Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS

Ignatius Bau

Follow this and additional works at: http://scholarship.law.berkeley.edu/blrlj

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/blrlj/vol7/iss1/2

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38CH3R

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley La Raza Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcer@law.berkeley.edu.
Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*

Ignatius Bau†

I. INTRODUCTION

This article analyzes the legal basis of local government ordinances, such as San Francisco’s City of Refuge ordinance, restricting cooperation between local police and the federal Immigration and Naturalization Service (INS). Although such ordinances are often referred to as “sanctuary” ordinances because of their emergence during the religious-based sanctuary movement on behalf of Central American refugees during the 1980’s, these noncooperation ordinances raise legal and public policy questions that endure beyond their historical genesis. This article examines those legal and public policy issues, including the appropriate separation of powers between federal and local governments and the distinctions between criminal and civil law enforcement. Finally, the article challenges the validity of the opinion issued by California Attorney General Daniel E. Lungren regarding such ordinances1 and analyzes the effect of the recent enactment of California Senate Bill 691 on such ordinances in the State of California.

II. CENTRAL AMERICAN REFUGEES DENIED GOVERNMENT PROTECTION

Throughout the 1980’s, thousands of Central American refugees fled to the United States in search of legal protection from the civil wars that ravaged their countries. Despite the passage of the Refugee Act of 19802, the INS steadfastly refused to recognize those Central American refugee claims, principally because of U.S. foreign policy interests that supported the governments from which Central American refugees were fleeing. For example, between 1983 and 1991, the INS denied 97% of Salvadoran asylum claims and denied 98% of Guatemalan asylum claims.3 Others have

---

* Copyright © 1994 by La Raza Law Journal, Inc.
† Staff Attorney, Lawyers’ Committee for Civil Rights of the San Francisco Bay Area, J.D. and B.A., University of California, Berkeley.
3. Asylum Cases Filed With INS District Directors Approved and Denied, By Selected Nationalities, 12 Refugee Reports at 12 (Dec. 30, 1991). In contrast, the overall approval rate for all asylum
analyzed the systematic bias in the INS' adjudication of those Central American asylum applications.  

III. SANCTUARY AS A RESPONSE

As a direct result of the INS' refusal to fairly adjudicate Central American asylum applications, many religious congregations began to declare themselves as "sanctuaries" for the refugees. These religious communities invoked the ancient tradition of sanctuary to provide protection in the face of unjust or unduly harsh laws. In the United States churches, universities and cities invoked the concept of sanctuary in the early 1970's to protect war resisters and conscientious objectors during the Vietnam War. Although sanctuary workers argued that the INS was failing to fairly administer the immigration law, several sanctuary workers were criminally prosecuted for transporting and harboring undocumented individuals. Those criminal convictions were ultimately upheld.

IV. CITIES OF REFUGE AND NONCOOPERATION POLICIES

In February 1985, the cities of Berkeley, California and St. Paul, Minnesota joined the growing sanctuary movement and declared their cities as sanctuaries for Central American refugees. The local resolutions prohibited city officials from cooperating with the arrest or deportation of any Central Americans within city limits. Berkeley had taken similar action in 1971
during the Vietnam war and modeled its Central American refugee resolution after its 1971 resolution. The cities of Madison, Wisconsin and Cambridge, Massachusetts soon followed with their own sanctuary declarations. Ultimately, the State of New Mexico and nearly twenty other cities, including San Francisco, California, passed sanctuary declarations. As the sanctuary movement evolved, other local governments, including the cities of New York, Chicago and Washington, D.C. and the state of Massachusetts promulgated policies directing noncooperation with the INS.

The 1985 San Francisco City of Refuge resolution urged the federal government to recognize Central Americans as refugees and opposed their deportation. The resolution commended the religious congregations in San Francisco who had declared themselves as sanctuaries and clarified that “the City and County of San Francisco finds that immigration and refugee policy is a matter of federal jurisdiction” and that “federal employees, not City employees, should be considered responsible for implementation of immigration and refugee policy.” Accordingly, the Board of Supervisors affirmed that “City departments shall not discriminate against Salvadoran and Guatemalan refugees because of immigration status, and shall not jeopardize the safety and welfare of law-abiding refugees by acting in a way that may cause their deportation.” Even the resolution’s ultimate declaration that “the City and County of San Francisco be declared a City and


13. Unlike the specific directives of the 1989 ordinance regarding inquiry and reporting of an individual’s immigration status, the language of the 1985 resolution directing city and county employees to refrain from “acting in a way that may cause” the deportation of Salvadoran and Guatemalan refugees is imprecise.
County of Refuge for Salvadoran and Guatemalan refugees” was conditioned on consistency with “federal statute, ordinance, regulation or court decision” and added that “the City and County of San Francisco is not, in adopting this resolution, encouraging its employees and citizens to violate any local, state or federal laws.”

