

NOVEMBER 1, 2018 | NUMBER 852

Walling Off Liberty

How Strict Immigration Enforcement Threatens Privacy and Local Policing

BY MATTHEW FEENEY

EXECUTIVE SUMMARY

During his campaign, Donald Trump vowed to aggressively ramp up immigration enforcement by implementing “extreme vetting,” building a wall along the southern border, cracking down on so-called “sanctuary cities,” and creating a “deportation force.” President Trump and his allies took steps to implement some of these proposals shortly after his inauguration. There are ample reasons for concern over how such efforts will impact America’s law enforcement agencies and Americans’ civil liberties.

In order to be effective, the president’s proposals require the federal government to gather more information about American citizens. Border Patrol will increase its presence both at the border and at interior checkpoints, inconveniencing Americans and foreigners alike. Immigration law enforcement officials will exploit the lack of privacy protections at the border, leading to citizens

being pressured into providing authorities with access to their electronic devices. The federal government will increase surveillance and explore new tools, such as facial-recognition drones. Federal immigration officials will expand databases and include biometric information on both visitors and American citizens.

Trump’s pledge to crack down on sanctuary cities runs afoul of the Tenth Amendment, while proposals to expand the class of removable aliens and deputize state and local law police officers threaten to undermine effective policing.

Although the president could take steps to reverse many of the damaging features of his immigration policy, such a reversal is unlikely. However, policymakers can mitigate the risks of the immigration agenda by strengthening legal protections on the border and limiting federal involvement in state and local policing.

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INTRODUCTION

During his campaign, Donald Trump vowed to aggressively ramp up immigration enforcement. Among the most notable of the president’s proposals were an “extreme vetting” procedure for those seeking admission to the United States, a wall along the southern border, a crackdown on so-called “sanctuary cities,” and the creation of a “deportation force.”¹ Once in office, President Trump took steps to implement some of these proposals and Republican lawmakers in Congress introduced legislation to enact others.² Even though the number of deportations and illegal attempted border crossings dropped, the administration’s increased immigration enforcement efforts show no signs of slowing down.³ There are ample reasons for concern over how such efforts will impact America’s law enforcement agencies and Americans’ civil liberties.

In order to be effective, the president’s proposals require the federal government to gather more information about American citizens. Border Patrol will increase its presence on the border and at interior checkpoints, inconveniencing Americans and foreigners alike. Immigration law enforcement officials will exploit the lack of privacy protections at the border, leading to citizens being pressured into providing authorities with access to their phones, laptops, and other electronic devices. The federal government will increase surveillance and explore new tools such as facial-recognition drones. Federal immigration officials will expand databases with an increasing amount of data, including biometric information, on visitors and American citizens. These databases and surveillance tools would need to be deployed to provide federal authorities with the data-gathering architecture for deportations.

In addition, Trump’s pledge to crack down on sanctuary cities requires that the federal government erode local control over law enforcement, while additional proposals to expand the class of removable aliens and deputize state and local law police officers threaten to undermine effective policing.

BORDER ENFORCEMENT AND PRIVACY

Trump’s plans to hire additional Border Patrol agents and increase the number of intrusive surveillance tools at ports of entry are a threat to the privacy of everyone who lives or works within 100 miles of the border. Not long after his inauguration, the president took steps to fulfill his immigration commitments via executive orders, and the increased number of searches of phones and other electronic property are already having an impact on Americans’ privacy. Meanwhile, facial-recognition drones and other surveillance technologies, as well as vastly expanding databases, are an emerging threat to Americans’ civil liberties.

Border Patrol Abuses

In February 2017 Trump directed the Customs and Border Protection (CBP) commissioner to hire 5,000 more Border Patrol agents via executive order.⁴ Given that the Border Patrol has a history of abuses, this increase in Border Patrol agents will likely exacerbate the kind of violations documented at the border and the interior.⁵

Since 9/11, Border Patrol’s tactics have become increasingly militarized.⁶ In recent years, some border agents have needlessly resorted to deadly force. In some cases where individuals have thrown rocks at Border Patrol agents, the agents responded with lethal force, despite being safe in their vehicles during the attack.⁷ As one Department of Homeland Security (DHS) official told *Politico*, “[Border Patrol] has created a culture that says, ‘If you throw a rock at me, you’re going to get shot.’”⁸

This military mindset is particularly concerning in an agency that has a well-documented history of being among the most ill disciplined and abusive of the federal government’s large law enforcement agencies. From 2006–2016 Border Patrol had a higher discipline or performance termination rate (0.71 percent) than CBP’s Office of Field Operations (0.47 percent); the Bureau of Prisons (0.46 percent); Immigration and Customs Enforcement (0.36 percent); the Federal Bureau of Investigation

(0.14 percent); and the Drug Enforcement Administration (0.11 percent).⁹

Terminated Border Patrol agents were involved in excessive use of force as well as corruption. In 2012, CBP, the Border Patrol's parent agency, commissioned a report on use-of-force policies but reportedly took steps to conceal its findings once it was completed.¹⁰ The report was highly critical of CBP, which only sent House and Senate oversight committees summaries of the report.¹¹ These summaries did not include some of the most shocking findings, namely, that "some border agents stood in front of moving vehicles as a pretext to open fire and that agents could have moved away from rock throwers instead of shooting at them."¹²

The CBP initially rejected two praiseworthy recommendations: "barring border agents from shooting at vehicles unless its [*sic*] occupants are trying to kill them, and barring agents from shooting people who throw things that can't cause serious physical injury."¹³ It was only after the *Los Angeles Times* got its hands on the report that CBP revised its use-of-force policies to require agents to reasonably believe that thrown rocks pose a risk of imminent death or serious injury.¹⁴ This policy merely codified existing law, but may have been necessary to spell out, given that for years Border Patrol had developed an unofficial policy of treating all rock-throwing incidents as lethal threats.¹⁵

The agency's use of deadly force was recently litigated to the Supreme Court. In 2010, Sergio Adrián Hernández Güereca, a 15-year-old Mexican citizen, was playing with a group of friends in a culvert between El Paso, Texas, and Ciudad Juárez, Mexico.¹⁶ Hernández and his friends dared each other to run to the American fence and back.¹⁷ Jesus Mesa, a Border Patrol agent, seized one of the boys.¹⁸ Hernández, who was unarmed, ran past Mesa, who then shot the teen in the head.¹⁹ Mesa was in the United States when he shot Hernández, who was in Mexico.²⁰ Mesa claimed that Hernández and the other boys threw rocks at him—a claim refuted by cell phone footage captured by a passerby.²¹ The Supreme Court vacated and

remanded the case to the Fifth Circuit, declining to resolve associated Fourth Amendment issues.²²

