

REPORT CARD

The Biden Administration's Track Record on Enforcement, Detention, and the Criminalization of Immigrants of Color

OVERVIEW

At the beginning of the Biden administration, the National Immigration Project issued policy priorities for executive action, and has regularly advocated with the administration on these key priorities alongside a broad range of partners. Now, almost halfway through President Biden's term, we reflect back on those priorities and what progress the administration has – and has not – made. In the coming months, it is critical for the administration to engage robustly with advocates on these priorities and to take more concrete action to eliminate the most harmful aspects of the immigration enforcement and detention apparatus.

OUR GRADING RUBRIC

We assessed the Biden administration's progress based on the following rubric:

GREEN

The administration fully implemented the recommendation.

YELLOW

The administration has taken some steps towards implementing the recommendation, but more action is needed.

RED

The administration has either failed to take any steps to advance the recommendation or has taken opposing steps that actively harm immigrant communities.

PRIORITY 1: Disentangling local and immigration law enforcement

Our Recommendation	Administrative Action	Grade
Do not reinstate the Priority Enforcement Program (PEP) and end data-sharing between state and local law enforcement and ICE/CBP	While the Biden administration has not reinstated PEP and instead issued its own enforcement framework, the administration has not ended data-sharing between state and local law enforcement and ICE/CBP.	YELLOW
End the use of immigration detainers and release notifications	<p>Jurisdictions with sanctuary policies have acted to reduce the efficacy of immigration detainers and release notifications, but the administration has not ended its use of and reliance on detainers.</p> <p>That said, interior arrests have decreased and the administration has reduced or eliminated the use of oppressive tactics like workplace and home raids.</p>	YELLOW
End the use of the Criminal Alien Program (CAP)	The Biden administration has not ended CAP and continues to rely on a prison to deportation pipeline that captures Black and brown immigrants who are already more likely to be caught up in the criminal legal system.	RED
Terminate existing 287(g) contracts and refrain from entering into new ones	<p>While on the campaign trail, President Biden promised to end all the 287(g) contracts the Trump administration entered into. That promise remains almost entirely unfulfilled.</p> <p>However, the Biden administration has not entered into new 287(g) contracts, and it ended two 287(g) programs.</p>	YELLOW
Terminate contracts with the private companies that fuel ICE's out of control data collection	Last year, the Biden administration renewed its contract with Palantir for another 5 years, and has not terminated its contracts with Thomson Reuters.	RED
End the construction of HART (Homeland Advanced Recognition Technology)	Congress reduced funding for HART and ordered an independent evaluation, but the Biden administration has not taken action to terminate the program.	RED

<p>Investigate and end entanglement with Operation Lone Star and other abusive state and local programs</p>	<p>The Biden administration has not cut ties with Operation Lone Star, and there is evidence that CBP officers are actively colluding to facilitate OLS arrests and prosecutions in many instances. Despite repeated requests from advocates, DHS has not initiated an investigation and has not meaningfully cut ties with Texas officials. Similarly, DOJ has not cut funding to Texas agencies and has moved far too slowly on the many complaints and letters that advocates have submitted detailing violations under the program.</p>	<p>RED</p>
<p>Immediately end other forms of DHS data-sharing and divest the agency of its powerful tech.</p>	<p>The Biden administration has asked for increased funding for surveillance tech for CBP and as a part of ICE ERO’s “alternatives to detention.”</p> <p>While in Executive Order 14074, the Biden administration has ordered the National Resource Council of the National Academy of Sciences to study federal law enforcement agency use of facial recognition technology, other technologies that employ biometric data, predictive algorithms, and data storage and access; and has also ordered the Attorney General, the Secretary of Homeland Security, and the Director of Office of Science and Technology Policy to conduct an inter-agency process to review the same, overall there has been a dramatic increase in the use of surveillance technologies across immigration enforcement agencies.</p>	<p>RED</p>
<p>Prohibit the collection and use of certain forms of data, including driver’s license and vehicle registration data, social media, and location tracking</p>	<p>The Biden administration has not prohibited the collection or use of any of these forms of data.</p>	<p>RED</p>
<p>Restore Privacy Act Protections by rescinding the policy that exempts DHS information collection and sharing from Privacy Act provisions and which extends Privacy Act protections only to U.S. citizens and lawful permanent residents</p>	<p>The Biden administration has not acted to restore Privacy Act protections.</p>	<p>RED</p>
<p>Remove civil immigration information from the FBI’s NCIC database</p>	<p>The Biden administration has not removed civil immigration information from the NCIC database.</p>	<p>RED</p>

