



Ending ICE's Use of State and Local Resources

The Biden administration should follow through on commitments President-elect Joe Biden made as a candidate to put a moratorium on all deportations in the first 100 days of his presidency.¹ This moratorium would afford the new administration time to replace the interior immigration enforcement regime as we have known it with a smarter approach that is predicated on, among other things, a renewed respect for the choice of state and local governments not to collaborate with Immigration and Customs Enforcement (ICE). Moreover, the administration will need to end programs that facilitated anti-immigrant harassment and racial profiling by certain state and local law enforcement agencies, particularly during the last four years.

There is wide-ranging support for disentangling state and local agencies from federal immigration enforcement. Law enforcement experts emphasize that when immigrants and their families live in fear that any interaction with local authorities could lead to arrest and deportation, they are less likely to come forward as witnesses, provide crime tips, and seek police protection—undermining safety for all.² In 2015, the President's Task Force on 21st Century Policing recommended that “whenever possible, state and local law enforcement should not be involved in immigration enforcement,” a change that would require DHS to “terminate the use of the state and local criminal justice system.”³

Yet within the first week in office, President Donald Trump issued an executive order that encouraged the Department of Homeland Security (DHS) to conscript state and local governments to deport as many people as possible; he also announced a “nationwide crackdown” to punish state and local governments that declined to participate in these deportations.⁴ Over the course of his term, he threatened mass raids on so-called sanctuary cities and at times carried out this threat.⁵ Many of the Trump administration's top targets for punishment were Democratic strongholds, but his agenda threatened hundreds of thousands of people in red and blue states alike; one in four counties in the United States have policies limiting their collaboration with ICE.⁶

¹ Democratic Debate, March 15, 2020 (“[In] the first 100 days of my administration, no one, no one will be deported at all. From that point on, the only deportations that will take place are commissions of felonies in the United States of America”).

² See, e.g., Nat'l Imm. Law Ctr., *Local Law Enforcement Leaders Oppose Mandates to Engage in Immigration Enforcement* (August 2013), <https://bit.ly/2J929st> (dozens of law enforcement leaders criticizing police-ICE entanglement).

³ See Final Report of the President's Task Force on 21st Century Policing, Recommendation 1.9 and 1.91 Action Item, May 2015, https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

⁴ See Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017); Alana Abramson, *I Can Be More Presidential Than Any President. Read Trump's Ohio Rally Speech*, TIME (July 26, 2017), <http://time.com/4874161/donald-trump-transcript-youngs-town-ohio/>.

⁵ See Alan Gomez, *Trump Immigration Raids Show Greater Focus on Non-Criminals*, USA TODAY (Feb. 16, 2017), <https://www.usatoday.com/story/news/nation/2017/02/16/president-trump-immigration-raids-target-fewer-criminals/97988770/>. See also Lyanne A. Guarecuco, “Federal Judge: ICE Conducted Austin Raids in Retaliation Against Sheriff's New Policy,” Mar. 20, 2017, <https://www.texasobserver.org/federal-judge-ice-conducted-austin-raids-in-retaliation-against-sheriffs-new-policy/>.

⁶ Immigrant Legal Resource Center, *Growing the Resistance: How Sanctuary Laws and Policies Have Flourished During the Trump Administration* (2019) (at least 23 percent of counties in the United States

As part of this attack on state and local governments, DHS and the Department of Justice (DOJ) devised method after method to coerce state and local governments to coordinate arrests and hand over information to facilitate deportations—in blatant contravention of state and local laws limiting such collaboration.⁷ President Trump promised to cut off state and local governments’ access to federal grants,⁸ including, in 2020, resources to respond to COVID-19, unless they agreed to certain immigration conditions, such as providing federal immigration enforcement authorities with access to local jails and prisons.⁹ Litigation stalled some of the Trump administration’s most pernicious attempts,¹⁰ but the administration nevertheless succeeded in intimidating some state and local governments that were considering measures to limit ICE collaboration.