But CBP abuses are hardly restricted to the border or to foreign nationals. From January 2010 to May 2016, 53 people died during encounters with the agency, 48 of them from use of force or coercion.²³ At least 19 of those were American citizens.²⁴ Some of the use of force incidents that led to these deaths were clearly justified, but others are less so. During one of these incidents a Border Patrol agent shot a 19-year old American in the back as he tried to flee to Mexico following a car chase.²⁵ A Department of Justice report found that the agent shot the teen while he was shooting at another male on the fence, who was reportedly throwing rocks.²⁶

In Southwest Arizona, up to 75 miles from the border, interior checkpoints and other immigration enforcement efforts have created a militarized zone, with ever-present agents, helicopters, and surveillance equipment, according to CBP documents that the American Civil Liberties Union obtained under the Freedom of Information Act.²⁷ These documents reveal that, between 2011 and 2014, residents of the Tohono O'odham Nation, a Native American tribe, were the subject of illegal searches, intimidation, and harassment.²⁸ One complaint described a school bus being stopped dozens of times, and the children forced to wait in 100-degree heat while their belongings were searched.²⁹

The American Civil Liberties Union report also revealed the existence of a CBP practice that agents call "shotgunning." Shotgunning is when agents stop motorists—immigrants and citizens alike—without reasonable suspicion and justify the seizure after the fact. Two Border Patrol whistleblowers revealed the tactic in 2008, but it continued regardless.³⁰

Border Exceptions to the Fourth Amendment

Although Border Patrol does dedicate resources to patrolling the line between the United States and its neighbors, its agents can

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treat territory far into the interior as if it is a border crossing. Thanks to federal law and Supreme Court precedent, CBP agents can search vehicles within 100 miles of the border, including the coastlines, as part of their mission to prevent illegal immigration.³¹ About two-thirds of Americans live within 100 miles of U.S. boundaries (see Figure 1).³² The CBP has set up checkpoints within this 100-mile zone, asking drivers if they’re American citizens. In addition, CBP can search electronic devices at international airports without reasonable suspicion or probable cause.³³ These two exceptions to the Fourth Amendment pose a significant risk to the civil liberties of Americans as well as immigrants.

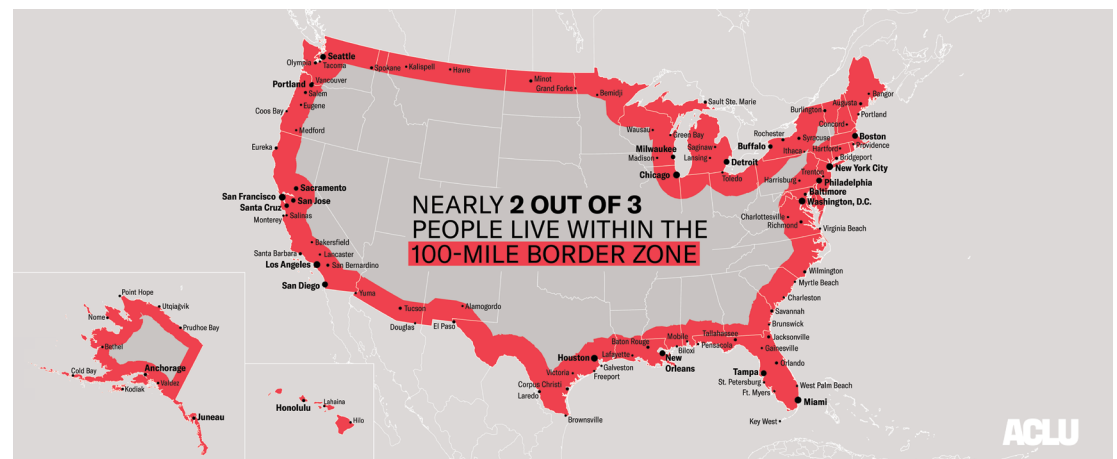
The Supreme Court considered fixed interior checkpoints in the 1976 case *United States v. Martinez-Fuerte*.³⁴ In that case, the Court ruled that fixed interior checkpoints do not violate the Fourth Amendment, which protects people in the U.S. from “unreasonable searches and seizures.”³⁵ The Court also held that referring motorists to secondary inspection at a checkpoint in large part because of their “Mexican ancestry” does not violate the Constitution.³⁶

In his dissent, Justice William Brennan (joined by Justice Thurgood Marshall)

criticized “the continuing evisceration of Fourth Amendment protections.”³⁷ Brennan correctly predicted the impact that the case would have on Mexican Americans: “Every American citizen of Mexican ancestry, and every Mexican alien lawfully in this country, must know after today’s decision that he travels the fixed checkpoint highways at the risk of being subjected not only to a stop, but also to detention and interrogation, both prolonged and to an extent far more than for non-Mexican appearing motorists.”³⁸ This fear is all the more pronounced given the current administration’s policy priorities.

After all, interior checkpoints are more successful at enforcing nonimmigration laws against American citizens, particularly drug laws, than enforcing immigration laws against illegal immigrants.³⁹ At interior checkpoints in Yuma Sector, which includes about 180,000 square miles of terrain in southwest Arizona, southeast California, and Nevada, American citizens were arrested at a rate almost eight times higher than noncitizens in 2013.⁴⁰ These checkpoints contribute very little to immigration enforcement. According to CBP statistics from 2013, interior checkpoints in the Tucson Sector, the Border Patrol region that includes all of Arizona not covered by Yuma Sector,

Figure 1
Customs and Border Patrol area of operations



Source: American Civil Liberties Union. Map of the 100-mile border zone within which Customs and Border Patrol agents can search vehicles during investigations into illegal immigration without a warrant or probable cause.

were responsible for only 0.67 percent of the sector's apprehensions that year.⁴¹

That CBP tramples on American citizens' rights is not a recent or isolated phenomenon. In 1993 Ninth Circuit judge Alex Kozinski noted in a dissent that, "There's reason to suspect the agents working these checkpoints are looking for more than illegal aliens. If this is true, it subverts the rationale of *Martinez-Fuerte* and turns a legitimate administrative search into a massive violation of the Fourth Amendment."⁴² Unfortunately, the border and the bloated 100-mile "border zone" are not the only places where immigration enforcement has eroded civil liberties.

