

## PRACTICE POINTER

### RESISTANCE TO ANTI-IMMIGRANT INITIATIVES: THE WAY FORWARD FOR IMMIGRANTS, THEIR ADVOCATES, FAITH-BASED AND LABOR LEADERS, AND STATE AND LOCAL GOVERNMENTS

#### Part 1: Assessing the new landscape

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As an organization that has for some forty years successfully challenged federal and state inhumane anti-immigrant policies, winning statutory and constitutional rights for several million migrants through class action litigation, and from time to time, drafted legislative initiatives, and having examined the recent executive decrees and agency memos issued by the Trump Administration dealing with immigration policy, we believe that the full and effective exercise of existing statutory and constitutional rights can block the sledge hammer now aimed by President Trump at immigrants and their families.

Extreme enforcement and extreme vetting have at their roots an appeal to ethno-centric nationalism and populism. Extreme protection of civil and constitutional rights is the best and only effective response.

#### The Problem: Extreme vetting and extreme enforcement

With millions of voters easily convinced that their marginal economic existence, local crime and fear of terrorist attacks are somehow linked to Mexican, Central American and Moslem immigrants, there is a joint responsibility of immigrant communities, their advocates, faith-based leaders, and elected officials to vastly increase efforts over the next four years to better inform the public about the importance of family unity, the honesty and good moral character of the vast majority of immigrants, the horrendous violence and abject poverty most migrants have fled, the contributions migrants make to the U.S. economy, and the benefits of multiculturalism and diversity. It is imperative that the dangerous anti-immigrant perceptions embraced by a substantial number of U.S. citizens and major part of the electorate be addressed.

The climate today is similar to the situation in California in 1994 when 63% of non-Hispanic white voters supported an initiative to require doctors, teachers and others to report undocumented immigrants to federal authorities and made undocumented children ineligible to attend public schools. The central declaration of Proposition 187 was similar to President Trump's rhetoric: "The People of California find and declare as follows: That they have suffered and are suffering economic hardship caused by the presence of illegal immigrants in this state. That they have suffered and are suffering personal injury and damage caused by the criminal conduct of illegal immigrants in this state." On November 8, 1994, California voters approved Proposition 187 by a wide margin: 59% to 41%. In a class action lawsuit we and other advocates filed the day after the election, LULAC v. Wilson, a temporary restraining order and later a permanent

injunction blocked implementation of Proposition 187. However, what avoided future waves of anti-immigrant California initiatives was a combination of voter registration and public education humanizing California's immigrants.

In the long run, voter registration of naturalized citizens and public education are critically important strategies to avoid more rounds of state or federal elections in which ethno-centric populism and xenophobia play a significant role.

### Overview of significant changes in policy brought about by the Trump Executive Orders

1. Enforcement priorities: "The Department no longer will exempt classes or categories of removable aliens from potential enforcement." Enforcement of the Immigration Laws to Serve the National Interest, February 20, 2017, DHS Secretary John Kelly memorandum issued to employees of ICE, CIS and CBP ("Kelly Memorandum"). This memorandum implements the Executive Order entitled "Enhancing Public Safety in the Interior of the United States," issued by the President on January 25, 2017.

Agents are directed to prioritize enforcement against immigrants –

Under INA 212(a)(2) - Immigrants "convicted of, or who admit[ ] having committed, or who admit[ ] committing acts which constitute the essential elements" of crimes involving moral turpitude, or controlled substances. This ground shall not apply to an immigrant who committed only one crime if - (I) the crime was committed when the immigrant was under 18 years of age, and the crime was committed (and the immigrant released from any confinement to a prison or correctional institution) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or (II) the maximum penalty possible for the crime of which the immigrant was convicted (or which the immigrant admits having committed or of which the acts that the immigrant admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the immigrant was convicted of such crime, the immigrant was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed). Any immigrant convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, may be targeted for removal if the aggregate sentences to confinement were 5 years or more.

Under INA 212(a)(3) – security and related grounds of inadmissibility.

Under INA 212(b) - Immigrants "arriving in the United States and certain other aliens who have not been admitted or paroled." This section allows ICE and CBP officers to "order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution." This section also provides that "An alien present in the United States who has not been admitted ... shall be deemed for purposes of this Act an applicant for

admission.” However, the statute limits this expansion of the term “arriving alien” to those who have resided in the U.S. for less than two years. Also note that this enforcement priority with regards immigrants apprehended in the interior will likely require a formal amendment regulations which must be accomplished in compliance with the Administrative Procedures Act (APA). The APA generally requires, other than in emergency situations, that proposed regulations be published in the Federal Register, and the public given an opportunity to comment before a final rule is adopted. This process can take several months to a year to complete.

