

Legal Sidebar

Immigration Officers' Authority to Apprehend and Remove Aliens: Questions & Answers in Brief

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Reports that U.S. Immigration and Customs Enforcement (ICE) agents [conducted enforcement actions](#) in at least six states during the week of February 6, 2017 have raised a number of questions about agents' authority to apprehend and remove aliens. This Sidebar provides brief answers to some of these questions.

Before getting to the questions and answers, though, it is important to note that aliens who are "[present in the United States without being admitted or paroled](#)" are potentially removable, as are aliens who entered legally but have [violated a condition of their admission](#) or engaged in other conduct set forth in the Immigration and Nationality Act (INA). The federal government has often had policies that make certain aliens—such as those who have been [convicted of felony offenses](#)—higher priorities for removal than other aliens. However, the Executive's enforcement priorities have [changed over time](#), and the Executive has generally been seen to have the authority to remove an otherwise removable alien even if the alien is not among the Executive's current enforcement priorities.

What gives immigration officers the authority to stop people and inquire as to their immigration status?

[Section 287\(a\)](#) of the INA gives immigration officers broad authority to "interrogate" aliens, or persons believed to be aliens, about their "right to be or to remain in the United States." It also authorizes immigration officers to arrest any alien in the United States whom there is "reason to believe" is present in the United States in violation of federal immigration law. A judicial or administrative warrant is not required for these and other actions authorized under INA § 287(a).

The Constitution (and more specifically the Fourth Amendment) has, however, been seen to impose certain constraints on immigration officials' exercise of their 287(a) authorities. For example, the authorization to "interrogate" aliens about their right to be in the United States has [generally not been seen](#) to permit immigration officials to enter into non-public areas without consent, a proper warrant, or exigent circumstances in order to pursue these inquiries. Similarly, the authority to arrest aliens whom there is "reason to believe" are unlawfully present [has generally been seen](#) to apply only to aliens for whom there is probable cause to believe they are in the country in violation of the law. Probable cause, in turn, "[exists where the facts and circumstances](#) within [an officer's] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." This is a very fact-specific inquiry.

How could an alien picked up by immigration officials be removed shortly thereafter, without any intervening legal proceedings?

Depending upon the facts and circumstances of the case, there could be several reasons why an alien could be removed shortly after being picked up by immigration officials without any intervening legal proceedings. For example, some aliens may be subject to a [final order of removal](#) that has not yet been executed. As a general rule, a removal order issued by an immigration judge in "formal" removal proceedings under [INA § 240](#) becomes final upon its entry [in cases where the alien does not show up](#) for proceedings and is ordered removed *in absentia*. [In other cases](#), the order generally becomes final upon the expiration of the [30-day period](#) allotted for appeal to the Board of Immigration Appeals (BIA),

if an appeal is not filed within that time, or upon dismissal of the appeal by the BIA. Final orders may generally be executed at any time, unless a court [stays removal](#).

Other aliens may be subject to reinstatement of removal under [INA § 241\(a\)\(5\)](#). Under this procedure, immigration officials may reinstate, “from its original date,” the prior order of removal against an alien who has illegally reentered the United States after having been removed or after having departed voluntarily while under a removal order. In such cases, the prior order is generally “not subject to being reopened and reviewed” and may generally be executed at any point, with relatively [limited avenues for relief](#) from removal.

In yet other cases, aliens could be permitted to withdraw their application for admission and “depart immediately” under the authority of the [INA § 235\(a\)\(5\)](#). (Aliens who are present in the United States without being admitted are deemed to have applied for admission.) Alternatively, aliens could be permitted to voluntarily depart the United States at their own expense in lieu of or prior to the completion of removal proceedings under the authority of [INA § 240B\(a\)\(1\)](#). In addition, streamlined [administrative removal proceedings](#) may be possible in certain cases.

Does a jurisdiction’s designation as a “sanctuary city” limit immigration officials’ authority to conduct enforcement actions?

In certain times and places, the [concept of “sanctuary”](#) involved a place—often a church or other religious facility—where persons enjoyed some legal protections from punishment. However, as a [1983 opinion](#) by the Office of Legal Counsel (OLC) of the Department of Justice noted, “[s]anctuary for criminals” was abolished in England in 1623 and is generally not seen to have “enter[ed] the United States as part of the common law.” Accordingly, a jurisdiction’s designation of itself as a “sanctuary” would generally not be seen as a legal impediment to immigration officers enforcing federal law, to the extent permitted under federal statutes and regulations and the U.S. Constitution, within that jurisdiction. There have been [cases in the past](#) where federal personnel entered self-designated “church sanctuaries” to make arrests for non-immigration related offenses. There is also at least one reported case in which church personnel were [convicted](#) of violating federal law because of sanctuary-related activities.

This is not to say, however, that a jurisdiction’s designation of itself as a “sanctuary” could not provide aliens within its territory with certain protections from federal immigration enforcement activities, particularly if the jurisdiction were willing to risk the potential loss of federal funds (as contemplated in a [recent executive order](#)). For example, the [Tenth Amendment’s constraints](#) upon federal “commandeering” of state and local governments have generally been taken to mean that state and local officials cannot be required to [take steps to investigate whether particular individuals may be removable aliens](#) or to [hold aliens pursuant to immigration detainers](#) until federal officials can take custody of them.

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