Searches at Ports of Entry

Cell phones and laptops contain troves of intimate details about our private lives. Family photos, romantic text messages, social media accounts, calendars, and much more can be found on these devices, which the majority of American adults own.⁴³ For young Americans in particular, smartphones are appendages necessary for an ordinary, modern social life.⁴⁴

Yet at ports of entry, these ubiquitous devices enjoy almost no protection. This border exception to the Fourth Amendment is being exploited by the Trump administration in the name of national security and immigration enforcement. These searches put Americans' privacy at risk. Fortunately, Congress could take steps to stop CBP looking through electronic devices without probable cause.

At the border or ports of entry, CBP officers enjoy an exception to the Fourth Amendment, which protects against "unreasonable searches and seizures."⁴⁵ This exception was summed up by Chief Justice William Rehnquist, who in *United States v. Ramsey* (1977) stated, "[S]earches made at the border . . . are reasonable simply by virtue of the fact that they occur at the border."⁴⁶

The number of searches of cell phones, laptops, and other electronic devices at the border and ports of entry has increased during the Trump administration.⁴⁷ From October to March in FY 2016, there were 8,383

international arrivals that were processed with electronic device searches. From the same time period in FY 2017 there were 14,993, a roughly 80 percent increase.⁴⁸ Trump administration officials believe these searches play an important role in investigating and preventing terrorism.⁴⁹ However, then DHS secretary John Kelly did not cite a single example of a warrantless electronic device search preventing terrorism when questioned by Sen. Rand Paul (R-KY) in April 2017.⁵⁰

Some Americans might think that they can avoid warrantless searches by avoiding terrorist hotspots. This is not the case.

On January 31, 2017, Sidd Bikkannavar, an American citizen, landed at Houston's George Bush Intercontinental Airport. He had been in Chile to indulge in one of his hobbies—racing solar-powered cars. Despite being an American citizen and a member of CBP's program for "pre-approved, low-risk travelers," a CBP officer escorted Bikkannavar to an interview room.⁵¹ A CBP officer asked Bikkannavar to reveal his phone's passcode.⁵² Although Bikkannavar told the officer that the phone included sensitive information related to his work for NASA, the agent persisted, and Bikkannavar eventually provided the passcode.⁵³ CBP analyzed Bikkannavar's phone and found nothing of interest.⁵⁴ Bikkannavar deactivated his social media accounts following the incident out of fear that they were compromised.⁵⁵

Citizens leaving the U.S. can also be needlessly delayed by CBP officials conducting warrantless searches. In February 2017, customs officers stopped Haisam Elsharkawi, an American citizen, as he was on his way to board a flight to Saudi Arabia from Los Angeles International Airport.⁵⁶ CBP agents demanded access to Elsharkawi's cell phone, handcuffed him, and detained him for four hours.⁵⁷ Elsharkawi did unlock his cell phone, which customs officials searched before releasing him without charges.⁵⁸

With very few exceptions, reduced civil liberties at the border and ports of entry can be exploited without first establishing probable cause or reasonable suspicion.⁵⁹ Indeed, a

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2009 DHS Privacy Impact Assessment of the border searches of electronic devices stated that searches on the border “may be conducted without a warrant and without suspicion.”⁶⁰ In 2018, CBP issued a new electronic device search directive, which distinguished between basic and advanced searches.⁶¹ In order to carry out an advanced search, which involves officers connecting devices to external equipment for copying or analysis, officers must first have reasonable suspicion. All searches that are not advanced are basic, and do not require suspicion.⁶² While conducting a basic search, officers “may examine an electronic device and may review and analyze information encountered at the border.”⁶³

Moreover, White House officials have reportedly explored the possibility of requiring visitors to disclose social media and internet browsing details.⁶⁴ So long as the administration considers warrantless searches of electronic devices to be an essential part of a counterterrorism strategy we will continue to see Americans’ civil liberties violated at the border and ports of entry.

Congress could address this issue by passing legislation requiring probable cause for electronic device searches at border crossings or ports of entry. In April 2017, Sen. Ron Wyden (D-OR) introduced a bill cosponsored by Sen. Paul and Sen. Edward Markey (D-MA) that would impose a warrant requirement for searches of electronic equipment belonging to U.S. citizens and permanent residents.⁶⁵ Reps. Jared Polis (D-CO) and Blake Farenthold (R-TX) introduced a House of Representatives version of the bill.⁶⁶ At the time of writing, neither of these bills has made it out of their respective committees.

The Supreme Court could also resolve this issue. In 2014, the Supreme Court recognized the privacy interest we have in cell phones, holding that police need a warrant to search cell phones belonging to arrested persons.⁶⁷ And yet this protection does not extend to federal agents at the border or ports of entry thanks to the border exception to the Fourth Amendment. However, there is currently a

circuit split on the question of what degree of suspicion CBP agents need before conducting advanced searches of cell phones at ports of entry.⁶⁸ If the Supreme Court decides to resolve the circuit split, its justices could look to the 2014 cell phone case as a privacy-preserving guide that takes into account the vast amount of personal information most American adults carry in their pockets every day.

Border Surveillance from the Sky

Outside of airports and checkpoints, federal immigration officials in the field use a wide range of equipment to find individuals who have crossed the border illegally. This equipment inevitably collects information related to law-abiding citizens.