Under INA 237(a)(2) – Identifies as deportable immigrants “convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and is convicted of a crime for which a sentence of one year or longer may be imposed.” The actual sentence imposed is not determinative. In addition, this section applies to any immigrant who “at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial . . .”

Under INA 237(a)(4) – Grounds of deportability based on national security concerns.

Additionally, “regardless of the basis of removability,” DHS personnel are instructed to “prioritize” removable immigrants who:

- (1) have been convicted of *any* criminal offense;
- (2) have been charged with any criminal offense that has not been resolved;
- (3) have committed acts which constitute a chargeable criminal offense;
- (4) have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency;
- (5) have abused any program related to receipt of public benefits;
- (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or
- (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

The Director of ICE, the Commissioner of CBP, and the Director of USCIS are permitted, “as they determine is appropriate,” to issue further guidance to “allocate appropriate resources to prioritize enforcement activities within these categories . . .”

The Obama Administration’s “Priority Enforcement Program” is seen as having hampered the Department's enforcement of the immigration laws in the interior of the United States. “Effective immediately, the Priority Enforcement Program is terminated and the Secure Communities Program shall be restored.” To better facilitate the “identification, detention, and removal of criminal aliens,” DHS will issue new forms to “effectively communicate with recipient law enforcement agencies.” ICE is directed to devote available resources to “expanding the use of the

Criminal Alien Program in any willing jurisdiction in the United States.”

To the maximum extent possible, in coordination with the Executive Office for Immigration Review (EOIR), removal proceedings will be initiated against aliens incarcerated in federal, state, and local correctional facilities under the Institutional Hearing and Removal Program pursuant to section 238(a) of the INA, and administrative removal processes, such as those under section 238(b) of the INA, shall be used in all eligible cases.

Relying on INA§ 287(g), ICE will work to designate as many state or local law enforcement officers as “immigration officers” for purposes of enforcing federal immigration law. In DHS’s view, such officers will “have the authority to perform all law enforcement functions specified in section 287(a) of the INA, including the authority to investigate, identify, apprehend, arrest, detain, and conduct searches authorized under the INA, under the direction and supervision of the Department.”

There are currently 32 law enforcement agencies in 16 states participating in the 287(g) Program. To the “greatest extent practicable,” the Director of ICE and Commissioner of CBP have been directed to “expand the 287(g) Program to include all qualified law enforcement agencies that request to participate” in the program.

With regards the “exercise of Prosecutorial Discretion,” the Kelly Memorandum reiterates that Department personnel have “full authority to arrest or apprehend an alien whom an immigration officer has probable cause to believe is in violation of the immigration laws.” The exercise of prosecutorial discretion with regard to any immigrant who is subject to arrest or removal “shall be made on a case-by-case basis in consultation with the head of the field office component of CBP, ICE, or USCIS that initiated or will initiate the enforcement action.

To enforce the immigration laws “effectively in the interior of the United States” in accordance with President Trump's directives, the Director of ICE will take “all appropriate action to expeditiously hire 10,000 agents and officers ...”

Under the Kelly Memorandum the DHS will no longer afford Privacy Act rights and protections to persons who are neither U.S. citizens nor lawful permanent residents. The DHS Privacy Office has been directed to rescind the DHS *Privacy Policy Guidance memorandum*, dated January 7, 2009, which implemented the DHS "mixed systems" policy of administratively treating all personal information contained in DHS record systems as being subject to the Privacy Act regardless of the subject's immigration status. The DHS Privacy Office, with the assistance of the Office of the General Counsel, has been directed to draft new guidance specifying the appropriate treatment of personal information DHS maintains in its record systems. These changes may require formal rule-making under the APA, including the publication of proposed rules and the opportunity for public comment.

A second memorandum issued by Secretary Kelly on February 20, 2017, addresses

implementation of the Executive Order entitled "Border Security and Immigration Enforcement Improvements," issued by the President on January 25, 2017 ("Kelly Border Memorandum"). In summary, the Administration will emphasize detention of immigrants to "prevent[ ] ... aliens from committing crimes while at large in the United States, ensure [ ] that aliens will appear for their removal proceedings, and substantially increase[ ] the likelihood that aliens lawfully ordered removed will be removed."

