

In Donald Trump’s January 25, 2017 Executive Order on cracking down on immigrants in the United States, he seems to set three priorities. He wants a hiring spree, focused on enforcement agents. He wants to bring in sympathetic localities and restart federal-local partnerships, which have been wound down in many ways post-2012 (except for “jail enforcement” agreements where jailors are empowered to investigate and report jailed immigrants for immigration violations¹). And he wants to punish uncooperative “sanctuary cities” into compliance, making good on his campaign threat to “cancel *all* federal funding to sanctuary cities.”² Before addressing the question of what a Sanctuary City (or other jurisdiction) can potentially do to defend itself from a defunding threat from the Trump administration, understanding some of the context for what local pushback against mass deportations has meant will be helpful.

The most dramatic shift in immigration enforcement over the last twenty-five years has been from informal ‘returns’ of immigrants at border crossings, without any formal hearing or process, to formal removals.³ In 1993, there were 1,243,410 returns compared to 42,542 formal removals. By 2011, the 381,738 formal removals outnumbered the 322,098 returns for the first time over this period and the trend in favor of formal removals continued into 2016, when they outnumbered returns by more than three to one. Part of this shift reflects increased enforcement intensity against illegal border-crossers because former removals can be accompanied by charges for illegal entry (or re-entry) and have knock-on legal consequences that a more informal return does not have.⁴ Another part of this shift has been caused by plummeting net migration from Mexico into the United States, which could plausibly be explained by increased border enforcement, deteriorating economic conditions in the United States, improving economic conditions in Mexico, and a host of other factors.⁵ Border apprehensions at the Mexican border fell from over one-and-a-half million a year in 2000 to around 400,000 a year between 2010 and 2016.⁶

Within the universe of formal removals, many are initiated with border apprehensions against migrants attempting to cross into the United States, and others are against migrants living without documents in the United States. However, immigrants with papers, but without citizenship in the United States, also face removal for a variety of acts, including so-called “aggravated felonies” which “does not require the crime to be ‘aggravated’ or a ‘felony’ to qualify.” These offenses can include “simple battery, theft, filing a false tax return, and failing to appear in court.”⁷ Estimating how many removals from inside the United States affect undocumented immigrants versus immigrants with papers, such as a green card, is difficult because federal statistics on removals do not break down removals of documented versus undocumented immigrants.⁸ However, a 2015 report from the Migration Policy Institute estimated that, of the 1.9 million people identified by

¹ <https://fas.org/sgp/crs/homesec/R44627.pdf> at 13, 20.

² https://assets.donaldjtrump.com/_landings/contract/O-TRU-102316-Contractv02.pdf (emphasis added).

³ The Department of Homeland Security further claims that these returns are done “voluntarily” by the migrant, but that seems like a dubious definition. Calling returns informal instead, due to their lack of hearings and official orders, seems like a more honest and accurate description of these returns.

<https://www.dhs.gov/news/2016/12/30/dhs-releases-end-year-fiscal-year-2016-statistics>.

⁴ <http://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>.

⁵ <http://www.pewresearch.org/fact-tank/2016/04/14/mexico-us-border-apprehensions/>.

⁶ <https://www.cbp.gov/sites/default/files/assets/documents/2016-Oct/BP%20Total%20Monthly%20Apps%20by%20Sector%20and%20Area%2C%20FY2000-FY2016.pdf>.

⁷ <https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview>.

⁸ <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/21/what-crimes-are-eligible-for-deportation>.

the Department of Homeland Security (DHS) as removable criminal aliens living in the United States, only 820,000 were immigrants without papers.⁹ Even though Trump's Executive order begins by addressing the "[m]any aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas," implying a specific concern for undocumented migrants, deportations of so-called "Criminal Aliens" includes all non-citizen immigrants in the United States who may be subject to deportation as a result of getting caught up in the criminal justice system, whether they are in the country in violation of immigration laws or not.¹⁰ This is significant because there are an estimated 22 million non-citizen immigrants in the United States, only half of whom are present without lawful immigration status.¹¹