In the air, DHS frequently uses drones, airplanes, helicopters, and tethered aerostats—large unmanned airships attached to the ground.⁶⁹ In 2013, the *New York Times* reported, “Lately it has become entirely normal to look up into the Arizona sky and to see Blackhawk helicopters and fixed-wing jets flying by. On a clear day, you can sometimes hear Predator B drones buzzing over the Sonoran border.”⁷⁰ Although drones are still a relatively new and rare tool for state and local police departments, CBP has been testing and using them on the U.S.-Mexican border since 2004.⁷¹

During his presidential campaign, Donald Trump expressed admiration for drone surveillance, saying, “I want surveillance for our borders, and the drone has great capabilities for surveillance.”⁷² Trump isn’t the only politician who is a fan of surveillance drones. Sen. John Cornyn (R-TX) introduced a bill in August 2017 that mandates border drone surveillance flights 24 hours a day, five days a week.⁷³ But there’s little evidence this would improve border security. A 2014 DHS Office of Inspector General report found that DHS’s drone program cost an estimated \$12,255 per flight hour and failed to achieve its expected results.⁷⁴

Despite its poor track record with drones,

DHS is looking to expand its aerial surveillance capabilities. In the summer of 2016, DHS asked companies to pitch them border patrol drone technology.⁷⁵ The solicitation notice specifically mentions facial recognition capability as one of the desired features of small, portable border patrol drones.⁷⁶ So many companies responded to the solicitation that DHS stopped accepting submissions more than two months before their initial deadline.⁷⁷

CBP facial recognition drones are of particular concern given that vast facial recognition databases are already in place and that CBP is authorized to operate up to 100 miles from the border. These databases don't only include information about criminals and wanted suspects: at least half of American adult citizens are already in a law enforcement facial recognition network.⁷⁸ These networks include facial images captured as part of criminal justice processing as well as drivers license photos from 16 states.⁷⁹ The FBI's facial recognition system includes 411 million facial images of people collected from states' department of motor vehicles, the State Department, the Department of Defense, and the FBI's own Next Generation Identification (NGI) Interstate Photo System.⁸⁰ If linked with local and state law enforcement databases, CBP drones could be used for far more than immigration enforcement, with the agency aiding with crackdowns on petty traffic offenses such as parking violations.

It's sensible to prepare for a time when facial recognition drones become a common tool for CBP agents operating both at the border and within their 100-mile enforcement zone. After all, officials in the agency have explicitly expressed an interest in the technology, which is rapidly improving. These preparations should include restrictions on the data available to CBP agents operating facial recognition drones. Facial recognition databases should be purged of data unrelated to active investigations, wanted persons, or persons with a history of violent crime. Without strict restrictions on the facial recognition data available to CBP drones, CBP will have

the ability to gather information about many innocent Americans' whereabouts.

Intelligence Tools

Drones are not the only tools that could be used to uncover information about American citizens. Mass collections of data provide U.S. Immigration and Customs Enforcement (ICE) with a massive ecosystem of information about immigrants and American citizens alike.⁸¹ Using a range of databases and intelligence tools, ICE agents can find targets, uncover a trove of personal information, and hamper travel in order to facilitate the kind of extreme vetting proposed by the Trump administration. These tools, as well as calls to make ICE a member of the intelligence community, put Americans' privacy at risk.

"COLLECT IT ALL" DATABASES. In June 2013, former intelligence contractor Edward Snowden's surveillance revelations made front-page news around the world.⁸² Not long after, one former intelligence official nicely summarized then National Security Agency (NSA) director Gen. Keith Alexander's approach to intelligence: "Rather than look for a single needle in the haystack, his approach was, 'Let's collect the whole haystack,' . . . 'Collect it all.'"⁸³ Although tasked with immigration enforcement rather than national security, ICE has adopted a similar attitude, seeking access to gargantuan amounts of personal information related to both Americans and immigrants.

One of the most notable intelligence systems is Investigative Case Management (ICM), a network of databases. In 2014, ICE awarded Palantir Technologies a \$41 million contract to build and maintain ICM.⁸⁴ Palantir has a history of involvement in government surveillance, playing a key role in developing a number of law enforcement and national security tools, including XKeyscore, a NSA internet surveillance program.⁸⁵ According to NSA documents leaked by Snowden, XKeyscore is one of the NSA's widest-reaching systems.⁸⁶

ICM allows users to access a wide range of information from federal agencies, including the Bureau of Alcohol, Tobacco, Firearms

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and Explosives; the FBI; the Drug Enforcement Administration (DEA); the Central Intelligence Agency; and the Defense Intelligence Agency.⁸⁷ Using ICM, ICE agents from Enforcement and Removal Operations and the office of Homeland Security Investigations can access extensive information from a collection of private law enforcement databases, such as Black Asphalt.⁸⁸ A 2014 report revealed that Black Asphalt allowed police to share information about innocent and criminal motorists including addresses, identifying tattoos, and Social Security numbers.⁸⁹ Thanks to ICM, ICE agents now have access to this database.

ICM is part of a project to upgrade TECS, a DHS information-sharing system.⁹⁰ Although most of the TECS data algorithms and analysis tools are secret, there is one that is known: the TECS Lookout.⁹¹ Immigration officials can issue a TECS Lookout, allowing law enforcement to arrange to meet targets leaving or arriving a port of entry.⁹²

TECS Lookouts can also be used to harass American citizens. In one notable case, immigration officials seized the laptop, camera, thumb drive, and cell phone belonging to a volunteer with the Bradley Manning Support Network as he was returning to the United States from Mexico.⁹³ Data from these devices were searched over a seven-month period, with no evidence of criminal wrongdoing discovered.⁹⁴ Documents related to the search reveal that ICE was acting with, and possibly at the request of, the Department of Justice, the Department of State, and the Army’s Criminal Investigative Division.⁹⁵ As the Trump administration continues to implement its restrictionist policy agenda, it will inevitably infringe on innocent Americans’ privacy.

Using ICM, ICE agents can gather biometric, educational, and employment information related to targets of investigations.⁹⁶ ICE agents also have access to work and home addresses, phone numbers, and personal contacts.⁹⁷ ICE attorneys handling deportation proceedings use ICM.⁹⁸

In the summer of 2017, the Trump

administration solicited private companies to help ICE build its “Extreme Vetting Initiative.”⁹⁹ Under the initiative, ICE officials will utilize social media monitoring in order to generate at least 10,000 investigative leads each year.¹⁰⁰ ICE also expressed an interest in using machine-learning capabilities to automate social-media snooping and determine whether a visa applicant will be a “positively contributing member of society.”¹⁰¹

Dozens of civil rights experts, engineers, computer scientists, and mathematicians wrote to Acting Secretary of Homeland Security Elaine Duke, pointing out that the current state of technology is not advanced enough to identify the traits ICE wants to monitor, and that the Extreme Vetting Initiative will be discriminatory as well as unreliable.¹⁰² Fortunately, ICE abandoned plans to use machine-learning technology to implement its Extreme Vetting Initiative.¹⁰³ However, ICE still plans to monitor social media accounts by hiring a contractor to train and manage personnel to conduct surveillance.¹⁰⁴ This human-based snooping will affect visa applicants as well as tourists, foreign students, temporary workers, and the American citizens they interact with online.¹⁰⁵ Such surveillance will undoubtedly chill these innocent parties’ speech once they know ICE is keeping an eye on their social media activity.

