

**ADMIN
UPDATE**

BIDEN ADMINISTRATION ON POLICING TWO YEARS IN

President Biden was elected just a few months after the height of the uprisings that took place following the murder of George Floyd. In the second half of 2020, politicians and corporations raced to put out statements proclaiming that Black Lives Matter and raising police violence as an urgent issue to be resolved. Immediately upon taking office, the Biden Administration issued [Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government](#), which mandated an assessment of the extent to which underserved communities could access and benefit from programs, policies, and opportunities across federal agencies; and what steps each agency needed to take in order to better advance the Administration’s policy of “equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.” President Biden also [campaigned](#) on promises to undo Trump’s racist immigration policies and to hold accountable ICE and CBP, their perpetrators.

Two summers after the nationwide protests, the backlash is clear. Although most police departments nationwide [did not see any permanent cuts](#) to their budgets, and though there is no [correlation between police spending and crime levels](#), both moderates and conservatives have rushed to [blame the Defund movement](#) for seemingly every crime that has happened since its advent. Moderate democrats also [wrongly assign responsibility](#) to the movement for their poor reelection prospects. Where the Biden Administration began with momentum to demand increased police accountability, halfway through, Congress has [failed to pass](#) any significant legislation addressing the issue. In July, President Biden announced his intention to request \$37 billion for crime prevention, [explicitly stating](#) that he wanted to fund the police. The Safer America plan would provide \$13 billion through the COPS program to hire 100,000 additional officers. Right now, the House is likewise [considering legislation](#) that would [funnel federal money](#) into local police departments with the aim to expand them. Likewise, the Biden administration and Democrats in Congress have succumbed to right wing rhetoric about the border and have channeled [more funding into CBP](#) rather than out of it.

What has the Biden Administration done to address police violence, or to reform ICE and CBP? In January of 2022, it issued its [Equity Action Plan](#) for DHS, the agency that houses

the largest federal law enforcement agencies, CBP and ICE. And on May 25, the Biden Administration issued an [Executive Order on “Advancing Effective, Accountable Policing, and Criminal Justice Practices to Enhance Public Trust and Public Safety.”](#) Neither of these policies will significantly reduce law enforcement violence – whether federal or local – against people of color. Neither of these policies lives up to the aspiration of racial equity and justice.

DHS EQUITY ACTION PLAN

What does it do and how does it fall short?

The DHS Equity Action Plan identifies seven areas where the agency intends to take action to “advance equity” consistent with EO 13985. Two areas cover TSA policies, one covers DHS contracting practices, and one covers naturalization. **Two of the seven program areas are relevant to its enforcement arms, ICE and CBP, and one relevant to local law enforcement:**

- Accessing humanitarian protection during immigration processing
- Filing complaints and seeking redress in DHS activities
- Countering Domestic Violent Extremism and Targeted Violence

“Accessing humanitarian protection” refers to receiving credible fear interviews and “immigration processing” refers to CBP or ICE custody. DHS identifies several barriers to receiving credible fear interviews across CBP, ICE, and USCIS. **The Action Plan finds that:**

- CBP must reduce language barriers and to increase accommodations for deaf and hard of hearing people;
- ICE must increase access to indigenous language interpretation; address issues in accessing counsel; and increase accommodations for people with disabilities;
- USCIS must provide better interpretation for CFIs and improve access to counsel in credible fear process

The Equity Action Plan then proposes that CBP conduct internal reviews and trainings in order to improve its language access program; it also states that CBP will contract for video remote sign language interpretation. For ICE, the Action Plan states that the agency will likewise conduct internal trainings; it also requires ICE to improve its website by adding information about attorney access and to expand the Legal Orientation Program. Finally, the Action Plan requires that USCIS pace individuals who cannot receive CFIs into removal proceedings; inform people of their rights to accommodations; and ensure people have access to the legal services lists.

In order to hold the agencies accountable, the Equity Action Plan calls for internal monitoring and reporting on each agency’s progress, as well as some reporting to stakeholders. “[R]elevant CBP officials” will also have some performance metrics tied to implementation of the Equity Action Plan.