For now, CBP and ICE personnel shall "only release from detention an alien detained pursuant to section 235(b) of the INA, who was apprehended or encountered after illegally entering or attempting to illegally enter the United States," in the following situations on a case-by-case basis, to the extent consistent with applicable statutes and regulations:

1. When removing the alien from the United States pursuant to statute or regulation;
2. When the alien obtains an order granting relief or protection from removal or the Department of Homeland Security (DHS) determines that the individual is a U.S. citizen, national of the United States, or an alien who is a lawful permanent resident, refugee, asylee, holds temporary protected status, or holds a valid immigration status in the United States;
3. When an ICE Field Office Director, ICE Special Agent-in-Charge , U.S. Border Patrol Sector Chief, or CBP Director of Field Operations, consents to the alien's withdrawal of an application for admission, and the alien contemporaneously departs from the United States;
4. When required to do so by statute, or to comply with a binding settlement agreement or order issued by a competent judicial or administrative authority;
5. When an ICE Field Office Director, ICE Special Agent-in-Charge , U.S. Border Patrol Sector Chief, CBP Director of Field Operations, or CBP Air & Marine Operations Director authorizes the alien's parole pursuant to section 212(d)(5) of the INA with the written concurrence of the Deputy Director of ICE or the Deputy Commissioner of CBP, except in exigent circumstances such as medical emergencies where seeking prior approval is not practicable. In those exceptional instances, any such parole will be reported to the Deputy Director or Deputy Commissioner as expeditiously as possible; or
6. When an arriving alien processed under the expedited removal

provisions of section 235(b) has been found to have established a "credible fear" of persecution or torture by an asylum officer or an immigration judge, provided that such an alien affirmatively establishes to the satisfaction of an ICE immigration officer his or her identity, that he or she presents neither a security risk nor a risk of absconding, and provided that he or she agrees to comply with any additional conditions of release imposed by ICE to ensure public safety and appearance at any removal hearings.

To the extent current regulations are inconsistent with this guidance, DHS will develop or revise regulations as appropriate. *Until such regulations are revised or removed, Department officials shall continue to operate according to regulations currently in place.*

The guidance states that it “*does not prohibit the return of an alien who is arriving on land to the foreign territory contiguous to the United States from which the alien is arriving pending a removal proceeding under section 240 of the INA ...*”.

To maximize participation by state and local jurisdictions in the enforcement of federal immigration law near the southern border, the DHS Secretary has directed the Director of ICE and the Commissioner of CBP to “engage immediately with all willing and qualified law enforcement jurisdictions that meet all program requirements for the purpose of entering into agreements under 287(g) of the INA.” CBP is authorized, in addition to the Director of ICE, to accept state services and take other actions as appropriate to carry out immigration enforcement pursuant to 287(g).

### **Expanding Expedited Removal Pursuant to Section 235(b)(1)(A)(iii)(I) of the INA**

The Kelly Border Memorandum states that it is in the national interest to “detain and expeditiously remove from the United States aliens apprehended at the border, who have been ordered removed after consideration and denial of their claims for relief or protection.” Pursuant to section 235(b)(1)(A)(i) of the INA, if an immigration officer determines that an arriving immigrant is inadmissible to the United States under section 212(a)(6)(C) or section 212(a)(7) of the INA, the officer shall order the immigrant removed from the United States without further hearing or review, unless the immigrant is an unaccompanied alien child as defined in 6 U.S.C. § 279(g)(2), or indicates an intention to apply for asylum or a fear of persecution or torture or a fear of return to his or her country, or claims to have a valid immigration status within the United States or to be a citizen or national of the United States.

Pursuant to section 235(b)(1)(A)(iii)(I) of the INA, the Secretary asserts that he has been granted the authority to apply the expedited removal provisions in section 235(b)(1)(A)(i) and (ii) of the INA to immigrants who have not been admitted or paroled into the United States, who are inadmissible to the United States under section 212(a)(6)(C) or section 212(a)(7) of the INA, and who have not

affirmatively shown, to the satisfaction of an immigration officer , that they have been continuously physically present in the United States for the two-year period immediately prior to the determination of their inadmissibility.

To date, this authority has only been exercised to designate for application of expedited removal, aliens encountered within 100 air miles of the border and 14 days of entry , and aliens who arrived in the United States by sea other than at a port of entry.<sup>1</sup>

The Kelly Border Memorandum states that “[t]o ensure the prompt removal of aliens apprehended soon after crossing the border illegally, the Department will publish in the *Federal Register* a new Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(a)(iii) of the Immigration and Nationality Act, which may, to the extent I determine is appropriate, depart from the limitations set forth in the designation currently in force. I direct the Commissioner of CBP and the Director of ICE to conform the use of expedited removal procedures to the designations made in this notice upon its publication.”

### **Implementing the Provisions of Section 235(b)(2)(C) of the INA to Return Immigrants to Contiguous Countries**

The Kelly Border memorandum further asserts that Section 235(b)(2)(C) of the INA authorizes the DHS to “return aliens arriving on land from a foreign territory contiguous to the United States, to the territory from which they arrived, pending a formal removal proceeding under section 240 of the INA.” Accordingly, subject to the requirements of international treaty obligations, “CBP and ICE personnel shall, to the extent appropriate and reasonably practicable, return aliens described in section 235(b)(2)(A) of the INA, who are placed in removal proceedings under section 240 of the INA - and who ... pose no risk of recidivism- to the territory of the foreign contiguous country from which they arrived pending such removal proceedings.”

