

INTRODUCTION AND BACKGROUND

**Sample Language for Policies Limiting the
Enforcement of Immigration Law
by Local Authorities**

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Introduction

Many cities, counties, police departments, and states across the country understand that immigration law enforcement should remain a federal responsibility, and they oppose the enforcement of civil immigration law by their police officers and other city agents. They recognize that turning state and local law enforcement agents and public service providers into federal immigration law enforcement agents would be counterproductive and that it actually would undermine public safety rather than enhance it. Not only would such an enforcement scheme amount to an unfunded federal mandate, it would divert scarce resources from more critical law enforcement and other tasks and would undermine successful community policing programs, which rely on trust between immigrant communities and police officers.

To date, at least 58 localities, including 3 states, have promulgated policies limiting the authority of their employees to enforce immigration law. Several have adopted policies that protect the confidentiality of a wide range of personal information, including immigration status.¹

These policies are critically important. They protect immigrants' access to services in their communities. They educate communities about immigrants' rights and make the case that a community's safety and best interests are protected when immigrants do not have to fear that every contact with the police and other authorities will invite questions about their immigration status. They enhance the ability and willingness of states and localities to fight measures currently pending in Congress to give state and local law enforcement the power to enforce both civil and criminal provisions of federal immigration law.² These bills, if enacted, would compel state and local governments to undo policies limiting the enforcement of immigration law by local authorities.

¹ See "Annotated Chart of Laws, Resolutions, and Policies Instituted Across the U.S. Limiting the Enforcement of Immigration Laws by Local Authorities" at www.nilc.org/immlawpolicy/LocalLaw/Local_Law_Enforcement_Chart_FINAL.pdf.

² The two bills are the Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act, HR 2671) and the Homeland Security Enhancement Act (HSEA, S 1906). The success of the Bill of Rights Defense Committee in facilitating the passage of local resolutions against the USA PATRIOT Act has provided considerable encouragement that local action can help preserve the basic civil rights of immigrants. See www.bordc.org.



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States and localities continue to institute such policies despite efforts to undermine the policy and legal grounds for such initiatives. Opponents of such policies, in an effort to discredit them, have mischaracterized them as “sanctuary” policies. However, none of the policies prevent sharing between local and federal authorities of information regarding criminal or terrorist activities. And, as outlined below, policies that limit local and state police enforcement of immigration law are in complete compliance with current federal law.

The National Immigration Law Center has drafted a sample policy limiting the enforcement of immigration law by local authorities. This sample policy is based on the statutes, resolutions, police policies and directives, executive orders, and legal opinions and memoranda that different localities and states around the country have put into effect. Since no single policy serves as *the* ideal model, NILC’s sample policy presents language that most extensively protects immigrants seeking access to police protection and public services. Each section of the sample policy begins with an explanation of the objective achieved by the sample language. An appendix that presents the sample language without the explanation and notes is also included.

Background for the adoption of state and local policies

When advocating for policies limiting the enforcement of federal immigration law by local or state authorities, it is helpful to have at least a general understanding of the recent legal and political debate about whether local officials have the authority to enforce provisions of immigration law and whether localities can limit such authority.

IIRIRA and the Justice Department’s about-face

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, Public Law 104-208) included two provisions relating to the enforcement of civil immigration law by state and local police. One updated a provision of law authorizing police to enforce civil immigration law in the event of a “mass influx” of foreign nationals.³ The other provision created a procedure whereby localities can enter into agreements (called memorandums of understanding, or MOUs) with the Dept. of Homeland Security to receive immigration law–related training and enforce immigration law.⁴

Until 2002, the U.S. Dept. of Justice (DOJ), state and local governments, and Congress all agreed that federal law does not give local law enforcement officers general authority to enforce civil immigration laws.⁵ Soon after the IIRIRA was enacted, the DOJ Office of Legal Counsel (OLC) issued a legal opinion that concluded that “state and local police lack recognized legal

³ This provision authorizes the attorney general to deputize state and local law enforcement officers to enforce immigration law if the attorney general “determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response.” 8 USC § 1103(a)(10) (2004). Three sections in the Code of Federal Regulations pertain to 8 USC § 1103(a)(10): 28 CFR §§ 65.81, 65.83, and 65.84.

⁴ 8 USC § 1357(g); INA § 287(g). Under this provision, the secretary of Homeland Security may enter into a written agreement (a memorandum of understanding) with a state or any political subdivision of a state, providing the latter’s officers the authority to investigate, apprehend, and detain non–U.S. citizens for the purpose of enforcing federal immigration law. Florida and Alabama have entered into such agreements.