That immigration intelligence tools include information about American citizens is hardly concealed by government officials. When asked how ICM ascertains citizenship, the government responded, “U.S. Citizens are still subject to criminal prosecution and thus are a part of ICM.”¹⁰⁶ Subjects of criminal prosecutions are not the only individuals whose information can make its way into the ICM database. According to a DHS privacy impact assessment, ICM contains extensive information concerning targets of investigations, associates of targets, victims, witnesses, informants, and third parties, such as employers and those who report crimes.¹⁰⁷

A few years after Palantir secured the ICM contract, the Obama administration issued

new rules allowing the NSA to share raw and unfiltered intercepted communications from around the world more easily with the DEA, FBI, and DHS.¹⁰⁸ This is of particularly acute concern, given that some ICE officials are pushing for the agency to be part of the intelligence community.¹⁰⁹

The intelligence community is made up of 17 of the federal government's most elite intelligence agencies, including 8 within the Department of Defense, as well as elements of domestic agencies, including the Drug Enforcement Agency and the Department of the Treasury.¹¹⁰ Members of the intelligence community can apply to NSA for access to feeds of raw, unfiltered intelligence, much of which is gathered without a warrant.¹¹¹

If ICE were to join the intelligence community, the agency could access more sensitive information about Americans' private lives. This will almost certainly lead to an increase in "parallel construction." Parallel construction is the process by which federal agencies with access to intelligence intercepts send information from those intercepts to state and local law enforcement for criminal investigations.¹¹²

Here's an example of how parallel construction works: the DEA receives intelligence concerning a drug cartel's plan to ship drugs across the U.S. in a series of trucks.¹¹³ The DEA then sends that information to local police officers, who keep a lookout for the trucks and wait for a traffic infraction to justify a pullover.¹¹⁴ The DEA directs local police not to use the intercepted intelligence as evidence at trial.¹¹⁵ Instead of using the information the DEA sent them, the local police department constructs an alternate set of evidence, claiming that they stopped the trucks for minor traffic violations. Using this method, police can conceal the fact that the DEA informed them about the trucks from defense attorneys—and sometimes from prosecutors and judges.¹¹⁶ There is a strong argument that the parallel construction strategy violates defendants' right to a fair trial. After all, at trial they will not hear an accurate account of how the evidence against them was obtained. If ICE becomes a member of the

intelligence community, we should expect it to engage in more parallel construction.

Since the Snowden revelations, Americans have grown accustomed to their privacy being infringed in the name of national security. However, policies aimed at strict immigration enforcement also pose a serious threat to our privacy. In its ramped-up search for deportable aliens, ICE will gather vast amounts of personal information about law-abiding American citizens. Although technology cannot be put back into the proverbial box, policymakers can ensure that ICE's new technological capabilities are only used consistent with constitutional protections.

STRICT IMMIGRATION ENFORCEMENT EXPANDS FEDERAL ROLE IN POLICING

The Trump administration's immigration enforcement priorities will impact American citizens as the federal government's role in local law enforcement grows. Secure Communities (SCOMM), a DHS-DOJ information-sharing program, needlessly expands the categories of removable immigrants while putting citizens at increased risk of having family members deported. Section 287(g) of the U.S. Immigration and Nationality Act, the federal program that deputizes local police for immigration enforcement, risks worsening police-community relationships. And crackdowns on so-called sanctuary cities threaten federalism—a foundation of America's constitutional system—as well as the decentralized approach that has traditionally guided American policing.

Secure Communities

Secure Communities is a recently revived data-sharing program between the DOJ and DHS that allows federal authorities to check arrested persons' fingerprints in order to identify removable aliens.¹¹⁷ The program began in 2008, but the Obama administration abandoned it in 2014 after it had been the subject of widespread criticism.¹¹⁸ Critics of SCOMM

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pointed out that it had resulted in American citizens being improperly detained, that it had split up families, and that it risked worsening police racial profiling. The Priorities Enforcement Program (PEP) replaced SCOMM in November 2014, narrowing the category of removal aliens.¹¹⁹ Despite research showing that SCOMM did not reduce crime rates, Trump scrapped PEP and reinstated SCOMM via executive order on January 25, 2017.¹²⁰

The detention of American citizens, separating American citizen children from their parents, and the potential for increased racial profiling, are high prices to pay for a program shown to have zero impact on crime rates. The Trump administration should narrow the category of removable aliens by reimplementing PEP, thereby ensuring violent and dangerous aliens are the focus of immigration enforcement efforts.

Under SCOMM, which contributed to almost 1,130,000 identifications and 325,000 arrests between 2009 and 2012, ICE can request local police to hold an alien for 48 hours beyond their release date if there is reason to believe that the alien is subject to removal.¹²¹ Removable aliens include those charged but not convicted of criminal offenses and those without a criminal history.¹²² With PEP in place, ICE prioritized the removal of aliens if they had been convicted of, rather than merely charged, with a serious offense; were linked to gang activity; or had been deemed a threat to national security.¹²³

Despite DHS' claim that SCOMM would improve public safety, the program did not reduce crime rates.¹²⁴ In addition, as SCOMM progressed, aliens convicted of nonserious crimes made up a higher share of removed criminal aliens than those convicted of common serious crimes (including assault, robbery, burglary, and sexual assault).¹²⁵ By 2012, fewer than 12 percent of removed criminal aliens were convicted of a common serious crimes.¹²⁶ According to a 2011 DHS task force's findings, “the impact of Secure Communities has not been limited to convicted criminals, dangerous and violent offenders, or threats to public

safety and national security.”¹²⁷

SCOMM had no noticeable impact on reducing crime rates, but it did result in the detention of large numbers of American citizens and lawful permanent residents.¹²⁸ From FY2008 through to the start of FY2012, ICE issued almost one million detainers.¹²⁹ During that time, detainers were issued for 28,489 legal permanent residents as well as 834 American citizens.¹³⁰ It is illegal for ICE to hold American citizens on detainers, and of the 28,489 legal permanent residents issued detainers 20,281 had no record of any criminal conviction.¹³¹

The numerous concerns associated with SCOMM prompted Obama to abandon the program in 2014 and replace it with PEP.¹³²

The resurrection of SCOMM means that ICE can now cast a wider net, targeting aliens who have not committed a violent or property crime and who are not a threat to national security. Detaining and deporting migrants who have not committed a serious crime will not only affect migrants, but their families as well. Many undocumented immigrants have family members who are American citizens. A Pew Study based on 2008 census data found that 37 percent of all undocumented adults in the U.S. were parents of children who are American citizens.¹³³

SCOMM's failure to achieve its stated goals strongly suggests that it should be abandoned, and that the president should reinstate PEP, which he abandoned in January 2017 via executive order.¹³⁴

Deputizing Local Police

The federal government can deputize local law enforcement for immigration enforcement. This authority, which has undergone a resurgence since Trump's inauguration, risks worsening racial profiling, is contrary to American law enforcement traditions, and has a track record of worsening police-community relationships.

