



# Building Immigration Policy Back Better

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Since 2017, President Trump and his allies have hurtled the politics and policy of immigration in xenophobic directions to an extent without modern precedent, and with devastating effect.<sup>1</sup> The Trump presidency has instituted hundreds of restrictionist measures, including high profile initiatives that have prompted significant public controversy and many less prominent, often technical measures that have erected a sprawling, “invisible wall” and placed millions at heightened risk of deportation.<sup>2</sup> With the onset of the novel coronavirus pandemic, the administration has intensified this crackdown further, using the outbreak as a pretext to institute even more sweeping restrictions that it previously had tried but failed to achieve.

Because these measures have been implemented almost entirely through executive action, rather than new legislation, the next administration will be well-positioned to roll back many of them—that is, provided that it commits the resources, energy, and political capital required. But even as it seeks to dismantle the Trump immigration legacy, the new administration should also lay the foundation for a more fundamental paradigm shift away from the entrenched regime of comprehensive immigration severity that enabled the Trump presidency’s xenophobic crackdown in the first place.<sup>3</sup> In both its executive actions and legislative agenda on immigration, the new administration has an opportunity to

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<sup>1</sup> See Todd Schulte, *Tearing Families Apart*, FWD.US (Sept. 29, 2020).

<sup>2</sup> See Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes Under the Trump Presidency*, MIGRATION POL’Y INST. (July 2020); Diane Rish, *Dismantling the “Invisible Wall” Against Legal Immigration, Brick by Brick*, AM. IMMIGR. LAWS. ASS’N (Mar. 21, 2018).

<sup>3</sup> See Anil Kalhan, *Revisiting the 1996 Experiment in Comprehensive Immigration Severity in the Age of Trump*, 9 DREXEL L. REV. 261 (2017).

embrace the more ambitious objective, as it has in other policy domains, to “build back better” in the aftermath of Trump.<sup>4</sup>

## Rolling Back Trumpism

Experts have provided detailed recommendations for specific actions that the next administration should take across different areas of immigration policy, and many of those recommendations can and should be swiftly implemented.<sup>5</sup> However, fully rolling back the Trump presidency’s immigration legacy requires more than detailed technocratic attention to specific policies. Several broad principles should guide the new administration’s efforts.

First, the new administration and its allies must commit the political capital and resources necessary to roll back Trump-era policies promptly and to the maximum extent feasible. The Trump White House achieved success in its immigration agenda by being relentlessly attentive to the details of their implementation in the federal bureaucracy.<sup>6</sup> The new administration needs to be similarly relentless in making reversal of those same measures a high priority and should therefore appoint personnel who are committed to energetically seeing reforms through in their implementation. The new administration also must be prepared, along with its political allies, to forcefully defend its actions and lean into the fights when it faces political criticism or litigation in response, which it will.

Second, the new administration should institute meaningful efforts to ensure accountability and redress for wrongdoing and ethical breaches under its predecessor. Most notably, for example—although by no means exclusively<sup>7</sup>—the need for accountability is readily apparent in the Trump presidency’s policy of forcibly separating children from their parents at the border, which experts have concluded amounts to torture.<sup>8</sup> In addition to working more diligently to reunite separated children with their families, the new administration should establish mechanisms to investigate and publicly disclose the facts surrounding the development and implementation of that policy, to

<sup>4</sup> See *Build Back Better: Joe Biden’s Jobs and Economic Recovery Plan for Working Families*, JOEBIDEN.COM (last visited Nov. 30, 2020).