During the same period the Trump administration was attacking so-called sanctuary cities, the anti-immigrant movement lobbied for and, in some states, succeeded in passing *anti-sanctuary* laws and policies. In some places, this has meant that local government entities that do not want to collaborate with ICE—believing it to be a counterproductive use of limited local resources—are required to do so by state law. State anti-sanctuary laws also “threaten the long-standing fundamentals of American-style local democracy” by prohibiting local officials from endorsing pro-immigrant, welcoming viewpoints and instead seeking to punish dissent from the Trump administration’s anti-immigrant agenda.¹¹

In other jurisdictions, racist and xenophobic law enforcement agencies, spurred on by the Trump administration, are using their participation in immigration enforcement programs to threaten and harass local immigrant community members.

To address these developments, the new administration should do more than simply withdraw the Trump administration’s threats against so-called sanctuary jurisdictions. It should design a

have such policies), <https://www.ilrc.org/growing-resistance-how-sanctuary-laws-and-policies-have-flourished-during-trump-administration>.

⁷ See, e.g., U.S. Department of Justice, “Attorney General William P. Barr Delivers Remarks at the National Sheriffs’ Association Winter Legislative and Technology Conference,” February 10, 2020, <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-national-sheriffs-association-winter>; Hamed Aleaziz, “DHS Considered How to Punish States That Deny Access to Driver Records, A Memo Says,” Feb. 10, 2020, <https://www.buzzfeednews.com/article/hamedaleaziz/dhs-memo-drivers-records-sanctuary>.

⁸ See *Full Text: Donald Trump Immigration Speech in Arizona*, POLITICO (Aug. 31, 2016, 10:54 PM), <https://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614> [<https://perma.cc/33MN-5W7A>]; see also *Donald Trump’s Contract with the American Voter*, DONALD J. TRUMP (Oct. 2016) [hereinafter *Trump’s Contract*], <https://assets.donaldjtrump.com/landings/contract/O-TRU-102316-Contractv02.pdf>. For an analysis, see Annie Lie & Christopher Lasch, “Crimmigration Resistance and the Case of Sanctuary City Defunding,” 57 Santa Clara L. Rev. 539 (2017).

⁹ See, e.g., Justin Wise, “Trump suggests coronavirus funding for states could be tied to sanctuary city policies,” The Hill, May 29, 2020, <https://thehill.com/homenews/administration/495170-trump-suggests-coronavirus-funding-for-states-could-be-tied-to>; Katie Benner et al., Mayors Cancel Meeting with Trump as Justice Dept. Squeezes Sanctuary Cities, N.Y. Times (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/us/politics/sanctuary-cities-justice-department.html>.

¹⁰ In April 2020, the 7th Circuit upheld a nationwide injunction on the Attorney General’s imposition of immigration-related conditions on Byrne-JAG grants. *City of Chicago v. Barr*, No. 19-3290 (7th Cir. 2020). See also *United States v. California*, 921 F.3d 865 (9th Cir. 2019), which rejects the Trump administration’s anti-sanctuary lawsuit.

¹¹ Pratheepan Gulasekaram et. al., *Anti-Sanctuary and Immigration Localism*, 119 Colum. L. Rev. 837, 867 (2019).

new enforcement system based on the need to honor state and local government choices not to participate in ICE enforcement. Moreover, it must dismantle the programs and partnerships with state and local entities that have turbo-charged immigration enforcement and resulted in racial profiling and other civil rights violations, particularly in the hostile anti-immigrant climate fostered by four years of a xenophobic White House.

