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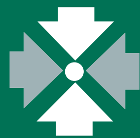

Memorandum

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Which Way, New York?
Will Feds Tolerate Local Interference or Assert Their Authority?

By W.D. Reasoner

Summary: *New York City (NYC) provides a window into how a lack of local government cooperation can adversely affect the federal government's ability to enforce immigration laws. This obstruction affects the safety of New York City residents and the rest of the state, even the entire country. It also influences how other jurisdictions interface with ICE. Rather than use tools available to discourage this obstruction, the federal government passively accepts this interference as a* fait accompli *— even as it has moved recently to sue other states for trying to help with enforcement.*

Key Findings

- Three-quarters of all foreign-born arrests in the entire state of New York occur in New York City (NYC). In 2008, the latest year for which data are available, local officers arrested 52,827 immigrants in NYC.

- For at least 20 years, NYC has had official policies impeding the enforcement of federal immigration laws. City policies prevent Immigration and Customs Enforcement (ICE) agents from receiving notification of arrested aliens before their release from police custody.

- In September 2009, NYC's Department of Correction adopted, and has since maintained, particularly obstructive policies and procedures for immigration officers and agents attempting to access criminal alien inmates housed in its detention facilities. Jail staff are required to follow procedures that actively encourage aliens to refuse to speak with ICE agents.

- Since the implementation of these procedures, the number of aliens charged with immigration violations at the city's main detention facility have been cut nearly in half.

- Notwithstanding its lack of cooperation, NYC has garnered millions of dollars each year in federal SCAAP (State Criminal Alien Assistance Program) funds since the program's inception.

- Despite all of the above facts, the federal government has never taken action to overcome the obstacles placed in its way by NYC — either through lawsuits, withholding of funding, or executive action — so that it can perform its job of immigration law enforcement in the most effective and efficient way possible.

Background

An interesting development in recent months has been the emergence of a growing "constituency" for alien criminals among a number of illegal-alien-oriented interest groups that cater to illegal aliens.[1]

This through-the-looking-glass phenomenon is perfectly illustrated by one such representative's statement that her group, the Immigrant Defense Project, "continue[s] to firmly object to the targeting of people with criminal convictions" — the individual at reference in this instance having been convicted of armed robbery.[2]

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It should come as no surprise that many of these organizations' home base is in New York City, which hosts among the highest population percentage of immigrants, legal and illegal, in the country (about 36 percent, according to the 2010 census). What is surprising is the extremity of their views, and the cacophony of their voices in denouncing the law enforcement efforts of federal authorities, no matter how reasonable or grounded in common sense they may be.

Under any other administration, the avowed goal of these groups to short-circuit the deportation of criminal aliens would seem quixotic at best, but that doesn't seem to be the case with the Obama administration. Here are some salient examples:

- The Justice Department has filed suit against the states of Arizona and Alabama for enacting statutes to *assist* the federal government in enforcing immigration law. When asked why they did not file similar suits against states, counties, or municipalities that have enacted sanctuary policies *obstructing* federal efforts, administration officials have striven, foolishly and to no avail in my view, to distinguish state and local sanctuary policies as somehow acceptable and legally defensible. Such logic could only hold true in a universe existing on the reverse side of a funhouse mirror.

- Meanwhile, under ICE Director John Morton — ironically, the agency charged with immigration enforcement in the interior of the United States — the administration has announced its intent to review hundreds of thousands of existing removal cases in which aliens have already been charged in immigration court, with an eye toward purging those deemed of "low priority," although exactly what that means remains murky. What is more, they intend to grant work authorization to deportable illegal aliens whose removal cases are administratively closed, at a time when unemployment among citizens and lawful workers is stalled at more than 9 percent.

  Because of the understandable backlash that accompanied the announcement, ICE has found itself obliged to issue a justification of this policy in order to deny that it constitutes the equivalent of administrative amnesty.[3] (The agency doth protest too much, methinks.)