Section 287(g) of the Immigration and Nationality Act permits DHS to enter into agreements with state and local law enforcement agencies, thereby deputizing officers to

enforce federal immigration laws.¹³⁵

In February 2017, 32 law enforcement agencies in 18 states had 287(g) agreements with ICE.¹³⁶ Since then, the Trump administration has more than doubled the number of 287(g) agreements. As of October 2018, 78 law enforcement agencies in 20 states had 287(g) agreements with ICE.¹³⁷

All local and state law enforcement agencies that wish to take part in the 287(g) program must enter into a Memorandum of Agreement with ICE.¹³⁸ Participating officers must complete a four-week training program run by instructors from the Federal Law Enforcement Training Center ICE Academy.¹³⁹

Local and state officers participating in 287(g) are authorized to verify whether someone at a correctional facility is a criminal alien by conducting interviews and checking biographic information against DHS databases.¹⁴⁰ They can also use the ICE's database and Enforcement Case Tracking System, allowing law enforcement officers to generate detainers and to enter data related to aliens in custody.¹⁴¹ This "jail enforcement" model is distinct from the abandoned task-force agreements that, up until the end of 2012, allowed 287(g) officers to question and arrest suspected immigration lawbreakers encountered in the field.¹⁴² All current 287(g) memorandum agreements are jail-enforcement agreements.¹⁴³ However, in his first week in office, Trump signed an executive order expanding the 287(g) program to include task-force agreements.¹⁴⁴ The order states that the DHS secretary shall authorize local and state police "to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens."¹⁴⁵

An expansion of 287(g) programs that includes the previously abandoned task-force model runs the risk of worsening racial profiling.

The concerns associated with 287(g) are well established, having been cited from the program's very beginning.¹⁴⁶ Widespread allegations of racial profiling spurred a Department of Homeland Security's Office of the Inspector General investigation in 2010, resulting in a

report that was very critical of the program.¹⁴⁷

Perhaps the most infamous instance of 287(g) racial profiling was noted in a 2011 DOJ Civil Rights Division's investigation into the Maricopa County, Arizona, Sheriff's Office (MCSO).¹⁴⁸ The investigation noted that Police Executive Research Forum interviews with Maricopa officers revealed that "a number of law enforcement officers in Maricopa County . . . believe that MCSO has enforced immigration laws in a way that has poisoned the relationship between law enforcement and Latinos, hindering general law enforcement efforts within the Latino community."¹⁴⁹ The Department of Justice had an expert on statistical racial profiling analysis examine MCSO traffic stops. According to the report, "Latino drivers were between four to nine times more likely to be stopped than similarly situated non-Latino drivers." Shortly after the release of the report, DHS withdrew from its 287(g) agreement with MCSO.¹⁵⁰

The DOJ Civil Rights division also issued a report in 2012 on Alamance County, North Carolina, Sheriff's Office (ACSO), which was also participating in 287(g), finding that ACSO engaged in a "pattern or practice of unconstitutional policing."¹⁵¹ The report highlighted the disparate impact that ACSO's policing practices had on Latinos—including citizens—with the sheriff unequivocally telling officers to target Latinos for arrests and checkpoint stops.¹⁵² ICE canceled ACSO's 287(g) agreement shortly after the report's release.¹⁵³ Analysis of the 287(g) program in North Carolina shows that it did not reduce crime rates in the state.¹⁵⁴

The Leadership Conference on Civil and Human Rights, citing examples of racial profiling across the country, characterized 287(g) as a tool for targeting Hispanics, saying that it "has been used by state and local law enforcement authorities to stop, detain, question, and otherwise target individual Hispanics and entire Hispanic communities in a broad way to enforce federal immigration laws, thus racially profiling vast numbers of Hispanics—most of whom are U.S. citizens or legal residents—as suspected undocumented immigrants."¹⁵⁵

“An expansion of 287(g) programs that includes the previously abandoned task-force model runs the risk of worsening racial profiling.”

“This expansion of 287(g) is contrary to American law enforcement traditions.”

Civil liberties groups and law enforcement officials note that the type of racial profiling in police work that can be sparked by 287(g) negatively impacts policing. Speaking before the House of Representative’s Committee on Homeland Security in 2009, Montgomery County, Maryland, Chief of Police Thomas Manger said that some of the largest police departments hadn’t embraced 287(g) because it would harm cooperation with immigrant communities, thereby undermining community policing.¹⁵⁶ This effect was mentioned by the Obama administration’s report on 21st Century Policing, which noted that, “whenever possible,” local police should not take part in immigration enforcement.¹⁵⁷

Children who are American citizens are often victims of 287(g). Just as with SCOMM, 287(g) threatens to split up families that include nonviolent undocumented immigrants. A 2011 Applied Research Center report found that, in counties where local police have entered into a 287(g) agreement, children in foster care were, on average, 29 percent more likely to have detained or deported parents than in other counties.¹⁵⁸

Adult citizens are also at risk of 287(g) abuses. In 2015, an 18-year-old, Diego Rojas, filed suit against the Los Angeles County Sheriff’s Department, claiming that officers participating in 287(g) threatened to continue holding him in custody if he didn’t admit to being born in Mexico after he’d been arrested on suspicion of burglary.¹⁵⁹ According to Rojas, he was only released after his sister showed officers a copy of his birth certificate, which confirmed that he was born in the United States.¹⁶⁰

According to Northwestern University political science professor Jacqueline Stevens, ICE memoranda issued since 2008 and obtained under the Freedom of Information Act “suggest that U.S. citizens are especially likely to be unlawfully held by ICE as a result of so-called 287(g) programs.”¹⁶¹ Not all citizens in 287(g) jurisdictions are as lucky as Rojas, who was released. Some have been deported erroneously.¹⁶² We should expect more such unlawful detentions as the Trump administration

takes steps to expand 287(g).