With respect to the second issue area, filing complaints and seeking redress in DHS activities, the Action Plan concludes that there is general confusion about and insufficient information available on how to file complaints, and that this may especially impact people who have less English proficiency and who are from migrant and immigrant communities.

The Action Plan proposes that, to address this issue, DHS:

- Enhance its webpage;
- Expand avenues for disseminating information;
- Review and consider improvements to Systems of Records Notices (required by the Privacy Act); and
- Create clear policies that make clear that retaliation will not be tolerated.

DHS will tie some executive performance metrics to implementing the Action Plan, as well as conduct internal monitoring and reporting.

For years, [advocates have protested](#) the distribution to police and others of grants under the heading “Countering Violent Extremism,” because the grants expand and entrench the [targeting of Muslim communities and spying on them](#) by police and other forms of law enforcement. In its section on Countering Domestic Violent Extremism and Targeted Violence, while the Action Plan does not acknowledge this harm, it states that it is moving to a “whole society approach” and away from “approaches that targeted specific communities.” It also identifies as a barrier to equity the increase in racially motivated, and specifically white supremacist violence.

The Action Plan proposes the following to promote equity:

- Expand awareness of its Center for Prevention Programs and Partnerships;
- Increase “underserved communities’” access to DHS CVE grant programs, including the Targeted Violence and Terrorism Prevention Grant Program and the Nonprofit Security Grant Program;
- Establish “policies and guidance to prevent, detect, and respond to potential domestic violent extremists within DHS”;
- Increase “intelligence analysis and information sharing capabilities” with “federal, state, tribal, local, and territorial partners”; and
- Engagement with “members of underserved communities to understand their concerns related to domestic violent extremism and targeted violence.”

As for accountability, the Action Plan states that DHS will “[c]ontinue to meet regularly with members of underserved communities and other stakeholders to report on DHS’s efforts to counter DVE and acts of targeted violence, and to welcome feedback on the effectiveness of those efforts.”

If these measures sound unimpressive it's because they are. To summarize, in order to further racial equity in DHS, the agency proposes primarily trainings, FAQs, and improving the website, and in order to hold itself accountable to those less than lofty goals, the agency primarily intends to rely on “internal monitoring and reporting,” or “stakeholder engagement” during which the agency will “welcome feedback.” The furthest the Action Plan goes is to acknowledge the presence of “potential domestic violent extremists” within the agency – both alarming and already widely known – and to propose creating policies to deal with them. The Action Plan does not actually create any such policy and the only mechanism in place to ensure DHS does is to ask “underserved communities” how they feel about DHS’s handling of the job. Meanwhile, even though both DHS and many local police departments house violent white supremacists, the Action Plan proposes that they increase intelligence sharing among such fraught agencies.

DHS and the Biden administration have some extremely low-hanging fruit when it comes to advancing racial equity. For instance, they could end the 287(g) program, which studies have shown to [increase racial profiling and decrease community safety](#). DHS could ensure that Border Patrol officers do not take custody of asylum seekers (or, in Action Plan terms, people who might need to “access humanitarian protections” while being “processed”) in the first place. DHS and the Biden administration could acknowledge the longstanding racial inequities of the U.S. criminal legal system and cease to rely on arrests and convictions in its enforcement decisions or in its enforcement mechanisms, like Secure Communities. DHS could also cease its reliance on detention and incarceration of immigrants and on electronic surveillance. Researchers and advocates have proposed [concrete achievable changes](#) on [each of those fronts](#), which the administration has so far fallen significantly short of adopting.

EXECUTIVE ORDER ON POLICING

What does it do and how does it fall short?

Even as a rhetorical, symbolic device, the President’s Executive Order on Advancing Effective, Accountable Policing, and Criminal Justice Practices to Enhance Public Trust and Public Safety falls short, as it does not explicitly name police killings as a problem. It opens by acknowledging that the “bonds of trust are frayed and broken” between many “Black and Brown communities and other communities of color” and the police. However, rather than stating outright that police have killed people, the EO identifies one of the causes of this broken trust as “law enforcement encounters that have tragically ended in the loss of life.” The passive voice that opens the EO foreshadows the debility of the provisions it contains, most of which resort to “sharing best practices,” and conducting studies about the feasibility of adopting various policies rather than actually changing them.