Recommendations to the President

First 100 Days

1. Withdraw Executive Order 13768 of Jan. 25, 2017, and issue a new executive order that does the following:
 - Directs DOJ to rescind all policies that deny federal funds to state and local agencies that limit their collaboration with ICE, and directs DHS to remove any immigration conditions to state and local grants, if such conditions are currently in place.
 - Directs DOJ to assess the civil rights impacts of state and local participation in federal immigration enforcement, as the Obama administration began to do, and to recommend ways to address and mitigate such risks in a publicly available report released within a year of the order. The report should include:
 - The impact of 287(g) agreements on immigrants' access to education, benefits, and federal programs; on racial profiling and other rights violations; and on community-police relationships
 - Guidance to ICE trial attorneys in 287(g) jurisdictions to clarify that Fourth Amendment and Equal Protection violations should result in termination of any removal proceedings that are brought against victims of such civil rights violations
 - Criteria for all relevant federal agencies to undertake investigations of 287(g) jurisdictions to identify a pattern or practice of violating civil rights
 - Directs DHS to end ICE detainers and restrict ICE to requests that state/local law enforcement provide *notice* of an individual's release (as opposed to a request that they continue detaining the individual in order to facilitate their transfer to federal custody). ICE should also issue a directive to field offices regarding civil liberties protections in the notifications process, including a requirement to monitor local law enforcement notification practices and conduct trainings. These recommendations are critical because:
 - ICE uses unreliable information to issue detainers. As a result, the ACLU and other organizations have documented thousands of cases of U.S. citizens held on erroneous detainers.¹²
 - ICE's reliance on detainers is not sustainable. As cases and settlements in the last several years show, local agencies face tremendous financial liability for honoring ICE detainers.¹³ ICE's entire detainer policy is riddled with Fourth Amendment problems, as numerous courts have found, and needs to be overhauled.
 - Directs DHS to end all forms of 287(g) agreements, Basic Ordering Agreements, and other agreements that permit local law enforcement to participate directly in federal immigration enforcement. These reforms are critical in light of the following:

¹² See Spencer Amdur, "Florida Sheriff Worked With ICE to Illegally Jail and Nearly Deport US Citizen," ACLU, Dec. 3, 2018, <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/florida-sheriff-worked-ice-illegally-jail-and>; David J. Bier, "U.S. Citizens Targeted by ICE," CATO Institute, Aug. 29, 2019, <https://www.cato.org/sites/cato.org/files/pubs/pdf/irpb-8.pdf>.

¹³ See ACLU, "Recent ICE Detainer Damages Cases," <https://www.aclu.org/fact-sheet/recent-ice-detainer-damages-cases>.

- While running for president, Biden pledged to “[e]nd the Trump administration’s historic use of 287(g) agreements” because they “undermine trust and cooperation between local law enforcement and the communities they are charged to protect.”¹⁴ Indeed, the Trump administration drastically ramped up 287(g) agreements, from 34 at the end of 2016 to a total of 151 as of November 2020.¹⁵ Many of these jurisdictions already had troubling civil rights records,¹⁶ and their participation in the 287(g) could accelerate racial profiling. The Trump administration also devised the Warrant Service Officer program, a new form of 287(g) agreement intended to encourage cooperation with ICE detainers.¹⁷
 - Jurisdictions that work closely with ICE are more likely to engage in racial profiling and harassment of immigrant communities, which does not make communities safer. For example, local law enforcement has used “foreign-sounding” last names, place of birth, or racial appearance as a reason for investigation and arrest.¹⁸
2. Direct DHS to end the Secure Communities program in name and practice—and dismantle the electronic information-sharing that redirects routine FBI fingerprint submissions from local police to DHS for civil immigration enforcement. Furthermore, the Biden administration cannot return to the Priority Enforcement Program (PEP).¹⁹ These recommendations are critical because:
- The Secure Communities program shares fingerprint information with ICE and triggers detainers. It does not matter if the arrest was illegal or if the criminal charge is ultimately dismissed. Jurisdictions do not have the option to limit their information-sharing to the FBI or to limit it to non-immigration enforcement purposes. As a result, even in so-called sanctuary jurisdictions, ICE is able to obtain “the name and criminal history of any community resident who comes in contact with the criminal legal system . . . [such that] there is no true sanctuary from deportation.”²⁰

¹⁴ “The Biden Agenda for the Latino Community,” <https://joebiden.com/latino-agenda/>.

¹⁵ See ICE, “Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act,” <https://www.ice.gov/287g> (last visited May 29, 2020) (reporting Jail Enforcement Model agreements with 77 law enforcement agencies in 21 states and 287(g) Warrant Service Officer agreements with 60 law enforcement agencies in 9 states).

¹⁶ See letter from ACLU, <https://www.aclu.org/letter/aclu-letter-calls-homeland-security-reject-immigration-agreements-between-local-and-federal>.

¹⁷ See ICE, “ICE launches program to strengthen immigration enforcement,” May 5, 2019, <https://www.ice.gov/news/releases/ice-launches-program-strengthen-immigration-enforcement>; ABA Journal, “ICE offers workaround to allow police in sanctuary cities to temporarily detain immigrants,” May 10, 2019, <https://www.abajournal.com/news/article/ice-offers-workaround-to-allow-police-in-sanctuary-cities-to-temporarily-detain-immigrants>.