#### Groups in the enforcement cross-hairs

For now, three groups are in the extreme enforcement cross-hairs: Mexicans, Moslems and asylum seekers from the Northern Triangle countries of Central America. Should the President ramp up disputes with China over trade issues, Chinese immigrants could be added to this list.

#### Interior enforcement

With regards Mexican nationals, most of the enforcement measures will be implemented in the interior regions of the country. Most at risk are millions of Mexican nationals whose identity and presence are known to the Department of Homeland Security because they have close family members (spouses, siblings, parents, children) who have formally petitioned the former INS or DHS to issue these immigrants visas. These immigrants are

ineligible to adjust their status in the U.S. because their entries, usually long ago, were without authorization. On the other hand, if they return to their home countries to apply for their lawful permanent resident status at a US Consulate, they face a ten year bar because they lived in the US for more than a year without authorization. Probably one to two million immigrants, almost all with immediate US citizen and lawful resident family members, could be summoned to appear at ICE interviews and then placed in removal proceedings.

The great majority of DACA recipients appear to be safe from deportation proceedings at this moment. See, e.g. Immigration hard-liners hold fire on ‘dreamers’ program, The Hill 2-23-17). However, several DACA recipients have been detained in Washington, Arizona, California and Texas for removal proceedings. In each case DHS alleged non-serious misconduct. In one of these cases the DACA recipient was released. In the Washington case a federal judge will soon decide whether to order the DACA recipient’s release. His lawyer states there’s “absolutely no evidence” to support his detention. While the status of Dreamers remains extremely tenuous, and should obviously become the focus of concerted legislative efforts, there will likely be no mass arrests or deportations of DACA recipients for now.

Farm workers and factory workers would make favorable targets for ICE raids with the attendant publicity President Trump could brag about. However, chambers of commerce and growers associations are lobbying the Administration to avoid enforcement actions that will interfere with business operations.

Stationary and temporary border patrol highway checkpoints will begin to play a more prominent role in the enforcement scheme putting a range of immigrants at risk of unexpected arrest and detention. The DHS asserts that stops and searches can be made based on probable cause developed from “agent observations ... and other established means.” Historically, race has been a key factor in who gets stopped, searched and detained. The law permits these searches and detentions with a “reasonable distance” from the border. INA 287(a)(3). Current regulations limit checkpoints to within 100 miles of the border. The Trump Administration may extend checkpoints 200 or 250 miles from any border arguing this is necessary for community safety and that these checkpoints remain within a reasonable distance from the border.

#### Border Enforcement to turn back asylum seekers

To be developed.

#### Actions and reactions of the Governments of Mexico and the Northern Triangle Countries

One of several factors that will determine the success of President Trump’ anti-immigrant offensive will be decisions made in Mexico, and to a lesser extent in the Northern Triangle countries, in response to the executive orders issued without bi-lateral consultation.



President Trump's uncompromising position has been simple: "We're going to have a good relationship with Mexico I hope. And if we don't, we don't." There are two basic demands: Mexico must pay for the metaphoric "wall," and it must accept Central American asylum seekers apprehended by the U.S. border patrol who will remain in Mexico until they are interviewed by U.S. authorities about their asylum claims. There is no reason to believe that as long as rational decision-making is taking place in Mexico, it would agree to President Trump's demands, undiplomatically communicated via twitter to President Enrique Peña Nieto. In a meeting this week with the U.S. Secretary of Homeland Security and Secretary of State, Mexican Foreign Minister Luis Videgaray said it was "legally impossible" for the U.S. to take unilateral decisions affecting both countries. Over the next several months further high level meetings will address trade, migration and security issues.

One effective step Mexico and the Northern Triage countries could take to protect their citizens living in the United States is to fund education and defense work for their citizens. The Government of Mexico has previously supported U.S.-based non-profit organizations to represent its citizens applying for visas based on domestic abuse or violent crimes. In addition to holding firm to its national sovereignty and dignity, which it unquestionably will, the Mexican Government should assess intensifying training of its protection officers based in Mexican consulates throughout the U.S., and supporting the work of community-based organizations that represent and protect the rights of Mexican nationals in the U.S.

#### State and local governments

Equally true, U.S. State and local governments must play a major role in standing with and protecting immigrant communities allocating technical resources and funding for community education and representation.

Several State and local governments and foundations dedicated significant resources in an effort to achieve comprehensive immigration reform. The brief opportunity for comprehensive immigration reform ended in November 2010, when in midterm elections Republicans regained control of the House of Representatives and opponents of "amnesty" could control the fate of any proposed legislation. The 2010 election resulted in the highest loss of a party in a House midterm election since 1938. Immigration reform was then almost dead. When the Democrats lost control of the Senate in November 2014, any hope for rational and humane comprehensive immigration reform was buried.