- And, finally, there is the Secure Communities program at ICE, which was intended to be the flagship program for identifying and removing criminal aliens in a technologically appropriate and efficient manner that at the same time conserves the productive hours of ICE's overworked officer corps and administrative support staff. Secure Communities is premised on electronically linking state and federal criminal fingerprint repositories with Department of Homeland Security (DHS) immigration fingerprint databases, so that by means of fingerprint matches, aliens subject to removal may be detected at the time they are arrested and booked by state or local police for criminal offenses. Regrettably, ICE kicked off Secure Communities by grossly underestimating the level of controversy the initiative would generate among open borders advocates and special interest groups, and publicly pronouncing that it would be based on voluntary agreements with state criminal history bureaus, despite a clear statutory basis for moving forward without such agreements. Consequently, some states and local jurisdictions opted not to participate, and even in some instances withdrew after signing the agreements.[4]

  After more than two years of dithering about the voluntariness of the program and whether state or local law enforcement agencies may "opt out," both ICE and DHS have finally acknowledged that they do not need the permission of state or local governments to pursue biometric matching of fingerprints of suspects arrested for crimes in order to ferret out those who should not be in this country. In August 2011, Director Morton notified signatory states that ICE would be terminating the Secure Communities memorandum of agreement, and pursue an activation schedule consistent with its needs and that of its federal partner, the FBI's Criminal Justice Information Systems division, which maintains all criminal history records and fingerprints at the federal level.

  But given the administration's peculiar unwillingness to confront jurisdictions that have chosen to impede federal efforts to identify and remove illegal aliens, including those charged with crimes, how will this long-overdue approach to Secure Communities work in real life? Is ICE's newfound resolve sufficient to ensure that

the congressional intent behind Secure Communities — actual identification and removal of criminal aliens — will in fact take place?

The jury is out, although there is reason to believe that uncooperative local and state governments still have the capacity to gum up the works considerably, even in the face of technological advancement and activation of biometric information system interfaces in the context of the Secure Communities initiative. This is because, when all is said and done, law enforcement remains a process of human interface requiring a substantial investment of individual officer time and effort to be expended on each criminal alien identified, before he or she can be arrested, charged, detained, and removed — a process I discussed in a July 2011 CIS *Backgrounder*.[5]

NYC Sanctuary Policies. New York City provides a window into how the lack of local government cooperation, in alliance with advocacy groups that are hostile to immigration law enforcement, can adversely affect the federal government's ability to effectively enforce immigration laws.

First, let's take a look at the numbers. Table 1 reflects the NYC arrest figures for calendar year 2008, as reported by the New York State Division of Criminal Justice Services the following year.

Table 1. 2008 Foreign-Born Arrest (FBA) Totals for New York City and New York State[1]

Counties	2008 Overall Arrest Total	2008 FBA Total	FBA Percent of Total Arrests	Percent of Statewide FBA Total
New York City's Five Counties[2]	336,623	52,827	15.7 %	76.7 %
All Other 57 New York State Counties	243,097	16,015	6.8 %	23.3 %
Statewide Figures	579,720	68,842	11.9 %	N/A

[1] More current figures for 2009 or 2010 could not be located; however, it is unlikely that the split between foreign-born arrestees emanating from the five counties of New York City, vs. the remaining counties of the state, has changed dramatically.
[2] The five counties (boroughs) comprising New York City are the Bronx, Brooklyn (Kings County), Manhattan (New York County), Queens, and Staten Island (Richmond County).

It should come as no surprise that the overwhelming majority of foreign-born arrests statewide — more than three-quarters of them — emanate from NYC. Where foreign-born arrests are concerned, NYC isn't just the tail that wags the dog; it *is* the dog, and a mighty big one at that.

For many years, NYC has had a practice of minimal cooperation between city government agencies (including the police) and federal immigration authorities, but in 1989 Mayor Ed Koch issued Executive Order 124,[6] making that practice the official policy of New York City government.

On May 13, 2003, Mayor Michael Bloomberg retracted Executive Order 124 and replaced it with his own Executive Order 34.[7] Again, the order established a very restrictive official policy with regard to inquiries about an alien's immigration status. Executive Order 34 was amended[8] in September of that year by Executive Order 41, and is slightly less restrictive.