⁵ Until the Dept. of Homeland Security was created in 2002, the DOJ was responsible for administering all immigration-related functions of the federal government, including enforcement of immigration law. The Dept. of Homeland Security took over most of those functions, but the attorney general retained ultimate authority within the executive branch to decide questions of immigration law.

authority to stop and detain an alien solely on suspicion of civil deportability, as opposed to a criminal violation of the immigration laws or other laws.”⁶

However, the issue of whether local authorities have legal authority to enforce civil immigration law resurfaced after the terrorist attacks of Sept. 11, 2001. In April 2002, the *New York Times*, among other media outlets, reported that the OLC had written a new legal opinion that “clears the way for Attorney General John Ashcroft to declare that state and local police departments have the power to enforce federal immigration laws.”⁷ On June 5, 2002, Ashcroft announced that state and local police have the “inherent authority” to enforce federal civil immigration laws.⁸

Despite attempts by immigrant rights advocates to gain access to the new OLC legal opinion cited by Ashcroft, the DOJ has declined to make it public. As a result of a lawsuit brought by advocacy organizations under the Freedom of Information Act, a federal district judge in New York on September 4, 2004 ordered the DOJ to produce the OLC legal opinion for *in camera* inspection (inspection by the judge so that he can make a determination of whether it should be revealed to the public).⁹ However, we have yet to see a copy of the OLC legal opinion.

The response to Ashcroft’s announcement was overwhelmingly negative, and the *New York Times* reported that even within the Bush administration there was significant disagreement on the issue.¹⁰ Hundreds of organizations—including police associations and departments, government associations, conservative policy groups, and crime victim advocates—have publicly opposed adding civil immigration enforcement to the duties of state and local law enforcement officers.¹¹

Most significant, perhaps, has been the response by state and local elected officials. Dozens of cities, counties, and states have passed policies making clear that the enforcement of civil immigration law should not be placed on the shoulders of local police and governments. To date, over 58 cities and counties in 21 states have instituted such policies. Alaska, Oregon, and Maine have statewide policies affirming a clear division of labor between federal authorities, such as immigration agents, and their local police and city employees.

Second Circuit interprets IIRIRA’s information-sharing provision

Another provision created by the IIRIRA pertaining to the issue of state and local authorities’ enforcement of immigration law is 8 USC section 1373, which provides that “a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”¹²

⁶ “Assistance by State and Local Police in Apprehending Illegal Aliens,” Office of Legal Counsel, Department of Justice, Feb. 5, 1996, available at <http://www.usdoj.gov/olc/immstopo1a.htm>.

⁷ “Ruling Clears Way to Use State Police in Immigration Duty,” *N.Y. Times*, Apr. 4, 2002, at A19.

⁸ *Quoted in* National Council of La Raza v. Dept. of Justice, No. 03 Civ. 2559 (LAK) (D.N.Y. Sept. 4, 2004), at 2–3 (emphasis added).

⁹ *Id.* at 25.

¹⁰ “Administration Split on Local Role in Terror Fight,” *N.Y. Times*, Apr. 29, 2002, at A1.

¹¹ See “Backgrounder: Immigration Law Enforcement by State and Local Police,” National Immigration Forum, May 2004, available at www.immigrationforum.org/DesktopDefault.aspx?tabid=572. For a list of excellent resources on the topic of immigration law enforcement by local authorities, see www.immigrationforum.org.

Section 1373 addresses communication between government agencies. It does *not* require state or local government personnel to collect information about the immigration status of people with whom they come into contact. If an agent of a city's government does not know the immigration status of the people with whom the agent deals (because the city has a policy against inquiring into immigration status or in any other way helping to enforce immigration law), then the agent has no information to share. Localities, therefore, do not violate this section when they restrict the collection of immigration-related information.

In the only case interpreting this section, the U.S. Court of Appeals for the Second Circuit in 1999 affirmed the decision of a New York federal district court finding that section 1373 does not violate the Tenth Amendment to the U.S. Constitution, the Constitution amendment barring Congress from exercising power that impinges directly upon state functions.¹³ At the time of the ruling, New York had a policy, Executive Order No. 124, issued by New York Mayor Ed Koch in 1989 that prohibited city officers and employees from transmitting information about the immigration status of any individual to federal immigration authorities. In its decision, the Second Circuit suggested that if the order had instead constituted a general policy limiting disclosure of confidential information, including immigration status, it might have been viewed “as an explanatory measure designed to reassure aliens that information they might impart was truly confidential, even from the INS.” In that case, the executive order may have been considered “more integral to the operation of City government, and [section 1373] might seem more intrusive.”¹⁴ As a result of the decision, New York City revised its policy so that it now provides for the confidentiality of a range of information a city agent may receive about an individual, including immigration status. Subsequently, Maine's governor issued an executive order and Philadelphia's city solicitor issued a legal memorandum that established policies similar to the revised New York City Executive Order.

Local governments continue to voice the wisdom of limiting their role in enforcing civil immigration law

Local action has been a very important, proactive way for advocates to influence the continuing national debate about the role of local authorities in enforcing federal civil immigration law. But our work is far from over. The persistence of those who would like all public servants to be deputized as immigration agents, coupled with the grave consequences that such a reality would provoke, calls for even more localities to clarify the police's and other public agents' role in the enforcement of federal immigration law. To help advance this critical goal, NILC has developed guidance, including a sample policy, to assist advocates in initiating, advancing, and passing initiatives in their localities.

¹² In 2002, the Immigration and Naturalization Service was dissolved and its functions assumed by agencies within the newly created Dept. of Homeland Security. Therefore, this provision now applies to communication between federal, state, or local government entities or officials and *the Dept. of Homeland Security*.

¹³ *City of New York v. Reno*, 179 F.3d 29 (2d Cir. 1999).

¹⁴ *Id.* at 37.