However, States, local governments and foundations should now reboot their focus on immigration issues and, as discussed below, direct substantial resources and funding to coordinated efforts aimed at educating immigrant communities about their legal rights and providing legal representation for immigrants in removal proceedings, petitions to legalize status and in the range of related law violations immigrants will experience at the hands of unscrupulous landlords, employers and businesses as their status becomes more vulnerable under new federal policies.

This memorandum suggests six components of a strategic resistance that will protect the human and civil rights of the vast majority immigrants targeted by the Trump executive decrees:

1. Community education is essential to successfully combat injustice

Community education is essential to replace pervasive “fear” with “knowledge of rights” from the moment of contact with immigration enforcement authorities, including, for example, the right to remain silent, the right not to be searched without a warrant, the right (except in exigent circumstances) not to be arrested without a warrant, the right to a prompt bond hearing if ever arrest, the right to be represented by counsel, and the right (for most people) to formal removal proceedings with administrative and judicial appeals that routinely take several years to resolve.

Those who have lived here for less than two years may apply for asylum before being expelled, and should be released from custody if they have a credible fear of persecution in their home countries.

Separate groups within the immigrant communities need different information about their rights. Children who have been abused, abandoned or neglected may qualify for lawful permanent resident status, along with survivors of domestic violence and victims of certain serious crimes who cooperated with law enforcement by reporting crimes. Community education must include both rights when confronted by enforcement authorities and options some immigrants may have legalization of status.

Different groups that the Administration could target for enforcement should be identified and members of these groups must be especially prepared to exercise their rights.

DHS could identify 1-2 million long-term residents who have approved or pending visa petitions but are ineligible for adjustment of status because they entered the country without inspection, and have resided here for more than a year without authorization. Since 1996, these immigrants must return to their home countries for ten years before they can be granted lawful permanent resident status. Because of family ties, none of these immigrants have left or will leave the U.S. and be apart from their spouses and children for ten years in order to legalize their status. DHS has each of these applicants' names, addresses, etc. This is low-hanging fruit for any mass deportation scheme.

Whether DHS selects this population or any other, it is less likely to engage in many mass raids than to pursue arrests by writing to immigrants already in the DHS system and demanding that they attend a registration interview. This was the approach taken post-9/11 in the National Security Entry-Exit Registration System, when immigrants were ordered to appear for interviews and if determined to be out of status, detained and removed if they had entered on a visa-waiver program, or subject to removal proceedings. If and when any effort is undertaken to have large groups of immigrants report to ICE, those immigrants and their families and advocates will have to decide how to respond. As discussed below, even if they appear, most will be entitled to extended administrative removal proceedings potentially delaying any deportation for years.

Local police enforcement of immigration laws and policies to detain suspected undocumented immigrants for ICE agents is a central part of the Trump Policy. The recent DHS policy memo makes clear that “Empowering state and local law enforcement agencies to assist in the enforcement of federal immigration law is critical to an effective enforcement strategy, and CBP and ICE will work with interested and eligible jurisdictions ...”

Communities that support intelligent law enforcement understand that the more local police cooperate with ICE, the less immigrants report crimes and the more violent criminals will remain on the streets.

Communities and their advocates must encourage State and local laws that clearly separate criminal and immigration law enforcement.

*Outreach community education must address the policies of any police jurisdictions where immigrants live and work.* An easily accessible database available in several languages should inform immigrants and their advocates of the policies of all law enforcement agencies where immigrants reside and work. In jurisdictions where the policy is not to hold suspected immigrants for ICE, immigrants may carry cards that reiterate the policy and present those cards to police officers who threaten to arrest or hold them for ICE.

Numerous difficult cases will arise in which immigrants already in the system must advise DHS of changes of addresses, or are considering filing new applications especially if eligibility is unclear, or must report monthly or annually while under a discretionary stay of deportation, deferred action status or parole status. While these concerns should be addressed in community outreach materials and discussions, they almost always will require individual consultations with legal services or pro bono counsel.

Outreach community education must also address areas in which the civil rights of immigrants are in danger because of the *ripple effect* of harsh federal policies that increase the vulnerability of immigrant communities in many localized situations. For example, in past periods of repressive national policy, exploitative landlords and employers increased the use of threats of reporting to the immigration authorities as a weapon to exploit tenants and workers. Immigrant consumers, tenants and workers must be informed through outreach materials and group discussions about State laws and local policies that provide legal protections to tenants, workers and consumers regardless of immigration status. At the same time, immigrant communities need to be better informed about the meaning and scope of anti-immigrant State and local initiatives that have already been adopted or are under consideration.