The new and revised executive orders themselves do not explain why there was a perceived need to retract and supersede Mayor Koch's original Executive Order 124, nor even why the first version of Mayor Bloomberg's Executive Order 34 required amendment. But we can find at least one reason in the Command Operations Section of the New

York City Police Department (NYPD) Patrol Guide,[9] which states that the changes were necessary to comply with the provisions of federal law, specifically citing 18 U.S.C. 1373(a) [sic].

Note that this is an inaccurate citation of the statute, which is in fact to be found at 8 (not 18) U.S.C. 1373(a). That section states in pertinent part, "[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[10] information regarding the citizenship or immigration status, lawful or unlawful, of any individual."

The revised mayoral orders contain some masterful wordsmithing in their attempt to straddle the divide between the desire to shield aliens on the one hand and, on the other, avoid accusations of egregiously violating the plain language of the federal statute. For instance, in the case of the NYPD, the Patrol Guide unambiguously states that "[n]o member of the service will transmit information regarding aliens to any agencies *except* through the Commanding Officer, Intelligence Division" (emphasis in the original), but it also provides that arresting officers will question arrestees about their citizenship status and record the results in the NYPD's online booking system, with results relayed to ICE by the Intelligence Division.

Because NYPD has outlined a method for recording an arrestee's citizenship status and giving that information to ICE — however stove-piped, time-consuming, and unwieldy the method may be — one would think this provides the agency a foot in the door to do what it needs to do from an enforcement perspective. But that isn't the case, for the simple reason that NYPD is not in the business of detaining arrestees, except for the very short time needed to move the individual into the criminal justice system for a bond hearing (assuming he isn't given a "desk ticket" and released directly from one of the city's 76 precincts).

After that point, responsibility for holding pre-trial detainees (and even those sentenced after conviction to less than a year of incarceration) falls to the New York City Department of Correction. Therefore, any realistic opportunity to engage in the kind of face-to-face exchange needed by ICE officers to interview an alien and issue a charging document in removal proceedings will of necessity take place in a NYC Department of Correction facility, the major one being Riker's Island.

The problem is that city corrections officials have done everything possible to ensure that such interviews never take place. On September 4, 2009, a Chief's Order[11] was issued directing staff to decline to present any inmate for interview by ICE unless and until the inmate is consulted by correctional officers and consents, in writing, to waive his rights to an attorney and proceed. The NYC Department of Correction has even gone so far as to create an official form (at city taxpayers' expense) on which the consent may be recorded: Form 144-ICE.[12]

ICE line officers who work at Riker's Island assert that institution of the Chief's Order and use of Form 144-ICE, along with other restrictions placed on their physical presence at the facility, have cumulatively combined to cut the number of Notices to Appear (the charging documents in removal proceedings) arising from interviews of alien inmates at Riker's Island detention facility nearly in half.

The Chief's Order instructs jail staff that when an ICE agent asks for access to an inmate to determine his immigration status, the jail staff must first inform the inmate that he may refuse the interview and record the consent or refusal on Form 144-ICE. The staff must provide a translation of the forms in any language requested by the inmate. In addition, jail staff are to display bilingual posters informing inmates that they may refuse ICE interviews.

Special interest groups of the sort described at the beginning of this paper will tell you that the NYC Department of Correction is simply looking out for aliens' constitutional rights. But such arguments are specious:

- First, it isn't the job of the Department of Correction to assert aliens' constitutional rights on their behalf — that job belongs more properly to the aliens' attorneys and advocates.

- Second, U.S. citizen inmates have the same constitutional rights, yet there is no evidence whatever that the NYC Department of Correction has undertaken similar procedures to obtain their written concurrence before permitting NYPD officers to speak to them. Why this double standard, if the aim is simply to protect inmates' constitutional rights?