<sup>5</sup> See Doris Meissner & Michelle Mittelstadt, *At the Starting Gate: The Incoming Biden Administration’s Immigration Plans*, MIGRATION POL’Y INST. (Nov. 2020); see also *A Vision for America as a Welcoming Nation: AILA Recommendations for the Future of Immigration*, AM. IMMIGR. LAWS. ASS’N (Nov. 30, 2020); *As Trump Prepares Immigration Rally in Arizona, Over 200 Organizations Release ‘2021 Immigration Action Plan’, Offering Blueprint to Undo Damage Wrought by Trump, Transform America’s Immigration System*, IMMIGR. HUB (Aug. 18, 2020); T. Alexander Aleinikoff & Donald Kerwin, *Improving the U.S. Immigration System in the First Year of the Biden Administration*, ZOLBERG INST. ON MIGRATION AND MOBILITY (last updated Nov. 10, 2020); *Immigration Priorities for a Biden Administration*, NAT’L IMMIGR. F. (Nov. 11, 2020).

<sup>6</sup> See Gabby Orr & Andrew Restuccia, *How Stephen Miller Made Immigration Personal*, POLITICO (Apr. 22, 2019).

<sup>7</sup> See Jennifer Lee Koh, *Executive Defiance and the Deportation State*, 130 YALE L.J. (forthcoming 2021); see also Hamed Aleaziz, *ICE Expelled 33 Immigrant Children Back To Guatemala After A Judge Said They Couldn’t*, BUZZFEED NEWS (Nov. 24, 2020); Antonia Noori Farzan, *Iranian Student Turned Around at the Airport was Deported Despite Order from a Federal Judge, Attorneys Say*, WASH. POST (Jan. 22, 2020); Matt Katz, *ICE Swiftly Deports Uzbek Man After He Alleges Being Beaten in Custody*, Gothamist (Sept. 22, 2020); Miranda Bryant, *Allegations of Unwanted ICE Hysterectomies Recall Grim Time in US History*, GUARDIAN (Sept. 21, 2020).

<sup>8</sup> See Michael D. Shear, Katie Brenner & Michael S. Schmidt, *‘We Need to Take Away Children,’ No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 6, 2020); see also Beth Van Schaack, *The Torture of Forcibly Separating Children from Their Parents*, JUST SECURITY (Oct. 18, 2018).

provide redress to children and families who suffered harms, and to ensure that officials at any level who directed, authorized, participated in, or condoned misconduct are held accountable.<sup>9</sup> For wrongdoing that is less severe, less severe responses may be appropriate, but disclosure and proportionate forms of accountability remain essential—not only to penalize individuals who are culpable, but to deter future officials from similarly engaging in wrongdoing and flouting the rule of law.

Finally, the new administration should directly confront the broader context that has enabled the Trump presidency’s xenophobic agenda. For years, Trump has dehumanized and incited supporters to scapegoat immigrants, often in openly racist terms, while his Republican Party allies have acquiesced or joined him with impunity. The new president and other administration officials should forcefully repudiate this toxic discourse and find creative ways to contribute—on a regular and ongoing basis—to the development of a fundamentally different discourse about immigrants and immigration in the years to come.

### Reconstructing Immigration Policy

Ultimately, the new administration should aspire to effect a paradigm shift in the regulation of immigration, moving away from the punitive regime of comprehensive immigration severity that has dominated immigration policy for decades and that directly enabled the Trump presidency’s policies. In its proposals for pandemic relief and economic recovery, the incoming administration has pledged to “build back better,” echoing an emergent approach to international post-disaster recovery that emphasizes creating sustainability, building resilience in affected communities, and reducing vulnerability to future disasters.<sup>10</sup> Analogous principles should guide the new administration’s approach to recovery from the Trump administration’s damage to immigration policy.

The most durable means of achieving a paradigm shift would be through legislation, and the new administration certainly should pursue meaningful reforms in Congress. When doing so, however, it should avoid the flawed notion, as described (and criticized) by Frank Sharry, that taking a “hard stance on enforcement” might successfully “win over . . . support for comprehensive immigration reform.”<sup>11</sup> This largely discredited approach—which previous administrations have incorporated into both their enforcement practices and their legislative proposals—not only has failed to achieve reform. It also has further deepened and consolidated the overly punitive nature of the existing regime—thereby exacerbating some of the very dysfunctions in need of legislative reform in the first place. The new administration should break this self-defeating cycle, using its legislative agenda more creatively instead to articulate and build support for a fundamentally different framework.

