

Talking Points on Sanctuary Cities, the OIG memo, and 8 U.S.C. § 1373

October 24, 2016

1. The Civil Rights Division of the Department of Justice says sanctuary policies are lawful.

Vanita Gupta, Principal Deputy Assistant Attorney General and head of the U.S. Department of Justice's Civil Rights Division, testified before a congressional subcommittee that the policy adopted by the New Orleans Police Department in February 2016 pursuant to a consent decree with the USDOJ (and also its successor policy, revised in September 2016) was **lawful**.¹ The policy broadly stated that the NOPD “shall not engage in, assist, or support immigration enforcement” except in limited circumstances, and specifically prohibited disclosure of “information regarding the citizenship or immigration status of any person.”²

2. It is ICE's detainer practices, not local policies restricting warrantless detention, that are violating federal law. The OIG memorandum incorrectly suggests that policies restricting detention pursuant to ICE detainers may be unlawful. But local policies adopted to *comply* with federal law are not unlawful.

A United States District Court recently held that ICE routinely exceeds its statutory authority in issuing detainers,³ adding to a series of judicial decisions finding constitutional problems with detainer-based prolonged detention.⁴ Thus, jurisdictions that decline detainer requests to prolong detention are complying with federal law, not violating it. The memorandum issued by Department of Justice Inspector General Michael E. Horowitz in May 2016⁵ incorrectly suggested that policies relating to immigration detainers, even those that do not “explicitly restrict[] the sharing of immigration status with ICE” might in practice be “inconsistent with and prohibited by” Section

¹ *New Orleans: How the Crescent City Became a Sanctuary City* (Sept. 27, 2016), video testimony at 1:28:18 – 1:29:37, available at <https://judiciary.house.gov/hearing/new-orleans-crescent-city-became-sanctuary-city/>.

² NEW ORLEANS POLICE DEPARTMENT OPERATIONS MANUAL, § 41.6.1 (“Immigration Status”) (effective Feb. 28, 2016), ¶¶ 5, 12.

³ *Jimenez Moreno v. Napolitano*, No. 1:11-cv-05452, Docket Entry 230 (memorandum opinion and order granting summary judgment) at 15-16 (N.D. Ill. Sept. 30, 2016) (“The bottom line is that, because immigration officers make no determination whatsoever that the subject of a detainer is likely to escape upon release before a warrant can be obtained, ICE’s issuance of detainers that seek to detain individuals without a warrant goes beyond its statutory authority to make warrantless arrests under 8 U.S.C. § 1357(a)(2).”).

⁴ See Memorandum from Jeh Johnson, Secretary, Dept. of Homeland Security, to Thomas S. Winkowski, Acting Director, Immigration & Customs Enforcement, *et al.* (Nov. 20, 2014) at 2 & n.1 (noting the “increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment”) (and cases cited therein), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

⁵ Memorandum from Michael E. Horowitz, Inspector General, to Karol V. Mason, Assistant Attorney General for the Office of Justice Programs (May 31, 2016) (hereinafter “Horowitz memorandum”), <https://oig.justice.gov/reports/2016/1607.pdf>.

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1373.⁶ To the contrary, it is jurisdictions that use immigration detainers to justify prolonged detention of prisoners who would otherwise be released are likely violating federal law,⁷ while jurisdictions with policies limiting prolonged detention are complying with federal law.

3. Local police departments are entitled to make final policy decisions concerning crime control and the vindication of victims. The decision to disentangle local policing from immigration enforcement promotes community trust in the pursuit of both goals, and the federal government cannot interfere with this local policymaking.

The Supreme Court has said there is “no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”⁸ State and local sanctuary policies are directed at improving policing, by ensuring that witnesses and victims of crime trust that communicating with police will not trigger deportation. To the extent Section 1373 is interpreted to limit sanctuary policies it would directly interfere with and undermine the policing decisions of local governments. Interpreting Section 1373 to dictate that states and localities cannot prohibit local law enforcement officials from communicating immigration status information to ICE eviscerates any meaningful attempt by state and local policy makers to create community trust. As long as individual officers can communicate with ICE and thereby initiate deportation, the community trust is negated. The Tenth Amendment protects local policymaking and prevents federal interference with policymaking concerning the quintessentially local function of policing.

4. Local police departments are entitled to combat racial profiling and the unequal provision of police services. Congress’s enactments should be construed, where possible, to permit such efforts to comply with federal constitutional requirements.

State and local sanctuary policies aim to reduce or eliminate the well-documented phenomenon of racial profiling correlated to the availability of immigration enforcement action following local police action, and strive to provide police services equally to all residents, in order to comply with the Equal Protection Clause of the Constitution. The New Orleans Police Department (NOPD) policy that was recently targeted by Republicans, by way of example, actually arose after a Department of Justice investigation “found patterns of conduct by NOPD that violated the law and caused unnecessary harm to residents,” including “biased policing, including racial and ethnic profiling; and a failure to effectively communicate with, and provide policing services to, residents

⁶ Horowitz memorandum at 6-8 (addressing Cook County, Orleans Parish, Philadelphia, and New York City policies and ordinances).