This expansion of 287(g) is contrary to American law enforcement traditions. Unlike many other developed nations, the United States does not have a centralized law enforcement authority. This is appropriate, given the size of the country and the diversity of its communities. While there will always be police officers and departments engaging in misconduct, America’s decentralized policing system remains preferable to a centralized one. Regrettably, some police departments could have 287(g) agreements thrust upon them without their consent thanks to lawmakers and officials who are intent on bucking America’s law enforcement traditions.

In early 2017, Kansas lawmakers introduced bills in the Senate and House of Representatives that would require the Kansas Highway Patrol to enter into a 287(g) agreement.¹⁶³ The bills were introduced on behalf of Kansas Secretary of State Kris Kobach, a key Trump adviser on immigration policy.¹⁶⁴ Speaking about the Kansas bills, Kobach mentioned that, while the Kansas governor already has the authority to order the Highway Patrol to enter into a 287(g) agreement, “Governors come and go,” adding, “This puts it in Kansas law and says that the people of Kansas want it to be done.”¹⁶⁵

The growth in the number of 287(g) agreements and the revival of the task-force model will have a negative impact on policing, especially in communities with a significant Latino population. A 2013 survey from the think tank PolicyLink found that almost half of Latinos were less likely to contact police if they were victims of crime because of fear that police will ask them or people they know about their immigration status.¹⁶⁶ This fear doesn’t only apply to undocumented migrants; almost a third of U.S.-born Hispanics also report that they would be hesitant to contact the police if they had been the victim of a crime.¹⁶⁷ Less cooperation with police means more crimes that go unsolved.

There is already some evidence that minority communities have been hesitant to

report serious crimes in the wake of Trump's inauguration, with officials in a number of cities noticing a decline in Latinos reporting crime.¹⁶⁸ In March 2017, Los Angeles Police Department Chief Charlie Beck noted that Latino reports of sexual assault had declined 25 percent compared to the number reported in 2016.¹⁶⁹ Houston's police chief reported that from January to March 2017 there had been a 42.8 percent decrease in rape reports by Hispanics compared to the same time period in 2016.¹⁷⁰ The non-Hispanic community decreased their rape reporting by only 8.2 percent. Although it is too early to definitively claim that Trump's administration is responsible for this fall in crime reporting, it is noteworthy—and hardly surprising—given the research on Latino's hesitancy to contact the police if they fear that they or someone they know could be deported.¹⁷¹

Effective policing requires that citizens report crimes and have confidence in police officers. The revitalization and expansion of the 287(g) program would not only run the risk of worsening racial profiling, it would also breed mistrust of police among the communities they serve. More fundamentally, the 287(g) program inappropriately morphs local police officers into federal immigration agents. DHS should scrap all existing 287(g) agreements and not enter into any new agreements.

Sanctuary Cities

On the campaign trail, candidate Trump repeatedly railed against so-called sanctuary cities, which he and his allies characterized as lawless holdouts where dangerous undocumented aliens flourish.¹⁷² In keeping with his repeated campaign pledge to put an end to sanctuary cities, Trump and his allies have taken aim at federal funding of sanctuary cities and argued that these cities are violating federal law.¹⁷³ Attacks on sanctuary cities raise federalism concerns that have important implications on whether local voters get to change their local law enforcement policies. Fortunately, the Constitution allows local jurisdictions to implement sanctuary policies.

“Sanctuary city” is not a legally defined label. Rather, it is a term used to describe a city where local policymakers have chosen not to assist the federal government in enforcing immigration laws through informal agreements or codified policy. Depending on how it's defined, there are anywhere from a few dozen to hundreds of sanctuary jurisdictions in the United States.¹⁷⁴

Trump targeted sanctuary cities on January 25, 2017, when he signed an executive order that prohibited the federal government from issuing non-law-enforcement grants to agencies that don't comply with a federal statute banning local governments from limiting cooperation with immigration authorities.¹⁷⁵

But what motivated Trump to issue the executive order in the first place? On the campaign trail, Trump emphasized the supposed public safety risks associated with sanctuary policies: “We will end the Sanctuary Cities that have resulted in so many needless deaths.”¹⁷⁶ Trump's allies have expressed similar sentiments. Before President Trump nominated him to be attorney general, then senator Jeff Sessions introduced the tendentiously named Protecting American Lives Act, a bill seeking to withhold funds from sanctuary cities.¹⁷⁷ In an August 2017 column for *Breitbart*, Kobach wrote that sanctuary policies “have had deadly consequences for U.S. citizens.”¹⁷⁸

Attorney General Sessions described sanctuary policies as “lawless” in an August 2017 speech, and *National Review* editor Rich Lowry wrote in July 2015 that San Francisco's sanctuary policies are “meant to create a zone of lawlessness.”¹⁷⁹ In early 2018, DHS Secretary Kirstjen Nielsen told the Senate Judiciary Committee that DOJ was considering criminally charging officials in sanctuary jurisdictions.¹⁸⁰

Despite what critics of sanctuary cities sometimes claim, there is little evidence that sanctuary cities suffer from more crime than other cities.¹⁸¹ Sanctuary policies do not have a statistically significant effect on crime rates.¹⁸²

Nor are sanctuary city policies lawless. It is not the job of states and localities to enforce

“Effective policing requires that citizens report crimes and have confidence in police officers. The revitalization and expansion of the 287(g) program would not only run the risk of worsening racial profiling, it would also breed mistrust of police among the communities they serve.”

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federal law. The Tenth Amendment protects states from forced cooperation with federal law enforcement, with its anti-commandeering doctrine banning the federal government from commandeering state legislatures or law enforcement officers. This doctrine allows state and local governments to refuse to enforce federal law.¹⁸³

Many sanctuary city policies are implemented at the department and city level.¹⁸⁴ Shortly after the 2016 election, the Los Angeles Police Department announced that it would continue its policy of forbidding officers from stopping people solely to confirm immigration status.¹⁸⁵ A Chicago ordinance bars police officers from inquiring after an individual’s immigration status or citizenship.¹⁸⁶

Why would dozens, if not hundreds, of state and local jurisdictions choose not to cooperate with federal immigration enforcement? In some jurisdictions there are political benefits for local lawmakers and police officials who adhere to sanctuary policies. But there are also sound law enforcement reasons for declining to enforce immigration law. Sanctuary policies help police, allowing them to secure cooperation from crime victims and witnesses who don’t wish to disclose their immigration status or the immigration status of a friend, spouse, or family member.