In terms of sanctuary jurisdictions and the reaction to them, it makes sense to focus on immigrants who live in the United States instead of migrants caught at the border. After all, sanctuary policies are most likely to protect migrants already living in these communities rather than migrants that never arrive and settle in them. And despite the rhetoric from the Trump administration, these removals, or deportations, may include as many or more documented immigrants as "illegal" immigrants. Another takeaway from the general trends in immigration enforcement is that local cooperation or resistance has become increasingly central to overall immigration policy as a higher proportion of removals has come from deportations from within the United States, as opposed to at the border. While border enforcement is not hugely relevant to sanctuary jurisdictions and their policies of resistance to deportations of immigrants already living in America, it is still important for some states, like Texas, which is planning to continue spending \$800 million for border enforcement while at the same time cutting social investments in education and health care.¹²

Focusing on deportations from within the United States, the area most relevant to sanctuary jurisdictions, there were 234,770 recorded for 2008, and these deportation numbers have since dropped to 69,478 in 2015.¹³ This downward trend occurred almost entirely between 2011-2015. The significant drop in deportations initiated from within the United States over this period was ascribed by Obama's Secretary of Homeland Security Jeh Johnson, at least in part, to

the number of state and local law enforcement jurisdictions that have limited or declined cooperation with ICE, due to the enactment of numerous state statutes and local ordinances reducing and/or preventing cooperation with ICE, in addition to federal court decisions that created the perception of liability concerns for cooperating law enforcement agencies.¹⁴

In other words, ICE blamed the falling deportation numbers of people living in the United States on sanctuary jurisdictions.

⁹ <http://www.migrationpolicy.org/news/authorized-immigrants-criminal-convictions-who-might-be-priority-removal>.

¹⁰ <https://fas.org/sgp/crs/homesec/R44627.pdf> at Summary ("Congress has long supported efforts to identify, detain, and remove criminal aliens, defined as noncitizens who have been convicted of crimes in the United States.").

¹¹ <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states/#Unauthorized>.

¹² <https://www.usnews.com/news/best-states/texas/articles/2017-04-06/texas-still-spending-big-on-border-despite-trump-promises>.

¹³ The numbers for each year are the following: 2008: 234,770, 2009: 237,941, 2010: 229,235, 2011: 233,755, 2012: 180,970, 2013: 133,551, 2014: 102,224, 2015: 69,478.

¹⁴ <https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2016-statistics>.

To understand why ICE is so concerned with local deportation partnerships and what its general capacity for deporting immigrants without local assistance might be, we can look at the number of deportations under ICE's so-called fugitive operations, which search for and arrest people in the United States who ICE has determined are deportable and at-large.¹⁵ In 2016, roughly 13,000 of those deported from within the United States were picked up under this program, which was about twenty percent of all deportations from within the United States for that year.¹⁶ These operations seem to have peaked in 2011 at around 40,000 deportations, but have declined since,¹⁷ and for 2011 they represented slightly more than 17% of total deportations from within the United States. Even at its peak operating capacity, if ICE had to search out and detain every person living without papers in the United States without local support, these numbers indicate it would take its officers over two-hundred and fifty years to deport all eleven million undocumented Americans.¹⁸

Put another way, in a recent statement to Congress by Chris Crane, a leader of the ICE employees union:

Currently [ICE Enforcement and Removal Operations] has around 5,000 officers to police approximately 11 million illegal aliens, as well as millions of other lawfully admitted foreign nationals, in 50 states, Guam, Puerto Rico, Saipan and the U.S. Virgin Islands. We are set up for failure. Compare ICE ERO's 5,000 officers to the approximately 35,000 officers on the New York City Police Department alone.¹⁹

While President Trump hopes to hire 10,000 more ICE agents and 5,000 more border agents, those agencies have had problems maintaining their current levels of staffing because of attrition, have had trouble with huge proportions of potential hires failing interview tests, and even have bemoaned the fact that ICE, which works in cities instead of remote border outposts, will potentially poach away current border agents.²⁰ If the past is any indication, roughly doubling staffing for ICE and border enforcement after 9/11 did not position the agencies to deport their way to a solution for undocumented immigrants, and it is unlikely that a renewed hiring spree, even if more agents can be found, will yield much more significant results this time around.²¹

The limited capacity of federal authorities to go it alone makes it clear why Trump (and Bush and Obama before him) considers local assistance and cooperation important to carry out mass deportations. In the jumbled jargon of enforcement since 9/11, these programs have been called 287(g) agreements, Secure Communities, Priority Enforcement, and ICE detainees, or

¹⁵ <https://www.ice.gov/fugitive-operations>. One recent TRAC report mentions that, while the data turned over by ICE in response to Freedom of Information Requests has been spotty to date, by not providing much in the way of geographic breakdowns as an example, ICE seems to be withholding more and more data in recent releases.