PRIORITY 2: End the criminalization of migrants

Our Recommendation	Administrative Action	Grade
Issue an equity-focused prosecutorial discretion memo	The Biden administration issued a prosecutorial discretion memo that did not have any categorical bars to receiving prosecutorial discretion. It did, however, rely on criminal convictions as negative factors, and especially the flawed category of aggravated felony convictions, and still framed the question in terms of who would be an enforcement priority rather than a priority for protection.	YELLOW
Rescind the Trump Administration’s pending criminal bars to receiving asylum	The Biden administration did not rescind this pending rule, which was stopped because of a court-ordered preliminary injunction. The Biden Administration also did not withdraw its appeal of the injunction, and the appeal has been stayed for over two years while it “reviews” the rule. Meanwhile, the administration has put forward other rules that erode asylum, harm those seeking safety, and violate our treaty obligations.	RED
Stop referring individuals to DOJ for prosecution under 8 USC § 1325 and 8 USC § 1326 (criminalizing entry and reentry to the US)	The Biden administration continues to prosecute people for crossing the border under racist laws passed by eugenicist, white supremacist legislators. They have also defended these laws against constitutional challenges.	RED
Establish a Commission to review §§ 1324, 1325, and 1326 convictions and begin a pardon and commutation process	The Biden administration has not undertaken any such action.	RED
Office of Inspector General (OIG) should investigate abuses associated with immigration-related prosecutions	OIG has not investigated the use of prosecutions in executing the family separation policy and has not initiated any investigation of ongoing abuses associated with immigration-related prosecutions.	RED
Suspend the Institutional Hearing Program (in which people who are still incarcerated go through their removal proceedings via video teleconference)	The Biden administration has not suspended the Institutional Hearing Program, which continues to fuel well-documented violations of basic due process rights and to funnel people from incarceration to deportation without any possibility of second chances.	RED

<p>End the use of for-profit prisons and Intergovernmental Service Agreements across all federal agencies and for all purpose</p>	<p>The Biden administration issued an executive order phasing out the use of for-profit prisons for federal prisoners held under Bureau of Prisons authority, but continues to use them for immigration detention, which represents the bulk of for-profit prison contracts with the federal government. It also continues to use IGSA's for immigration detention, even where facilities are documented to be particularly abusive.</p> <p>The Biden administration took some early steps to end certain IGSA's or decrease the use of facilities with IGSA's, but those efforts have not continued as they should.</p>	<p>YELLOW</p>
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PRIORITY 3: Ending immigration detention

Our Recommendation	Administrative Action	Grade
<p>End the use of immigration detention</p>	<p>When President Biden took office, detention numbers were the lowest they had been in years, an average daily population of around 12,000 people. Currently, ICE incarcerates nearly 28,000 people.</p> <p>The Biden administration closed some especially abusive detention facilities, but appears to have stopped those shutdowns and has not reduced the number of people in detention overall. And although the Biden administration ended the disastrous and cruel practice of family detention, they are now considering reinstating it.</p>	<p>RED</p>
<p>Terminate contracts with local jails and private prisons and regulate to prevent any future local quotas, which guarantee a minimum number of people ICE will detain in a given locality</p>	<p>The Biden administration has terminated some jail contracts (as with the notorious Etowah County Jail) and some private prison facilities, but has not terminated nearly enough and has not regulated to prevent local quotas.</p>	<p>YELLOW</p>

