



THE SECRETARY OF THE INTERIOR
WASHINGTON

ORDER NO. 3385

Subject: Enforcement Priorities

Sec. 1 Purpose. This Order is intended to focus enforcement resources on intentional violations, prevent unfair surprise for persons reasonably relying on Department of the Interior (Department) guidance, and satisfy Section 5 of Executive Order 13924, Regulatory Relief to Support Economic Recovery (May 19, 2020).

Sec. 2 Authorities. This Order is issued under the authority of Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262), as amended.

Sec. 3 Background. “The contention that an injury can amount to a crime only when inflicted by intention . . . is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.” *Morissette v. U.S.*, 342 U.S. 246, 250 (1952). Put differently, as Oliver Wendell Holmes, Jr. wrote “[e]ven a dog distinguishes between being stumbled over and being kicked.” *Id.* at 252 n. 9 (quoting Oliver Wendell Holmes, Jr., *The Common Law*). This Order is intended to focus the Department’s scarce enforcement resources on those who do not merely stumble into a violation, but choose to break the law.

As Executive Order 13933, Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence (June 26, 2020), notes, in recent weeks there has been a “sustained assault on . . . revered American monuments such as the Lincoln Memorial.” This effort has been marked by intentional efforts to damage and destroy monuments and statues under the protection of the Department. Peaceful protestors do not stumble onto National Park land in the District of Columbia with ropes and other equipment that can be used to damage large statues and monuments, and any resulting destruction is hardly accidental. Therefore, this Order builds upon and further implements four Executive Orders issued by President Donald J. Trump:

a. Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents (Oct. 9, 2019), declares: “it is the policy of the executive branch, to the extent consistent with applicable law, to require that agencies treat guidance documents as non-binding both in law and in practice, except as incorporated into a contract” Executive Order 13891 sets forth procedures for ensuring transparency in the use of guidance documents, sets conditions on the promulgation of guidance documents, explicitly applies the requirements of several prior Executive Orders to guidance documents, and provides for the Director of the Office of Management and Budget to take steps further implementing this Order.

b. Executive Order 13892, Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication (Oct. 9, 2019), declares

“[t]he rule of law requires transparency. Regulated parties must know in advance the rules by which the Federal Government will judge their actions.” It goes on to state: “Guidance documents may not be used to impose new standards of conduct on persons outside the executive branch except as expressly authorized by law or as expressly incorporated into a contract. When an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it must establish a violation of law by applying statutes or regulations. The agency may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations.” It also takes a number of steps related to proper reliance on guidance documents, fairness and notice in administrative enforcement actions and adjudications, fairness and notice in jurisdictional determinations, opportunities to contest agency determinations, ensuring reasonable civil administrative inspections, appropriate procedures for information collections, encouraging cooperative information sharing and enforcement, and addressing compliance with the Small Business Regulatory Enforcement Fairness Act of 1996.

c. Executive Order 13924, Regulatory Relief to Support Economic Recovery (May 19, 2020), was signed in response to the effects of the COVID-19 outbreak that emanated out of the People’s Republic of China. As part of a policy to “combat the economic consequences of COVID-19,” it directed agency heads to consider policies of enforcement discretion that “decline enforcement against persons and entities that have attempted in reasonable good faith to comply with applicable statutory and regulatory standards . . .,” and to consider a situation in which a person “makes a reasonable attempt” to comply with guidance on actions to stem the transmission and spread of COVID-19 to be a rationale for declining enforcement. The Order reiterates that “[n]on-adherence to guidance shall not form the basis for an enforcement action by a Federal agency.” This Order addressed the Federal response to COVID-19, the rescission and waiver of regulatory standards, compliance assistance for regulated entities, fairness in administrative enforcement and adjudication, review of regulatory response, and implementation by the Office of Management and Budget.

d. Executive Order 13933, Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence (June 26, 2020), was signed in response to recent acts of destruction, desecration, and vandalism directed in part at historical monuments, memorials, and statues on Federal land. It declared a policy to “prosecute to the fullest extent permitted under Federal law, and as appropriate, any person or any entity that destroys, damages, vandalizes, or desecrates a monument, memorial, or statue within the United States or otherwise vandalizes government property,” and directed the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security to provide personnel to assist with the protection of Federal monuments, memorials, statues, or property, as appropriate and upon the request of the Secretary of the Interior, among others.

This Order sets forth an enforcement policy that focuses enforcement resources on persons who have the most culpability, including those who intentionally seek to damage or destroy monuments, memorials, and statutes, and further implements President Trump’s Executive Orders on improved agency guidance, fairness in administrative enforcement and adjudications, regulatory relief to support economic recovery, and protecting American monuments, memorials, and statues.

Sec. 4 Directives.

a. The head of each Bureau/Office with enforcement responsibilities shall, in exercising enforcement discretion, prioritize investigation and enforcement of alleged violations where the alleged violator had actual or constructive knowledge that their conduct was prohibited. For purposes of this subsection, routine safety inspections shall not be considered investigations. In implementing this subsection, all referrals to the Department of Justice for civil or criminal enforcement action, including those to relevant United States Attorney Offices, shall include a brief statement detailing:

- (1) Whether the subject of the referral had actual or constructive knowledge that their conduct was prohibited; and
- (2) An outline of the facts supporting the conclusion in Section 4(a)(1) above.

b. Consistent with Executive Order 13924, a reasonable attempt to comply with a guidance document issued by the Department or another Federal agency shall constitute a rationale for exercising discretion and declining to initiate an enforcement action.

c. Consistent with Executive Orders 13892 and 13924, violation of standards set forth in non-regulatory guidance documents or through other informal mechanisms may not serve as a basis for initiating an enforcement action.

d. Consistent with Executive Order 13933, the head of each Bureau/Office with enforcement responsibilities shall prioritize the protection of monuments, memorials, and statutes, including by prioritizing:

- (1) The investigation of intentional damage to or destruction of monuments, memorials, and statues; and
- (2) The referral of individuals suspected of intentionally damaging or destroying monuments, memorials, and statues to the Department of Justice, including to relevant United States Attorney Offices, for civil or criminal action, as appropriate.

e. Within 30 days of this Order, the head of each Bureau/Office with enforcement responsibilities shall update Bureau/Office manuals, handbooks, and other guidance to incorporate:


- (1) The directives in this section; and
- (2) The principles set forth in Section 6 of Executive Order 13924 concerning fairness in administrative enforcement and adjudication.

f. Notwithstanding any other provision of this Order, the directives in this section shall not apply to the Inspector General and the activities of the Office of the Inspector General.

Sec. 5 Implementation. The Deputy Secretary is responsible for implementing all aspects of this Order, in coordination with the Solicitor and the Assistant Secretaries.

Sec. 6 Effect of this Order. This Order is intended to improve the internal management of the Department. This Order and any resulting report or recommendations are not intended to, and do not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person. To the extent there is any inconsistency between the provisions of this Order and any Federal laws or regulations, the laws or regulations will control.

Sec. 7 Expiration Date. This Order is effective immediately and will remain in effect until it is amended, superseded, or revoked, whichever occurs first.



Secretary of the Interior

Date: **SEP 14 2020**