⁷ *Jiminez Moreno*, at 15-16 (noting that prolonged detention pursuant to an immigration detainer amounts to a warrantless arrest in violation of 8 U.S.C. § 1357(a)(2)); *see also Arizona v. United States*, 132 S.Ct. 2492, 2506 (2012) (noting that Congress has carefully delineated the arrest authority of both federal immigration officers and state and local law enforcement).

⁸ *United States v. Morrison*, 529 U.S. 598, 618 (2000); *see also Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (“The promotion of safety of persons and property is unquestionably at the core of the State's police power”).

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with limited English proficiency.”⁹ The NOPD policy enacted to remedy these constitutional violations declared that NOPD officers “shall not take law enforcement action on the basis of actual or perceived immigration status, including the initiation of stops or other field contacts.”¹⁰

Restricting the acquisition of, or dissemination of immigration status information is lawful in order to guarantee Equal Protection as required by the Constitution. A federal court decision¹¹ struck down a provision of Alabama’s House Bill 56 (“HB56”) that would have required Alabama public schools to ascertain the immigration status of every enrolled student,¹² on the grounds that this created an “increased likelihood of deportation or harassment upon enrollment in school” that would “significantly deter[] undocumented children from enrolling in and attending school,” in violation of their right to Equal Protection.¹³ Sanctuary policies are lawful because they strive to avoid similar Equal Protection problems that arise in the policing context.

5. Local police departments are entitled to control how scarce policing resources are spent, and federal laws cannot intrude upon their sovereignty in this regard.

Federal law redirecting the efforts of state officials to the federal immigration enforcement effort implicates a Tenth Amendment concern identified by the Supreme Court, that “[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.”¹⁴ In a “world of fixed and limited law enforcement resources,” preventing the local government from being able to direct its officers away from “federal” work and toward “state” work amounts to commandeering.¹⁵ “When someone who is paid a salary so that she will contribute to an agency’s effective operation begins to do or say things that detract from the agency’s effective operation, the government employer must have some power to restrain her.”¹⁶

6. Policies addressing conduct, rather than speech, do not conflict with 8 U.S.C. § 1373.

⁹ *New Orleans: How the Crescent City Became a Sanctuary City* (Sept. 27, 2016), Statement of Vanita Gupta, Principal Deputy Asst. Att’y Gen’l, Civil Rights Division, U.S. Dep’t of Justice at 3, available at <http://docs.house.gov/meetings/JU/JU01/20160927/105392/HHRG-114-JU01-Wstate-GuptaV-20160927.pdf>.

¹⁰ NEW ORLEANS POLICE DEPARTMENT OPERATIONS MANUAL, § 41.6.1 (“Immigration Status”) (effective Feb. 28, 2016), ¶¶ 2.

¹¹ *Hispanic Interest Coal. of Alabama v. Governor of Alabama*, 691 F.3d 1236, 1248 (11th Cir. 2012).

¹² *Id.* at 1244.

¹³ *Id.* at 1247 (citing *Plyler v. Doe*, 457 U.S. 202 (1982)).

¹⁴ *Printz v. United States*, 521 U.S. 898, 922 (1997).

¹⁵ *Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996), *cert. denied sub nom. United States v. Gonzalez*, 521 U.S. 1118 (1997).

¹⁶ *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 386–87, 131 S. Ct. 2488, 2494, 180 L. Ed. 2d 408 (2011) (quoting *Waters v. Churchill*, 511 U.S. 661, 675, 114 S. Ct. 1878, 128 L.Ed.2d 686 (1994) (plurality opinion)).

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A case addressing “Special Order 40” of the Los Angeles Police Department (“LAPD”) governing interactions with noncitizens is instructive. “Special Order 40” did not restrict LAPD officers from communicating with federal immigration authorities, but instead “impose[d] limits on [their] ability to investigate the immigration status of aliens with whom they come into contact.”¹⁷ The California appellate court found Special Order 40 did not conflict with 8 U.S.C. § 1373: “[Special Order 40] does not address communication with ICE; it addresses only the initiation of police action and arrests for illegal entry. Section 1373(a) does not address the initiation of police action or arrests for illegal entry; it addresses only communications with ICE.”¹⁸ The court held Special Order 40 to be “a regulation of police conduct and not a regulation of immigration”¹⁹ and therefore not preempted by federal law. Similar to Special Order 40, sanctuary policies around the country regulate police conduct, not police communication with immigration officials.²⁰

7. The Second Circuit’s decision in *City of New York v. United States* does not establish that Section 1373 may categorically limit sanctuary policies.

In *City of New York v. United States*,²¹ the Second Circuit dismissed a *facial challenge* to constitutionality of Section 1373—the hardest type of legal challenge to bring, which requires that a law be proved unconstitutional in every possible application. The court acknowledged the “circumscribed nature” of its analysis and noted the “not insubstantial” concerns with federal intrusion on state sovereignty posed by Section 1373, leaving such questions for another day. Thus, the law is far from settled on the question of whether Section 1373 unconstitutionally interferes with local sovereignty.

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¹⁷ *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 724 (Cal. App. 2009).

¹⁸ *Id.* at 731.

¹⁹ *Id.* at 732.

²⁰ <https://www.ilrc.org/detainer-map>.

²¹ 179 F.3d 29, 36–37 (2d Cir. 1999).