Some States (California, Colorado, Connecticut, Illinois, Maryland, Nevada, New Mexico, Utah, Vermont, and Washington), as well as Washington, D.C., allow undocumented immigrants to apply for drivers licenses and some local entities issue identity cards regardless of immigration status. In today’s anti-immigrant environment, many immigrants question whether they may safely apply for or renew drivers license or identity cards without being exposed to arrest and deportation. In

community outreach materials and discussions the risks or lack of risks involved in obtaining State or local government issued licenses or identification cards should be addressed.

At bottom, community education must stress that the vast majority of undocumented migrants living in the U.S. *do not face deportation as long as they are aware of and exercise their existing statutory and constitutional protections and have access to legal representation.*

No families or long-term residents should be unjustly deported until there is a new President who understands the emotional and psychological harm caused when nuclear families are separated, and appreciates the adverse and recessionary consequences mass deportations would have on the economy. Then a new policy or possibly legislation may block the removal of long-term residents.

Over the past week long-term managers at ICE and CIS have finally explained the basics of the law to key people in the Trump Administration. DHS Secretary Kelly today said: [“There will be no mass deportations.”](#) He added that all removals will be conducted in accordance with the law, including the right to appeal. He also acknowledged this is a long process.

Effective defense requires that fear among the immigrant population be addressed and reduced and replaced with knowledge of immigrants’ rights under U.S. laws and resolve to exercise these rights if and when ever encountered by law enforcement authorities. This is perhaps the best tool to block the worst aspects of President Trump’s initiatives aimed at isolating, intimidating and marginalizing immigrants and their families.

## 2. Strengthening the capacity of legal services programs

It is critically important to strengthen and expand the capacity of legal services programs, community-based programs, unions and *pro bono* panels to defend low-income immigrants both in removal proceedings and in applications for potential benefits (asylum, SIJ, U-visas, family-based visas, etc.).

The presence of legal representation in individual cases is vitally important to the outcome of the proceedings. [Without legal representation, the chances of success drop significantly.](#)

Broad policies that violate statutes or the constitution may be subject to judicial challenge in class action cases.

States, counties, cities and foundations must be encouraged to refocus the support they previously dedicated to comprehensive immigration reform on the immediate resource needs of community-based and legal services programs now ready, willing and able to represent and defend immigrant families and children.

As was true during past periods of mass arrests at work site raids, legal services attorneys and paralegals and pro bono attorneys must be familiar with the Fourth Amendment rights of immigrants, the right to [suppress coerced statements and statements made in violation of the right to counsel](#), what people confronted by law enforcement are required to say or have the right not to say, [the right to consult with counsel before, during or after arrest](#), the right to a [prompt bond hearing](#), factors to consider at bond hearings, administrative and judicial review of bond decisions, [burdens of proof in removal hearings](#), [defenses to deportation](#) and appeals processes following hearings before the Immigration Judges.

Lawyers and accredited representatives representing immigrants in removal cases must also be familiar with the full scope of [due process rights](#) that immigrants possess while subject to removal proceedings. These certainly include the right to a fair and non-biased judge and decisions, the right to exclude illegally obtained evidence, the right to present evidence including witnesses and to confront adverse evidence, the right in some cases to cross-examine ICE arresting agents who obtained statements from the immigrant now being used to establish deportability, the right to a record of the proceedings, notice of classified evidence, and the right to competent legal representation. Immigrants in removal proceedings also have the right to equal treatment: Individuals may not be treated differently from other similarly situated individuals without a rational reason for such different treatment. This much is guaranteed by the Fifth Amendment of the U.S. Constitution, which luckily trumps President Trump's executive powers.

### 3. Role of State and local Governments

State, county and city governments will play a critical role in the unfolding of new federal policies. Some may be inclined to embrace the Administration's new anti-immigrant policies, some may stay essentially neutral, others may play an affirmative role in reducing the personal, political and economic harms likely to result from implementation of Trump's policies. As discussed below, major efforts must be undertaken by community-based groups, faith-based and labor leaders, the media and others to encourage State and local governments to stand firm against policies that would harm local communities' efforts at effective policing, providing medical care, making drivers licenses or identity cards available, access to education, etc.

In an interview with Breitbart News in May 2016, candidate Donald J. Trump stated, "[Sanctuary cities are a disaster](#)." Trump claimed sanctuary cities are "a safe-haven for criminals ..."

On January 25, 2017, President Trump issued an Executive Order entitled, "Enhancing Public Safety in the Interior of the United States." Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) ("Public Safety Executive Order").

The Executive Order relies on [Title 8, Section 1373 of the United States Code](#), which provides that local governments may not prohibit or restrict any government entity or official from "sending to, or receiving from, [federal immigration officials] information regarding the citizenship or immigration status . . . of any individual." To address the purported harm caused by Sanctuary Cities, the Executive Order establishes the policy

that “jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law.” Executive Order, at 8799.

The Executive Order directs the Attorney General and Secretary of Homeland Security to ensure that sanctuary jurisdictions do not receive Federal grants, and directs the Attorney General to take enforcement action against any local entity that “hinders the enforcement of Federal law.”