The timing of the Chief's order is curious, coming as it did exactly five days before Mayor Bloomberg publicly named his new Commissioner of Correction, Dora Schriro, Ph.D. For those who don't know, or may have forgotten, immediately before that appointment Schriro was Department of Homeland Security Secretary Napolitano's personally chosen special representative to ICE, serving there as the Director of Detention Policy and Planning at ICE under John Morton. It beggars belief to think that Schriro was not involved in the development and promulgation of this order, although if she wasn't it has remained the policy and procedure for two years of her leadership, and so she now owns it as thoroughly as if she did participate in its development. It also speaks loudly about her views toward immigration law enforcement — this is particularly astounding given her prior position within ICE. And, finally, it is substantial evidence of this administration's cynical views on the same subject.

Impact on State Criminal Justice System

How immigration enforcement is conducted in NYC is important to ICE, and to the federal government writ large, and not just because of the massive volume of foreign-born arrests. It is important because effective and efficient enforcement in the largest city in the United States beneficially impacts the rest of the state, and in addition has a significant effect on ensuring positive attitudes toward immigration enforcement efforts in other major metropolitan centers throughout the nation as well. For this reason, ICE's posture should not be passively accepting as a *fait accompli* the fundamentally obstructionist policies of any NYC agency.

How successful could a fully implemented Secure Communities be in New York City, if it were free from local roadblocks? Consider these words written in 2010 by the New York State Department of Correctional Services (NYDOCS) with regard to ICE's Institutional Removal Program, which identifies aliens who are incarcerated in penal institutions throughout the state:[13]

- The Institutional Removal Program (IRP) is a comprehensive program designed to efficiently process criminal aliens while under Department custody for the purpose of preparing them for deportation from the United States immediately upon their release from Department custody.

- The proportion of foreign-born inmates in the Department's under custody population has been declining since 2000. Foreign-born inmates now represent 11 percent of the total under custody population. The decline in the proportion of foreign-born inmates in the under custody population is largely attributable to the [ICE] Institutional Removal Program (IRP).[14]

The decline in foreign-born inmate population referred to in the report was from 13 percent to 11 percent over the 10-year period studied. While two percentage points may not seem statistically significant when viewed abstractly, in human terms it means that approximately 13,000 alien felony offenders were taken into custody for removal under terms of the IRP — and were not released back into communities in New York state.

Although the state's Department of Correctional Services has clearly come to understand the importance and benefits of working with ICE, unfortunately the city's Department of Correction is going in the other direction, and actively inhibiting the ability of ICE officers and agents to identify and process for removal criminal aliens in city custody.

Federal Options to Discourage Sanctuary Policies. It is an absurd fiction to pretend that the sanctuary and protectionist policies of state or local governments have no adverse impact on federal efforts at immigration law enforcement. Of course they do, as New York State and New York City exemplify. What can be done about it?

The federal government could reverse this administration's stance that policies restricting or impeding cooperation with immigration authorities are essentially benign, and choose instead to take the offenders to court, as it has Arizona and Alabama for enacting legislation to permit state and local police *help* the federal government enforce immigration laws in those states.

In the context of NYC, ICE could file suit against the city in U.S. District Court seeking an injunction against all policies, practices, and procedures that violate the provisions of 8 U.S.C. 1373, and that impede ICE from doing its job. But, frankly, this is unlikely. ICE's Office of Professional Legal Advisor (OPLA) appears to be unaggressive about doing much of anything except poring through the existing stack of 300,000-plus existing removal cases, with an eye toward purging and closing them. In present circumstances, it is hard to imagine OPLA pressing forward with any kind of legal action whose aim is to strengthen immigration law enforcement.

Another alternative is to affect the pocketbooks of the offending state and local governments. The State Criminal Alien Assistance Program (SCAAP) is a prime example. This program, originally intended to make up for gaps and shortfalls in federal immigration enforcement, has instead become an entitlement in the hands of the Obama administration — even for those who actively impede those enforcement efforts. How much is at stake? Consider again the words of the New York State Department of Correctional Services in a report written February 2011:

> "The Department has received a total of over $600 million under SCAAP during the 16 years that SCAAP has been in existence and New York State (DOCS and localities) have received a combined total of over $1 billion under SCAAP for the 16-year period."[15]

In the year 2010 alone, New York City received almost $13.5 million in SCAAP payouts, despite its dismal record of cooperating with ICE officials whose job is to identify aliens arrested and placed into the custody of the New York City Department of Correction.[16]

A few members of Congress have introduced legislation tying SCAAP payments to state and local governments' cooperation with ICE in Secure Communities and other immigration enforcement efforts (such as honoring detainers filed by ICE), but so far these have not passed both houses of Congress, and were they to do so, it is not at all clear that this president would sign such legislation into law.