¹⁸ See, e.g., U.S. Dept. of Justice, Civil Rights Division. “United States’ Investigation of the Alamance County Sheriff’s Office” (Sept. 18, 2012), <https://www.justice.gov/iso/opa/resources/171201291812462488198.pdf>; U.S. Dept. of Justice, Civil Rights Division. “United States’ Investigation of the Maricopa County Sheriff’s Office.” (Dec. 15, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf; National Immigrant Justice Center, “CERD Shadow Report: Immigration Detainers Encourage Racial Profiling,” https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17787_E.pdf.

¹⁹ See Memo from Jeh Johnson, Secretary of the Department of Homeland Security, “Secure Communities,” Nov. 20, 2014, https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

²⁰ Alina Das, *No Justice In the Shadows: How America Criminalizes Immigrants*, 96 (2020).

- In 2014, the Obama administration ended the Secure Communities program, though the FBI-ICE data-sharing practice remained. Secure Communities was replaced with the PEP, which purported to limit ICE to requesting notification of an individual's impending release date, and only for people who fell within a subset of priorities. PEP, however, still allowed ICE to request the person's detention in "special circumstances." In reality, PEP did not significantly change practices on the ground.²¹ It did not prevent ICE officers from issuing thousands of detainers each year, accessing all of the FBI's arrest data, arresting people without any outside review, or exposing local police to financial liability. Nor did PEP ultimately address the community trust issues created by Secure Communities. The Trump administration reinstated Secure Communities.²²

Beyond the First 100 Days

1. End the Criminal Alien Program (CAP). Through the Criminal Alien Program, ICE agents conduct in-person interviews with people in federal and state prisons and local jails. These interviews raise serious due process concerns because the ICE agents often do not clearly identify themselves, provide adequate rights advisals, permit the presence of legal counsel, or make a proper record of the interviews. CAP is considered to be the largest component of ICE removals, resulting in as much as three-fourths of all deportations—while essentially bypassing due process.²³
2. End any arrangements or contracts providing ICE access to state or local government databases (e.g., driver's license databases) for purposes of immigration enforcement and prohibit, without exception, all ICE civil immigration enforcement operations at sensitive state and local government locations, including medical facilities, schools, courthouses, and probation offices. Without assurance that their information will not be used for deportations, immigrants may refrain from getting driver's licenses and accessing state and local services that require disclosure of sensitive information—services like health care and public education. Likewise, when courthouses and other local government facilities become sites for ICE arrests, it drives immigrants and their families into the shadows and undermines the criminal legal system by chilling witnesses and complainants. A new analysis shows that this form of immigration policing even makes eligible voters with mixed-status families less likely to register to vote.²⁴

²¹ See ACLU, "DHS Secretary Johnson Discontinues Use of Secure Communities 'As We Know It,'" <https://www.aclu.org/other/aclu-backgrounder-dhss-discontinued-secure-communities-program-detainer-reforms-and-new>. See Letter to Secretary Jeh Johnson from ACLU et al., June 17, 2015, https://www.aclu.org/sites/default/files/field_document/2015-06-17_dhs_detainer_letter.pdf.

²² According to one estimate, more than 80 percent of deportations in 2017 resulted from Secure Communities. See Econofact, "Secure Communities: Broad Impacts of Increased Immigration Enforcement," Jan. 13, 2020, <https://econofact.org/secure-communities-broad-impacts-of-increased-immigration-enforcement>. In April 2019, the last period for which data is available, Secure Communities resulted in about 6,000 removals. Under the Trump administration, ICE began withholding basic information about the program. <https://trac.syr.edu/foia/ice/20170608/>.

²³ Immigrant Legal Resource Center, ICE's Criminal Alien Program (CAP): Dismantling the Biggest Jail to Deportation Pipeline (2016), https://www.ilrc.org/sites/default/files/resources/cap_guide_final.pdf.

²⁴ Hannah Walker, Marcel Roman, Matt Barreto, The Direct and Indirect Effects of Immigration Enforcement on Latino Political Engagement, 66 UCLA L. Rev. 1818, 1825-26 (2019).