ICE'S USE OF SUBPOENAS TO CIRCUMVENT STATE & LOCAL LAWS

CARDOZO LAW
BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY
KATHRYN O. GREENBERG IMMIGRATION JUSTICE CLINIC

During the first Trump administration, Immigration and Customs Enforcement ("ICE") issued administrative subpoenas to states and localities to retaliate against them for not assisting with immigration enforcement and to circumvent local and state privacy and sanctuary laws. The second Trump administration will likely follow suit. This document describes ICE administrative subpoenas (also known as "immigration subpoenas"), the threats that these subpoenas pose, and preliminary recommendations for steps that states and localities should take when they receive these subpoenas.

WHAT IS AN IMMIGRATION SUBPOENA?

- An "immigration subpoena" or "ICE administrative subpoena" is a demand issued by an ICE officer–rather than a judge or a court–that orders a person or entity to produce records or testify in connection with an immigration-related investigation. (Sample here.)
- ICE frequently uses these subpoenas to obtain addresses, employment details, information about when people will be released from state and local custody, and other personal information about noncitizens and their family members (including U.S. citizens) from state and local government entities. ICE seeks this information from states and localities by subpoena to circumvent local sanctuary policies and to allow immigration agents to more cheaply and easily make immigration arrests.

WHAT MAKES IMMIGRATION SUBPOENAS PARTICULARLY CONCERNING?

A recent study documented some concerns that immigration subpoenas raise, including:

- ICE uses administrative subpoenas to force state and local government entities to provide information about their constituents–including sensitive personal details protected by state and local law–to enable more immigration enforcement.
- ICE subpoenas demand that states and localities expend resources and political capital on federal immigration enforcement. Regularly using subpoenas this way arguably violates constitutional limits on the federal government's power and constitutes unlawful commandeering of state and local resources.
- ICE's issuance of these subpoenas to state and local government entities–including primary schools and social services departments–can harm the relationship between immigrant and mixed-status communities and state and local governments, and it can chill individuals from accessing essential services such as schools and food pantries out of fear that doing so will expose them or their family members to detention and deportation.
- ICE has used subpoenas in ways that likely violate federal law and individuals' constitutional rights to privacy and free speech, including by imposing unauthorized gag requests purporting to prohibit subpoena recipients from disclosing the existence or substance of the subpoenas.

IMMIGRATION SUBPOENAS UNDERMINE STATE & LOCAL POLICY.

ICE uses immigration subpoenas to undermine state and local laws that were enacted to protect states' and localities' control over their own resources and their relationships with immigrant communities.

- The first Trump administration used ICE subpoenas in a high-profile, public effort in early 2020 to retaliate against so-called sanctuary jurisdictions and force them to collect and provide information otherwise protected by state and local laws. ICE then launched an internal campaign to encourage and systematize the use of these subpoenas across the agency, resulting in some field offices issuing many more. This effort sought to do what many state and local policies prohibit and the Constitution forbids: force states and localities to expend their own resources on federal immigration enforcement.
- The second Trump administration's aggressive immigration policies–including its efforts to undermine these constitutionally valid state and local laws–make it highly likely that his administration will ramp up their use of immigration subpoenas.

PROTECTING LOCAL RESIDENTS AND RESOURCES FROM UNLAWFUL SUBPOENAS

- States and localities can take steps to ensure that their agents comply with state and local law, protect their resources, maintain the trust of immigrant communities, and preserve the privacy of all constituents by adopting clear protocols for rigorous subpoena review and providing notice to impacted residents whose rights ICE subpoenas may violate.

- It is important to recognize that these subpoenas are not self-executing. If a recipient does not comply with an immigration subpoena and ICE intends to try to compel a response, it must seek a court order to do so. Courts retain the power to consider recipients' legal challenges and assess the validity of each administrative subpoena. Recipients may only be penalized if a court orders enforcement of the subpoena *and* they then fail to comply with the court order.

There are many reasons why a subpoena **may be invalid and unenforceable:**

- Immigration subpoenas may exceed the scope of the authorizing statute and regulations, which only authorize requests for testimony, books, papers, and documents. For example, ICE has demanded actions and items–such as prospective reporting and recordings–that it is not authorized to obtain via subpoena.

- Immigration subpoenas that request sensitive or private information may violate the Constitution. For example, subpoenas may implicate Fourth Amendment-protected privacy rights of states' and localities' residents (including U.S. citizens) or may be impermissibly overbroad.

- Of particular relevance for state and local government actors, there are arguments that some immigration subpoenas (individually or in the aggregate) violate the constitutional rule against federal commandeering of state resources.

Given these concerns, state and local jurisdictions should **adopt clear policies for subpoena review** and **carefully scrutinize immigration subpoenas prior to any response**. In developing policies for responding to ICE subpoenas, state and local jurisdictions should require that:

- All immigration subpoenas be referred to the relevant general counsel before responding.

- General counsel analyze whether each subpoena complies with the statute authorizing its issuance and with Fourth Amendment limits on searches and seizures (which requires consideration of relevance, overbreadth, and burdensomeness).

- General counsel consider whether administrative subpoenas issued by federal law enforcement–either individually or in consideration of all subpoenas received by that state or locality–constitute unlawful commandeering in violation of the Tenth Amendment.

- The person(s) whose information is targeted be notified, allowing them to consult with counsel about the subpoena and object to any potential violation of their rights. Notice should be given unless clearly prohibited by law, such as by a court-issued non-disclosure order or specific statute.

    - Although ICE has sometimes purported to command subpoena recipients to refrain from telling anyone about the subpoenas, those demands do not appear to be authorized by statute and would likely be found invalid.

- In any records produced, information that is *not* disclosable should be segregated and redacted. That is, if the relevant general counsel finds that certain information in a record may be disclosed, they should redact the information that is non-disclosable under state or local law.

- As noted, ICE cannot penalize administrative subpoena recipients for initially declining to comply with a subpoena. If a U.S. Attorney's Office seeks an enforcement order from a federal district court, recipients may then challenge the subpoena's validity. At that point, a court will decide whether the subpoena is valid and if the recipient must respond in whole or part.

Additional resources are forthcoming. Contact Lindsay Nash, Cardozo School of Law, lindsay.nash@yu.edu, and Lena Graber, Immigrant Legal Resource Center, lgraber@ilrc.org, for further information and assistance.