But in truth, such legislation should not be necessary. ICE Director Morton, who frequently asserts how tough and enforcement-minded the agency is, could effect a change for the better now. SCAAP is administered by the Office of Justice Programs (OJP) within the U.S. Justice Department. Pursuant to a memorandum of agreement with OJP, ICE "vets" the incarcerated aliens for whom reimbursement claims are made by the various states and local government. This is done so that OJP may ensure that it is only making payouts for incarcerated illegal aliens falling within the ambit of the statute that created the SCAAP program.

Unfortunately it appears that ICE has chosen to do such vetting in the most cursory way possible, through static systems checks run at a headquarters level, without taking the logical and reasonable step of determining whether its own field officers have been given access to the individuals in order to conduct interviews, determine deportability, or take the enforcement actions needed to remove aliens from the United States.

The disconnect is shocking, given the amounts paid out by OJP to state and local governments since the inception of the program — especially at a time of massive budget deficits and the need to ensure that the federal government is running as efficiently as possible. It also flies in the face of ICE's asserted priority to focus on alien criminals instead of "mere" status violators in the country illegally.

Mr. Morton could modify this egregious inadequacy with issuance of a policy memorandum outlining what steps ICE will henceforward consider satisfactory before it will "certify" a state or local government's requests for reimbursement of detained alien offenders. Will this happen? Probably not. Under his leadership, ICE appears more interested in determining what it can do to undermine its own officers' efforts at enforcing the immigration laws.

End Notes

[1] http://cis.org/reasoner/criminal-alien-constituency.

[2] http://www.cis.org/feere/even-armed-robbers-shouldnt-be-deported.

[3] http://www.ice.gov/news/fact-fiction/.

[4] The Secure Communities program has been discussed extensively in past Center publications and blogs. See, for instance, http://www.cis.org/vaughan/secure-communities-please, http://www.cis.org/vaughan/secure-communities-vs-287g, http://www.cis.org/Vaughan/SecureCommunities-Boston, http://www.cis.org/Feere/Open-Borders-Funding, http://www.cis.org/reasoner/doing-the-secure-communities-shuffle , and http://www.cis.org/vaughan/milford-protest, to mention just a few.

[5] http://www.cis.org/deportation-basics.

[6] http://www.cis.org/articles/2011/nyc-executive-order-124.pdf.

[7] http://www.cis.org/articles/2011/nyc-executive-order-34.pdf.

[8] http://www.cis.org/articles/2011/nyc-executive-order-34-amended.pdf.

[9] http://www.cis.org/articles/2011/nyc-patrol-guide.pdf.

[10] The Immigration and Naturalization Service no longer exists, having been split into various component agencies within DHS. One of those successor agencies is ICE.

[11] http://www.cis.org/articles/2011/nyc-chiefs-order.pdf.

[12] http://www.cis.org/articles/2011/nyc-rikers-form-144.pdf.

[13] Unlike many other divisions of state government – and in spite of the fact that New York State was one of those which signed, and then withdrew from, the Secure Communities memorandum of understanding – NYDOCS has a long history of cooperation and collaboration with ICE, and there is an attitude of mutual respect between NYDOCS and ICE New York's Enforcement and Removal Operations field officials.

[14] http://www.docs.state.ny.us/Research/Reports/2011/ForeignBorn_IRP_Report.pdf.

[15] http://www.docs.state.ny.us/Research/Reports/2011/SCAAP_Report.pdf.

[16] http://cis.org/subsidizing-sanctuaries.