DHS and DOJ are still assessing the ways in which they can use Section 1357(g) to bludgeon States and local governments into compliance with the Administration’s extreme immigration enforcement policies.

States and local Governments may adopt laws or policies to counteract some of the harms that will result from President Trump’s anti-immigrant agenda.

In California, for example, Senate President pro Tem Kevin de León has introduced Senate Bill 54 (the California Values Act). As amended in the Senate on January 24, 2017, this bill if enacted would prohibit state and local law enforcement agencies from using resources to investigate, detain, detect, or arrest persons for the purposes of immigration enforcement. The proposed law seeks to protect immigrants’ personal data, requiring state agencies to review their confidentiality policies and to ensure that they are only collecting information necessary to their departments. It would prohibit local police from giving federal immigration authorities access to interview individuals in agency or department custody for immigration enforcement purposes or performing the functions of an immigration officer, whether pursuant to Section 1357(g) of Title 8 of the United States Code or any other law, regulation, or policy.<sup>1</sup>

Another example of local Government’s refusing to collaborate with ill-advised and inhumane federal policy is San Francisco’s challenge to President Trump’s executive order seeking to pull federal funds from “sanctuary” cities. San Francisco is a Sanctuary City and has been since 1989. Numerous other municipalities—including New York, D.C., Chicago, Los Angeles, New Orleans, Santa Clara, Minneapolis, and Houston—have also enacted Sanctuary City laws. San Francisco law limits when city employees and agencies may assist with the enforcement of federal immigration law.

On January 31, 2017, the City of San Francisco filed suit challenging the constitutionality of President Trump’s executive order threatening to withhold federal funds from “sanctuary” cities. The complaint is available [here](#).

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<sup>1</sup> The proposal builds on the California Trust Act that California Gov. Jerry Brown signed in October 2013. The state law prevents law enforcement agencies from detaining immigrants longer than necessary for minor crimes so that federal immigration authorities can take them into custody.

There are legitimate policy grounds on which State and local governments may decline to be part of a federal detention and deportation regime. Immigrant communities and their advocates should share these grounds with the public and local and State elected officials.

Briefly, governing entities must be able to reliably collect confidential information from all residents regarding health issues. Both effective medical treatment programs and information gathering would be jeopardized if release of personal information results in a person being taken into immigration custody.

Second, it is our experience after representing tens of thousands of immigrants that they and their U.S. citizen immediate family members are unlikely to report crimes or cooperate with the prosecution of criminals if they fear exposing themselves, family members, or friends to a risk of arrest and deportation. *See, e.g. Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*. Indeed, violent criminals are the primary beneficiaries when their victims are afraid to cooperate with police because they fear being turned over to deportation authorities.

Finally, cooperating with federal immigration enforcement efforts (which rarely involve criminal conduct) requires the redirection of scarce local law enforcement personnel and resources. Responding to a civil immigration detainer includes extended detention time, the administrative costs of tracking and responding to detainers, and the legal liability for erroneously holding an individual who is not subject to a valid and lawful immigration detainer.

Protection for immigrants outside of the area of local cooperation with ICE is also important as the exploitation of low-income undocumented immigrants will now increase in response to the new repressive federal policies. One example of a response to these threats is California State Assembly member David Chiu's proposed legislation that would bar landlords from using a tenant's immigration status to intimidate them into leaving. The bill, AB 291, would make it illegal for a landlord to disclose a tenant's immigration status. It would also prohibit landlords from threatening a tenant with reporting them to immigration authorities if the tenant reports building violations.

In 2013 Gov. Brown approved a measure allowing immigrants to receive California driver's licenses. "While Washington waffles on immigration, California's forging ahead," Brown said. "I'm not waiting."

In 2013 other bills signed into law by Gov. Brown allow undocumented immigrants to be licensed as lawyers, impose restrictions on those who charge a fee to help immigrants gain legal status, and make it a crime for employers to "induce fear" by threatening to report someone's immigration status.

These California laws are examples of actions States and local Governments across the country may consider to counteract the political and economic harms and personal hardships President Trump's immigration policies will otherwise impose on local communities.

Immigrants are more likely than the native-born population to be poor and unable to afford retained legal services. Successful defense against some of the harshest aspects of the Trump executive orders will require representation by lawyers and paralegals. States and local Governments must consider vastly increasing funding of community-based organizations to engage in community education regarding immigrants' rights and providing legal representation to immigrants who face deportation and to those who are eligible to apply for legalization of status. The provision of additional funding for such efforts is particularly important given the federal [restrictions placed on legal services programs funded by the federal Legal Services Corporation](#). In the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Congress barred LSC-funded lawyers from providing any assistance to many undocumented persons, whether using LSC-funds or non-LSC-funds.