There are numerous examples of sanctuary policies aiding police departments’ relationships with the communities they serve. In 2006, the New Haven, Connecticut, police chief issued an order banning officers from asking about residents’ immigration status, with an exception for criminal activity investigations.¹⁸⁷ Despite initial disagreement within the department about the need for the order, many officers later reported that the policy improved relationships with the immigrant community. As one officer put it, “we have done an incredible job of getting them to overcome their fear of the police.”¹⁸⁸

As was noted above, a significant portion of Hispanics would be less likely to contact police if they were the victims of crime out of fear that officers will investigate their immigration

status or that of someone they know.¹⁸⁹ In cities with a large Hispanic community, that can have a major negative effect on policing.

Local officials in some of these jurisdictions have embraced their city’s sanctuary city designation. Shortly after Trump’s election, Chicago Mayor Rahm Emanuel said, “[Chicago] always will be a sanctuary city.”¹⁹⁰ In January 2017, San Francisco Mayor Edwin Lee echoed that sentiment: “We are a sanctuary city now, tomorrow, forever.”¹⁹¹

That some local lawmakers embrace their sanctuary city status with pride made confrontations with the federal government inevitable in the wake of Trump’s executive order.¹⁹²

Section 9(a) of Trump’s January 2017 executive order requires the attorney general and DHS secretary to withhold non-law-enforcement grants from jurisdictions that do not comply with 8 U.S.C. § 1373.¹⁹³ Section 1373 forbids state and local governments from imposing restrictions on local officials sending information about the immigration or citizenship status of any person to federal immigration agencies.¹⁹⁴

In April 2017, a judge on the United States District Court for the Northern District of California granted San Francisco’s and Santa Clara County’s motions to enjoin Section 9(a).¹⁹⁵ The federal government asked the court to reconsider the injunction, which the court declined to do.¹⁹⁶ In November 2017, the same judge permanently blocked the enforcement of Section 9(a), writing, “The Executive Order attempts to use coercive methods to circumvent the Tenth Amendment’s direct prohibition against conscription.”¹⁹⁷

There is a strong argument that Section 1373 is unconstitutional.¹⁹⁸ After all, Supreme Court precedent forbids the federal government from commandeering local officials.¹⁹⁹ In June 2018, Michael Baylson, a Senior United States District Judge of the U.S. District Court for the Eastern District of Pennsylvania, issued a decision regarding Jeff Sessions’s policy of withholding funds from sanctuary jurisdictions.²⁰⁰ Judge Baylson found that the Supreme Court’s ruling in *Murphy v. NCAA*, a sports gambling

case, made Section 1373 unconstitutional.²⁰¹

Section 1373 bans prohibitions on police departments sending immigration status information to federal authorities, so a jurisdiction can both have sanctuary policies and be in compliance with Section 1373 if it doesn't collect such information in the first place.²⁰² Seattle and San Francisco officials made this argument in their lawsuits against the Trump administration.²⁰³

A 1999 case left the policy of police not requesting immigration status information available to local lawmakers.²⁰⁴ The United States Court of Appeals for the Second Circuit held that Section 1373, did not, on its face, violate the Tenth Amendment's anti-commandeering doctrine.²⁰⁵ However, the ruling did leave room for sanctuary policies, as it didn't address policies forbidding police officers from inquiring about immigration status.²⁰⁶

The lack of information-sharing that Section 1373 seeks to address is not the only issue in sanctuary policy disputes between the federal government and state and local governments. Even if Section 1373 were constitutional, there are issues associated with Trump's executive order, which mandated that jurisdictions that don't comply with the statute be ineligible for non-law-enforcement grants.²⁰⁷

The Constitution grants spending powers to Congress, not the president.²⁰⁸ In his ruling enjoining the Executive Order, Judge Orrick of the United States District Court of the Northern District of California noted that its "attempt to place new conditions on federal funds is an improper attempt to wield Congress's exclusive spending power and is a violation of the Constitution's separation of powers principles."²⁰⁹

Trump's allies in Congress could impose grant restrictions on sanctuary jurisdictions. But even this approach is fraught with constitutional issues. Chief Justice Roberts, writing the majority opinion in the first Supreme Court challenge to the Affordable Care Act, noted that

the threat of withholding funds from states that didn't expand Medicaid was an unacceptable "gun to the head" of states.²¹⁰ If Congress authorized withholding all non-law-enforcement grants from sanctuary jurisdictions it's unlikely such conditions would survive the inevitable legal challenges. Courts would surely rule that such a move is unconstitutionally coercive.

Nonetheless, the Trump administration's position is unambiguous, and jurisdictions with sanctuary policies will continue to face pressure from the federal government until the Supreme Court addresses the constitutionality of Section 1373 and similar statutes. In the meantime, lawmakers should embrace federalism when it comes to policing. Law enforcement has traditionally been a local issue, and it should remain that way. San Francisco officials know more about what policies are best for San Franciscans than Trump administration officials in Washington. Federal agencies can still enforce federal law in sanctuary cities, but it should be up to local officials and police officers to determine how much cooperation is appropriate.

CONCLUSION

Overly aggressive enforcement of immigration laws erodes localism and threatens the civil liberties of American citizens and immigrants. The current administration's immigration policies are set to worsen this trend.

This worrying development can be halted by protecting citizens' privacy at the border and ports of entry, restricting the use of vast databases, scrapping 287(g) agreements, reinstating the Priorities Enforcement Program, and not pressuring local officials in sanctuary cities to cooperate with federal immigration authorities. Local control of law enforcement and privacy safeguards will help protect Americans from the civil liberties violations that accompany a federal government intent on aggressive immigration law enforcement.

“If Congress authorized withholding all non-law-enforcement grants from sanctuary jurisdictions it's unlikely such conditions would survive the inevitable legal challenges. Courts would surely rule that such a move is constitutionally coercive.”

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