<http://trac.syr.edu/immigration/reports/458/>.

¹⁶ <http://trac.syr.edu/immigration/reports/459/>.

¹⁷ <https://fas.org/sgp/crs/homesec/R44627.pdf> at 15.

¹⁸ <http://www.pewresearch.org/fact-tank/2016/11/03/5-facts-about-illegal-immigration-in-the-u-s/>. Also, it seems fair to call these undocumented people "Americans," given that Pew estimates that only 14% of them have lived in the United States for fewer than five years and 66% have lived in the United States for more than ten years.

¹⁹ <http://www.hsgac.senate.gov/download/03/20/2017/testimony-crane-2017-03-22>.

²⁰ <https://www.theguardian.com/us-news/2017/mar/08/border-patrol-lie-detector-test-new-hires-trump-jobs-order>.

²¹ <http://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>.

immigration holds.²² The main features of these strategies have been; to deputize local police to question and arrest suspected undocumented persons, to deputize jailers to question prisoners and report information to federal authorities, to demand or request that local authorities hold people in custody or incarceration while ICE investigates or arrives to take custody of a person,²³ and to funnel all fingerprint records taken by local authorities into databases that can be accessed by federal authorities.²⁴ These programs, forming a general “Criminal Alien Program,”²⁵ have also included permanently stationing ICE agents in New York’s Rikers Island (these agents were later evicted by Mayor de Blasio),²⁶ and ICE access to states that maintain databases of alleged gang members, which contain more than 250,000 people.²⁷

Sanctuary jurisdictions, for the most part, simply scale back some of those modes of cooperation, for example by cancelling the 287(g) agreements that deputize local police and jail staff.²⁸ Other sanctuary jurisdictions do not respond to ICE requests to hold people in jail for extra periods (by denying them bail, holding them post-sentence, or holding them after charges have been dropped or dismissed²⁹) to investigate those people’s immigration status and deportability.³⁰ Significantly, the sharing of arrest information that accompanies the sharing of fingerprints upon arrest,³¹ and access to local databases of alleged gang members³² still continues, even in sanctuary jurisdictions. A few proactive jurisdictions go further and even fund defense lawyers for poor people facing deportation, given that there is no right to a lawyer provided by the government in immigration cases.³³

As far as Trump’s reaction to sanctuary jurisdictions, and his efforts to punish them into submission, the legal framework is somewhat straightforward. Trump is threatening to cut all funds to sanctuary jurisdictions. With California, he said, “we give tremendous amounts of money to California [. . .] If we have to, we’ll defund.”³⁴ Part of Trump’s sanctuary litmus test is how jurisdictions respond to ICE detainers,³⁵ which request or demand cooperation from local

²² <http://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>;
<http://trac.syr.edu/immigration/reports/458/>.

²³ <https://www.americanimmigrationcouncil.org/research/287g-program-immigration>.

²⁴ <http://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>.

²⁵ <https://fas.org/sgp/crs/homesec/R44627.pdf>.

²⁶ <http://nypost.com/2017/02/22/evicting-ice-from-rikers-endangers-lives-feds/>.

²⁷ <https://theintercept.com/2016/11/28/obamas-use-of-unreliable-gang-databases-for-deportations-could-be-a-model-for-trump/>.

²⁸ <https://www.americanimmigrationcouncil.org/research/287g-program-immigration>.

²⁹ <https://www.americanimmigrationcouncil.org/research/immigration-detainers-overview>.

³⁰ <https://www.themarshallproject.org/2016/09/25/what-trump-and-others-get-wrong-about-sanctuary-cities#.9jiywALee>.

³¹ <http://www.vox.com/the-big-idea/2017/1/28/14416616/executive-order-immigrants-sanctuary-trump>;
<https://www.washingtonpost.com/graphics/national/sanctuary-cities/>.

³² <http://www.chicagotribune.com/news/immigration/ct-immigrant-lawsuit-gang-database-met-20170501-story.html>.

³³ <https://theintercept.com/2017/04/05/deportation-legal-defense-funds-move-to-distinguish-between-good-and-bad-immigrants/>.

³⁴ <http://www.cnn.com/2017/02/05/trump-threatens-to-defund-california-in-fight-against-sanctuary-cities.html>;
see also <https://assets.donaldjtrump.com/landings/contract/O-TRU-102316-Contractv02.pdf>.