PRIORITY 4: Creating a right to return home

Our Recommendation	Administrative Action	Grade
<p>Create an Office of Removal Order Review (OROR) to review the removal orders of deported people and create a process to facilitate their return</p>	<p>The Biden administration has not created an OROR, but did create an initiative specifically for veterans, ImmVets, that, in addition to streamlining immigration processes, has facilitated the return of some people who previously served in the U.S. armed forces.</p>	<p>YELLOW</p>

PRIORITY 5: Addressing the punitive and unjust immigration court system

Our Recommendation	Administrative Action	Grade
<p>The Attorney General (AG) should address a number of harmful Trump-era AG decisions, especially prioritizing <i>Matter of Castillo-Perez</i> and <i>Matter of Thomas/Thompson</i>, and should certify and issue new opinions for harmful Board of Immigration Appeals (BIA) decisions.</p>	<p>The AG has not certified or rescinded any of the decisions we recommended, and has yet to take action on <i>Castillo-Perez</i> or <i>Thomas/Thompson</i>, which remain the two key priority cases that must be addressed before the end of this administration because of their wide-ranging harmful impact and their racial just implications.</p> <p>The AG did issue <i>Matter of B-Z-R-</i>, which overruled <i>Matter of G-S-S-</i> and allowed for the consideration of mental illness when making a particularly serious crime determination, but more action is needed on harmful decisions of prior administrations.</p>	<p>YELLOW</p>
<p>Regulate to make clear immigration judges' authority to administratively close cases and require it in certain circumstances (beyond vacating <i>Matter of Castro-Tum</i>)</p>	<p>AG Garland vacated <i>Matter of Castro-Tum</i>. However, the Biden administration has not issued any regulations to clarify administrative closure authority or to require it in any circumstances.</p>	<p>YELLOW</p>
<p>Issue guidance advising AUSAs to take immigration consequences into account in plea negotiations</p>	<p>The Biden administration has not issued any such guidance, nor has the Office of Access to Justice engaged with advocates on these immigration-related issues.</p>	<p>RED</p>

<p>Create an oversight body outside of the Executive Office for Immigration Review (EOIR) to review complaints against immigration judges and give it the power of reassignment and dismissal</p>	<p>The Biden administration has not created any such body. However, the administration has appointed a more diverse bench of immigration judges and has not drawn as heavily from former ICE trial attorneys. It also appears to be taking more seriously complaints against abusive IJs.</p>	<p>YELLOW</p>
<p>Support states in advising in-lieu-of bond defendants of federal immigration consequences by establishing a nationwide task force and state-level support centers</p>	<p>The Biden administration has not assisted states in providing competent advice regarding the potential immigration consequences of a plea or conviction. While DOJ has set up a new Office of Access to Justice, that office has not meaningfully engaged on immigration issues.</p>	<p>RED</p>

CONCLUSION

While the administration, particularly in its early days, began to make some progress on interior enforcement and detention, that progress appears to have stalled and the engagement with advocates has been less than robust. We are heartened to see fewer interior enforcement actions; the rescission of some contracts with particularly abusive facilities; the creation of ImmVets; and the lack of categorical bars in prosecutorial discretion decisions, and we were thrilled with the administration’s decision to end family detention. However, we need to see more full-throated embrace of early goals to move towards a more humane and welcoming immigration system, and less reliance on categories that reify racial bias within the present system. We also need to see more concrete actions to end the ongoing criminalization of immigrants of color. Much remains to be done in order to create a more humane, equitable, and functional immigration system. Fortunately, the Biden administration still has time to undertake the steps we have laid out in these recommendations and in subsequent advocacy with different agencies. We still hope to issue a better report card upon the conclusion of President Biden’s first term.