates just as surely as they will inflame restrictionists. But implementation, particularly of the second change, will be challenging and hard for outsiders to assess.

A little recent history, for context: There are currently more than 11 million “out-of-status” immigrants in the United States. The [most recent figures](http://www.pewhispanic.org/files/2014/09/2014-09-03_Unauthorized-Final.pdf) [http://www.pewhispanic.org/files/2014/09/2014-09-03_Unauthorized-Final.pdf] are that more than 60 percent of them have been here for at least ten years, while only 16 percent have been here fewer than five years. There is simply no way that the government is going to deport them all. In fact, at the current congressional level of funding for deportation, annual removals represent less than 5 percent of this total—about [440,000 per year](http://www.dhs.gov/publication/immigration-enforcement-actions-2013) [http://www.dhs.gov/publication/immigration-enforcement-actions-2013]. (The funding level, and therefore number of deportations, went up significantly during the last term of the Bush administration, and has been more-or-less level since.)

Those numbers mean that somebody must make choices about whom to remove. If the president and executive agencies don’t decide, then the line-level immigration officers will—either one case at a time, or in line with their own sense of priorities. In 2011, Immigration and Customs Enforcement (ICE), the Department of Homeland Security agency that carries out interior immigration enforcement and most deportations, [formalized its enforcement approach](http://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detn-reml-aliens.pdf) [http://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detn-reml-aliens.pdf] by declaring, and ranking, several priorities for enforcement. First came those with criminal convictions—for “aggravated felonies” (some of which aren’t actually felonies), other felonies or several misdemeanors, or any other misdemeanor. Next on the priority list was recent illegal entrants—mostly people who had just snuck in, evading border inspection. Third was people who

had failed to appear as ordered at immigration hearings or had been given deportation orders in previous hearings.

The key to this prioritization was not so much the ranking of these three categories; the system had enough capacity to handle all of them. What mattered was whom the list didn't mention: people who had overstayed their visas, along with people who came to this country years ago and had never received a deportation order. Since 2011, ICE has mostly declined to remove people in these "non-priority" categories. Meanwhile, for those who fell into any of the three priority categories, deportations proceeded at a record pace. All it took was an encounter at a border checkpoint, or an arrest, even for minor crimes, for immigrants to come to ICE's attention and end up on a bus or a plane back to their country of origin—often a country the immigrant had left years and years before.

Imagine, for example, an immigrant who had been here without authorization since 1990. Perhaps she was the subject of a deportation order in 1995, but she either failed to leave or snuck back into the country in 1996, rejoining her family here. Under the 2011 priorities, if she had been arrested, booked briefly into jail, and fingerprinted for a minor criminal infraction like writing a bad check, the fingerprints would have alerted ICE to her presence. She would have faced likely removal, even without any criminal conviction, because she had that 1995 deportation order.

Or consider (again, hypothetically) her brother, who came with her to the U.S. in 1990. Perhaps he pleaded guilty to a misdemeanor charge of disorderly conduct when he was 19. Under the 2011 priorities, if he had come to DHS's attention, he too could have faced deportation or perhaps pressure to submit to "voluntary return"—that is, to leave the country in lieu of deportation. The same thing could have happened if either of them went through an immigration checkpoint, which Border Patrol sometimes set up as much as 100 miles away from the actual border.

nce the new policies Obama just announced are in place, federal immigration agencies will no longer make an effort to deport these kinds

O of people. That's a pretty big change. In 2013, *nearly half* of ICE's 369,000 removals were of people with misdemeanor convictions or prior deportation orders (or both), and no other more significant reason for deportation. Not all of these people will fall off the priority list, because some will have misdemeanor convictions that even the new guidelines count as significant. Still others will have prior deportation orders recent enough to qualify for immediate deportation. But the change could spare as many as 100,000 from deportation. (Earlier this year, ICE's former Acting Director, John Sandweg, [wrote an op-ed](http://articles.latimes.com/2014/mar/27/opinion/la-oe-sandweg-ice-obama-humanitarian-reform-20140327) [http://articles.latimes.com/2014/mar/27/opinion/la-oe-sandweg-ice-obama-humanitarian-reform-20140327] advocating for a change like the one just made and stated that "tens of thousands of people are treated as enforcement priorities based on their immigration history alone.")

It's also significant that the Administration is insisting that Customs and Border Protection (CBP), as well as ICE, implement enforcement priorities. ICE is the U.S.'s lead deportation agency, but it is CBP that arrests and then turns over to ICE about half of the total aliens deported every year. And CBP itself carries out about another quarter of DHS's deportations. In addition, there are hundreds of thousands of "returns" every year—departures by noncitizens to avoid formal removal proceedings.

ICE was subject to the old priorities, which DHS issued in 2011. CBP was not. The agency's leadership never embraced the idea of prioritization; its officers have basically taken an "arrest them all" approach. That is now supposed to change. In [one](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf)

[http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf] [of last week's policy memos](http://www.dhs.gov/immigration-action) [http://www.dhs.gov/immigration-action] DHS Secretary Jeh Johnson for the first time instructed not just ICE but also CBP to consider the Department's priorities in deciding "whom to stop, question, and arrest," and "whom to detain or release." If CBP actually implements the new priorities, this will affect especially immigrants who live near the border and have resided in the U.S. for many years.

Whether CBP will actually do that is far from certain. It's an enormous culture change for the nation's largest law enforcement agency, and it will be hard for outsiders to evaluate. CBP shares very little information about its removal and return activities. But if CBP does what has been directed, that should substantially ease the threat of deportation for longstanding residents along the southwest border—who were, perhaps, deported some years past but came back and have lived here without trouble ever since.

Critics of Obama's immigration order will not be happy about these changes. They'll say it's one more example of the president failing to enforce existing laws. But these changes don't necessarily mean the federal government will end up deporting fewer people. They may deport different people instead—the ones who are still on the priority list, because they have more serious criminal histories or have come to the country only recently. That would be consistent with Obama's professed goals, of improving border security while allowing those who have lived and worked in this country for years to come out of the shadows. His orders are not as good as comprehensive immigration reform would be, but they will help a lot of people—more, in fact, than you've heard so far.

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