<sup>9</sup> See Denise Bell, *US Officials Involved in Policy of Family Separation Must Be Investigated*, GLOBE POST (Nov. 20, 2020).

<sup>10</sup> See Report, Global Facility for Disaster Reduction and Recovery, *Building Back Better in Post-Disaster Recovery* (2020).

<sup>11</sup> See Frank Sharry, *Backlash, Big Stakes, and Bad Laws: How the Right Went for Broke and the Left Fought Back in the Fight over the 1996 Immigration Laws*, 9 DREXEL L. REV. 269, 288 (2017).

Wherever possible, the new administration also should build that kind of framework into its interpretation, implementation, and enforcement of existing laws, with careful attention to the ways in which executive actions can create the foundation for subsequent legislation.<sup>12</sup> While the Trump administration turned every aspect of immigration policy into a potential occasion for either excluding individuals from the United States or initiating removal proceedings, the new administration should use the opportunity created by a moratorium on deportations—which it already has pledged—to develop and articulate a different conception of the place of enforcement in immigration policy. Immigration enforcement is civil and administrative in nature, not criminal and punitive, and it also must reflect and embody principles of proportionality, due process, transparency, and accountability. Moreover, sound administration of immigration policy also requires attention to a range of other social, economic, and humanitarian objectives that are embodied in the immigration laws and that are no less important than enforcement.

In addition to rebalancing these objectives in the administration of immigration policy, the new administration should make its civil enforcement practices less punitive—for example, by minimizing the use of detention, barring ICE officers from mischaracterizing themselves as “police,” and making greater use of mechanisms that treat civil enforcement practices as occasions for individuals to come into compliance with legal requirements, rather than exclusively as occasions for detention, deportation, and other punitive responses.<sup>13</sup> It also should make sure that the Justice Department’s statutory interpretation approaches and litigation strategies are aligned with the full range of values and principles reflected in the immigration laws, rather than aggressively interpreting statutory language in enforcement-maximizing fashion, as previous administrations often have done.

Finally, the new administration should reclaim and center rule of law values in its immigration policy agenda.<sup>14</sup> As Tom Jawetz has explained, while immigration restrictionists have long deployed heavy doses of “law and order” rhetoric in support of their agenda, the immigration system itself has long failed to fulfill and encourage respect for rule of law principles. Those longstanding failures have worsened under the Trump presidency, which has gutted judicial independence of the immigration courts and whose officials have often defied judicial directives and legal requirements altogether.<sup>15</sup> In both its executive actions and its legislative reform agenda, the new administration should make clear not only that a modernized immigration system that “builds back better” is consistent with rule of law values, but also that respect for the rule of law depends upon a fundamental paradigm shift.<sup>16</sup>

<sup>12</sup> See Tom Jawetz, *The President and Immigration Law: Restoring Faith in Our Immigration System Through Enforcement Discretion and Reform*, JUST SECURITY (Oct. 14, 2020).

<sup>13</sup> See Press Release, Congresswoman Nydia M. Velázquez, Velázquez Seeks to Block Immigration Feds from Identifying as Local Police (July 11, 2019); see also Jawetz, *supra* note 12.

<sup>14</sup> See Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, CTR. FOR AM. PROGRESS (July 22, 2019).

<sup>15</sup> See Koh, *supra* note 7.

<sup>16</sup> *The Biden Plan for Securing Our Values as a Nation of Immigrants*, JOEBIDEN.COM (last visited Nov. 30, 2020).