The EO was issued nearly two years after George Floyd’s murder and after several bills to reform policing failed in Congress. There is a limit to what the Administration can do to reform state and local policing. However, this EO does not approach that limit; in fact, it was [significantly watered down](#) from a January draft version that leaked and that [would have imposed a higher use of force standard](#) on federal law enforcement and required adoption of the higher standard and the policies in the EO in order to receive certain discretionary grants (which are only a small portion of the federal funds that go to local law enforcement).

The higher standard would have allowed for lethal force “as a last resort when there is no reasonable alternative, in other words only when necessary to prevent imminent and serious bodily injury or death.” That version [infuriated powerful police unions](#) and organizations, who complained loudly to the Biden Administration. The Administration caved to this pressure and watered down this central piece of the EO. The EO now applies the 2021 [Department of Justice use of force standard](#), which still permits lethal force if “no reasonably effective, safe, and feasible alternative appears to exist and may use only the level of force that a reasonable officer on the scene would use under the same or similar circumstances.” The “reasonable officer” standard is similar to the use of force standard that local law enforcement agencies already use, and which has led to multiple instances of excessive and deadly use of force. The Administration also weakened the incentivizing grant language, so that now discretionary grants will be distributed “in a manner that furthers the policy goals,” rather than solely upon full adoption of the policies in the EO.

However, the DOJ standard does impose on officers a duty to intervene if they see one of their colleagues using excessive force. The standard also makes explicit that officers may not use deadly force when the person would harm “only property or themselves.” Nor may they use deadly force to stop a car or someone’s escape. While these are helpful provisions to include, the EO does not come close to addressing the problem driving its adoption in the first place – police killings, especially of Black people, enabled by the “reasonable officer” standard.

The EO also expands DOJ’s ban on carotid restraints and chokeholds, as well as DOJ’s more stringent standard for no-knock entries, to all federal agencies (and incentivizes their adoption by local law enforcement agencies as described above). Additionally, the EO reinstates an Obama-era policy banning the transfer of certain military equipment to local police. And it establishes a credentialing procedure for state, local, and tribal LEAs.

Perhaps most ambitiously, the EO creates a “National Law Enforcement Accountability Database,” which would function as “a centralized repository of official records documenting instances of law enforcement officer misconduct as well as commendations and awards.” Federal LEAs will be required to submit data that is “deemed appropriate by the Attorney General” while local, state, and tribal LEAs will be “encouraged” to. While this could be a useful tool for advocates and to ensure that officers who are fired for misconduct are not

rehired in other jurisdictions, the EO seems to question the legality of establishing the database by emphasizing that the Attorney General will only undertake actions that are “consistent with applicable law,” and is charged with “assess[ing] the feasibility” of opening the Database to public access, and if so to what extent. Officers included in the Database will have the opportunity to review their information for errors and have it removed if they demonstrate that the record of misconduct came out of a procedure that lacked due process protections. Unfortunately these protections do not extend to the FBI’s [error-ridden NCIC database](#), or to DHS’s biometric database, IDENT, which contains [biometric records for over 230 million people](#) and which is [not subject to any kind of correction](#).

Of interest to immigration advocates, the EO also requires a National Academy of Sciences study of federal LEAs’ use of surveillance technology, which would assess the technology’s disparate impact; its impact on privacy and civil rights; and its accuracy. The study will include best practices and policy recommendations. Additionally, the Equitable Data Working Group is directed to assess current policies and practices governing federal use of surveillance technology. Neither of these will produce any binding policies, and both will take place on an extended timeline, but they may become useful tools for advocates combating surveillance practices.

In sum, the Administration’s EO on policing will produce some tools – studies, the Accountability Database, etc. – but fails in its primary ambition and should please only those who wish to maintain the status quo. The DHS Equity Action Plan does not even go that far. The Administration still can and should take action to implement life-saving policies limiting the power of and collaboration between local and state LEAs and ICE and CBP.



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