³⁵ <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

authorities (although it is not totally clear that detainers play a major role in the overall volume of deportations).³⁶

But, by a Constitutional doctrine of separate state and federal powers called anti-commandeering, federal authorities cannot force states and localities to enforce federal laws. And more specifically, ICE cannot force states and localities to cooperate with detainers.³⁷ A corollary is that if states that are not forced to detain people they suspect may be immigrants or deportable, then any liability for illegal detentions falls on the states.³⁸ This is important because individual local or state officials have very limited authority to detain people for immigration violations without some formal agreement with the federal government that authorizes that person to enforce immigration law.³⁹ So without formal authorization, immigration law violations cannot be a basis for state or local authorities to jail or arrest someone.

This brings us back to Trump’s threats. One could argue that he is not forcing sanctuary jurisdictions to cooperate, he is merely threatening to cut their funding if they refuse. But that was an argument that the Supreme Court rejected in a case on the Affordable Care Act. Basically, it said that withholding too much funding from states, or funding that is unrelated to the cooperation the federal government seeks, is still coercive and unconstitutional.⁴⁰ This was generally the reasoning of a federal court ruling on April 25, 2017 that neuters Trump’s defunding threat nationwide.⁴¹

In the end, Trump’s executive order is probably more significant as a rhetorical, public relations statement against immigrant-friendly policies. Although even one element of *that* strategy, calling out alleged sanctuary jurisdictions in public reports, has been halted by ICE because of complaints that it was riddled with errors and unfair.⁴² Even as the Trump administration continues to send angry letters to accused sanctuary jurisdictions⁴³ and Trump himself calls the

³⁶ <http://trac.syr.edu/immigration/reports/458/> .

³⁷ <https://bipartisanpolicy.org/blog/sanctuary-cities-and-immigration-detainers-a-primer/>; <https://www.theatlantic.com/politics/archive/2017/01/trumps-sloppy-unconstitutional-order-on-sanctuary-cities/514883/>; <http://www.vox.com/the-big-idea/2017/1/28/14416616/executive-order-immigrants-sanctuary-trump>.

³⁸ See e.g., <https://www.law360.com/articles/884608/analyzing-the-legality-of-proposed-sanctuary-city-measures>; https://www.ilrc.org/sites/default/files/resources/detainers_legal_update_february_2017.pdf. This is also probably the source of Obama DHS Secretary Jeh Johnson’s comments about “the perception of liability concerns” from *supra*, note 14.

³⁹ See e.g., <http://www.latimes.com/nation/la-na-arizona-law-20160915-snap-story.html>; <http://www.azcentral.com/story/news/politics/immigration/2016/09/15/arizona-settlement-sb-1070-lawsuit-aclu-immigration/90424942/>.

⁴⁰ See e.g., <https://bipartisanpolicy.org/blog/sanctuary-cities-and-immigration-detainers-a-primer/>; https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/25/federal-court-rules-against-trumps-executive-order-targeting-sanctuary-cities/?utm_term=.84e1b644d705; <https://www.lawfareblog.com/sanctuary-cities-under-trump-administration>.

⁴¹ *City of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017); see also https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/25/federal-court-rules-against-trumps-executive-order-targeting-sanctuary-cities/?utm_term=.84e1b644d705.

⁴² <http://thehill.com/latino/328400-trump-administration-halts-sanctuary-city-reports>; <https://www.ice.gov/declined-detainer-outcome-report#tab4> (as of May 1, 2017, the message on this page states that, “ICE remains committed to publishing the most accurate information available regarding declined detainers across the country and continues to analyze and refine its reporting methodologies. While this analysis is ongoing, the publication of the Declined Detainer Outcome Report (DDOR) will be temporarily suspended.”).

⁴³ <https://www.justice.gov/opa/press-release/file/959431/download>.

April 25 court ruling "ridiculous,"⁴⁴ the main effect of Trump's order has probably been to galvanize the thirty-three states that have introduced or enacted anti-sanctuary, ICE-cooperation laws.⁴⁵ Although Trump appears to be speaking to the sanctuary jurisdictions he is admonishing, his words seem to exert a much stronger effect on anti-immigrant jurisdictions.

⁴⁴ <https://twitter.com/realDonaldTrump/status/857177434210304001>.

⁴⁵ <http://www.migrationpolicy.org/article/despite-little-action-yet-trump-administration-sanctuary-cities-states-and-localities-rush>.