More paralegals must be trained to become “[accredited representatives](#)” allowing them to represent immigrants in DHS proceedings. Accredited representatives may assist immigrants in immigration proceedings before the CIS and ICE, and the Executive Office for Immigration Review's (EOIR) immigration courts and the Board of Immigration Appeals (BIA). All “accredited representatives” must be affiliated with an organization that is recognized. Organizations must apply for recognition as well as accreditation of their representatives. States should promptly allocate funds for non-profit organizations to gain “recognition” by the EOIR and to train and get accredited representatives certified to represent low-income immigrants in petitions submitted to CIS and ICE and in removal proceedings before EOIR.

At the same time, community-based organizations need substantially increased funding to conduct community education programs and to provide lawyers to represent low-income immigrants in applications for legal status based on asylum claims, domestic abuse, cooperation with police in the investigation of serious crimes, family relationships, and in the case of minors, abuse, abandonment or neglect. Lawyers also will play a critical role in minimizing the number of immigrants who fail to appear in removal proceedings after being released on bond following apprehension, and defending immigrants placed in removal proceedings following arrest by ICE authorities. Such defense work requires training of lawyers, on-going technical support to those lawyers, and the time needed to research and adequately defend clients with meritorious defenses to deportation. At bottom, States are in a unique position to fund such humanitarian efforts that will stave off the worst aspects of the Trump immigration policies.

Overall, this is the time for immigrant communities and their representatives to advocate for State and local funding for a range of programs to represent low-income immigrants and to consider innovative laws and local ordinances that will protect immigrants from the harsh consequences of the Trump executive decrees and from the exploitative practices that will now mushroom as unscrupulous employers, landlords and businesses seek to take advantage of the new vulnerabilities immigrants experience as a result of President Trump's assault on and limitation of their legal protections and rights.

#### 4. Representation and support for immigrant children



Increased *pro bono* and legal services protection of immigrant children is critically important. Children may suffer the most under President Trump's policies as they are increasingly detained by ICE in unlicensed secure facilities commingled with unrelated adults, possibly not treated as unaccompanied minors (and transferred from ICE to ORR custody) because they have one or more parents residing in the US, arrest of parents if they show up to collect their detained children, separation of children from parents with whom they were apprehended so the parents can be criminally prosecuted, etc.

Children possess a range of legal rights under the *Flores* settlement and the TVPRA and increased funding and technical support for free legal services will be needed so that those rights are exercised, the detention of children is held to a minimum, the conditions of detention are humane, children eligible for Special Immigrant Juvenile Status are not deported, and that children's asylum claims are fairly assessed separate and apart from the claims possessed by accompanying parents.

#### 5. Public and media education

Public and media education initiated by immigrants and immigrant leaders must focus on the fruitless and unjust nature of mass deportations and the break up of families, and the likely unintended consequences of new restrictions on traditional avenues to legalize status – i.e. a further build up of the undocumented population as traditional methods to legalize status are blocked by new restrictive policies and practices. Public education must also make clear that all immigrants have statutory and constitutional protections and that exercising those rights is entirely justified to avoid summary or unjust deportation and to avoid the breakup of families.

#### 6. Immigration reform

Further advocacy for comprehensive immigration reform (other than as a long-term goal when the votes exist for passage) must be set aside for an *incremental* approach starting with obvious populations that should be granted lawful permanent resident status, including, for example, (1) certain farmworkers, (2) refugees who have had Temporary Protected Status (TPS) for several decades, and (3) people who have applied for DACA.

Legalizing these three groups of immigrants who in practical terms are unlikely to ever be deported could extend permanent lawful status to 1-2 million people.

Immigrants should also advocate for a change in Advance Parole policy which could allow an additional one to two million immigrants to be granted permanent resident status after briefly visiting family abroad and then returning with inspection (rather than without inspection). Having returned through the “door” President Trump said during his campaign would be available, they could then apply for lawful permanent resident status and would not have to return to their home countries for ten years before being granted resident status.

Other issues that directly impact on migration policy are not addressed in this memorandum but may be discussed in future memoranda. Obvious issues include the plan to build a “wall” along the US-Mexico border, a looming possible trade war with

Mexico, the externalization of enforcement in the form of interdiction of Central American asylum seekers along the southern border of Mexico in violation of international law, and an overarching tendency to support authoritarian regimes and exploitation of natural resources that may well soon precipitate new migrant flows seeking to enter the United States.

These issues must be assessed and reacted to as they impact migrants before they reach the US-Mexico border and may increase future migration flows as migrants seek refuge from spiraling violence, displacement and poverty.

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The Center for Human Rights and Constitutional Law is available to provide training and technical support to immigrant communities and legal services and pro bono attorneys representing immigrants and asylum seekers. For support or assistance please email [support@centerforhumanrights.org](mailto:support@centerforhumanrights.org)

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