## The Continuing Importance of State and Local Engagement

In the coming years, state and local governments will continue to have important roles to play in shaping the politics and policy of immigration, both in cooperation and conflict with the federal government. While restrictionists have long urged states and localities to adopt various enforcement-oriented measures, many states and localities have recognized the constructive roles they can play in support of immigration—as institutions directly working to integrate and support immigrants as community members; as sources of alternative, potentially broader conceptions of immigrants’ rights; as influences on federal actors who seek their cooperation; and as focal points for building and asserting opposition to restrictionist policies at the federal level.<sup>17</sup>

During the Bush and Obama administrations, states and localities increasingly implemented initiatives to pursue these objectives, including more comprehensive immigrant integration programs; efforts to extend occupational licensing opportunities; efforts to expand access to government benefits, programs, and services; and policies limiting state and local participation in federal immigration enforcement activities.<sup>18</sup> The Trump presidency’s anti-immigration crackdown has prompted many states and localities to become even more active defenders of immigration and immigrants’ rights<sup>19</sup>—perhaps most visibly through litigation directly challenging some of the Trump presidency’s high profile measures and other actions by state attorneys general, but also through a broad constellation of less visible ways that build upon the roles that states and localities already had come to play during previous administrations.<sup>20</sup>

Even with a new administration that professes support for immigration, states and localities should remain engaged with immigration issues in these same ways. While states and localities will find additional opportunities to cooperate with the new administration in support of immigrant communities, there also will continue to be occasions in which the interests of their constituents prompt state and local governments to challenge federal immigration enforcement policies and practices, as they periodically did under the Obama administration.<sup>21</sup> And with the federal government less hospitable to the restrictionist agenda, anti-immigration advocates likely will renew and intensify efforts to pursue restrictionist measures at the state and local levels—thereby heightening the importance of state and local responses in their own backyards.

<sup>17</sup> See Anil Kalhan, *Immigration Enforcement and Federalism after September 11, 2001*, in *IMMIGRATION, INTEGRATION, AND SECURITY: AMERICA AND EUROPE IN COMPARATIVE PERSPECTIVE*, (Ariane Chebel d’Appollonia & Simon Reich, eds., 2008).

<sup>18</sup> See Anil Kalhan, *A Comprehensive Approach to “Immigrant-Friendly” State and Local Policies*, 2 DREXEL POLICY NOTES 7 (2015).

<sup>19</sup> See Jonathan Miller, *Beyond the Courts: The Role of State and Local Governments in Supporting Immigrant Communities in the Trump Era*, ACS BLOGS (July 17, 2018).

<sup>20</sup> See Terri Gerstein, *The People’s Lawyer, For All the People: State Attorneys General and Immigrants’ Rights*, ACS ISSUE BRIEF (June 2020).

<sup>21</sup> See Anil Kalhan, *Rahmmigration, Romneygration, and Federalism*, DORF ON L. BLOG (July 25, 2012).

## Conclusion

While the Trump presidency has found success in implementing its sweeping anti-immigration measures, it never has enjoyed strong public or congressional support for its radical agenda. To the contrary, even as restrictionism and xenophobia have been ascendant among conservative political, legal, and judicial elites, polls steadily have found that majorities of Americans oppose the Trump presidency's immigration agenda and continue to hold positive views about immigration.<sup>22</sup> In fact, public support for immigration has grown stronger during Trump's presidency, including among Trump's own supporters.<sup>23</sup> With this deep reservoir of public support for a new direction, the incoming administration and its allies should be neither tentative nor apologetic about seeking to do more than merely to roll back the Trump presidency's specific policy initiatives. Only by working to more fundamentally to overhaul the underlying institutions, practices, and laws that Trump inherited—which enabled his presidency to implement its restrictionist agenda so readily—will it be possible to fully turn the page and minimize the risk of a future president causing similar damage to immigration policy.

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<sup>22</sup> *Memo: Voters Across the Political Spectrum Oppose Trump's Immigration Policies*, DATA FOR PROGRESS (Nov. 3, 2020).

<sup>23</sup> See Mohamed Younis, *Americans Want More, Not Less, Immigration for First Time*, GALLUP (July 1, 2020); *Majority of Voters Say Growing Number of Newcomers to the U.S. Strengthens American Society*, PEW RES. CTR. (Sept. 10, 2020).