The San Francisco City of Refuge resolution resurfaced in controversy during the summer of 1989 as a result of two incidents involving the San Francisco Police Department. The first incident occurred during a June 6, 1989 meeting between Salvadoran Consul General Ana Margarita Cuellar and a delegation of Salvadoran refugees, religious leaders and attorneys at the Salvadoran consulate. The delegation was presenting the results of a national opinion poll of Salvadorans living in the United States regarding the role of the United States in El Salvador, the assumption of political power by the right-wing ARENA party in El Salvador and possible solutions to the civil war and the problems of refugees from El Salvador. During the meeting, a member of the Salvadoran consulate staff began taking photographs of the delegation. When members of the delegation protested and requested that their photographs not be taken, a San Francisco police sergeant who had been called to the meeting by the building manager took the camera and began taking photographs himself. As a result of the incident, concerns were raised about the inappropriateness of the San Francisco police voluntarily conducting surveillance activities on behalf of foreign governments, especially when those subject to the surveillance were not engaged in any criminal activity.

In the second incident, officers from the INS, the California state Office of Alcohol and Beverage Control (ABC) and the San Francisco Police Department conducted a joint raid on a popular nightclub, the Club Elegante, in the predominantly Latino Mission District on Saturday, July 22, 1989. The officers surrounded the club at around 11 p.m., blocked the exits, stopped the music and announced to the approximately two hundred patrons that they could not leave until their identification documents had been checked. Among the patrons detained for over an hour was a city commissioner, who became the lead plaintiff in a civil lawsuit against the INS and state ABC for civil rights violations during the raid. That lawsuit resulted in an $83,000 settlement for the plaintiffs.

The combined effect of these two incidents was to raise concerns about the involvement of the San Francisco Police Department in enforcement

14. SAN FRANCISCO, CAL., RESOLUTION NO. 1087-85.
and surveillance activities on behalf of the INS or foreign governments. After hearings before the San Francisco Human Rights Commission and the Board of Supervisors, the Board unanimously adopted an ordinance in September 1989 that prohibited the cooperation of city officials, including police officers, with the INS or foreign governments unless required by federal or state law. Unlike the non-binding 1985 resolution, which only established a general principle of noncooperation with the INS, the ordinance specifically prohibited certain acts by city and county officials. City and county officials were prohibited from inquiring about, or disseminating information about, any individual’s immigration status unless affirmatively required by federal or state statute, regulation or court decision. The ordinance also required all city agencies, departments and commissions to review and revise their applications, questionnaires and other forms to delete any questions about immigration status now prohibited by the ordinance. The Human Rights Commission was given responsibility for monitoring compliance with the ordinance, but each city department, agency or commission was made responsible for informing its employees about the prohibitions of the ordinance and warning that failure to comply would result in appropriate disciplinary action.

Thus, the San Francisco City of Refuge ordinance developed from a general policy of noncooperation with the INS, embodied in the 1985 non-binding resolution, into a local prohibition against cooperation with the INS except when affirmatively required by federal or state law. The intent of the ordinance evolved beyond a local government statement about the federal government’s inequitable treatment of Central American refugees into a local public policy regarding the appropriate relationship between city and county officials and the federal INS. The ordinance was not an attempt to control or restrict the activities of the federal INS, but rather was directed at the use of city and county resources. In the context of the two particular incidents involving the San Francisco police, the ordinance was intended to rebuild trust and cooperation among San Francisco’s many immigrant and refugee communities. This article will now examine the legal basis for such local noncooperation ordinances.

19. Id.
20. In the fall of 1992, the Board of Supervisors agreed to amend the ordinance after Mayor Frank Jordan placed a proposition on the November 1992 ballot clarifying that the ordinance did not prohibit cooperation with the INS “regarding an individual who has been convicted of a felony committed within the state of California.” Although it continued to be the policy and practice of the San Francisco District Attorney’s office, the San Francisco Adult Probation Department and the San Francisco criminal courts to share information with the INS about individuals convicted of all crimes, the Mayor interpreted the proposition to allow inquiry and reporting about immigration status at any point after a felony arrest. After negotiations with the Mayor’s office, the Board adopted an amendment to the ordinance clarifying that such inquiry and reporting would take place only after conviction or upon any subsequent
V. Jurisdiction to Enforce Federal Immigration Law

The legal authority for the interrogation, arrest, detention and removal of noncitizens from the United States is found in the Immigration and Nationality Act (INA). 21 The INA contains both civil and criminal provisions. 22 While the INA provides a criminal penalty for entering the U.S. without “inspection” in a manner, time and place designated by the INS, few are prosecuted in federal courts for such violations. Most “undocumented” individuals arrested by the INS are placed in civil administrative proceedings to determine whether they should be deported. The United States Supreme Court has repeatedly held that violations of the INA that result in deportation from the United States are civil and not criminal in nature. 23 The distinction between the criminal and civil provisions of the INA are critical to the scope of responsibility that state and local officials have in enforcing its provisions.

A. Enforcement of the Criminal Provisions of the INA

The distinction between the enforcement of the civil provisions of the INA and the enforcement of its relatively limited criminal provisions 24 is critical because state and local officials are only authorized to enforce the criminal provisions of the INA. 25 While illegal entry is a criminal offense enforceable by state and local officials, illegal presence in the U.S. is a civil offense enforceable only by the INS. As noted by the Ninth Circuit, “[t]here are numerous reasons why a person could be illegally present in the United States without having entered in violation of section 1325

---

22. The Immigration Reform and Control Act of 1986 (IRCA) added civil and criminal sanctions against persons who employ undocumented individuals, defined as persons without INS authorization to work in the United States. 8 U.S.C. § 1324a (1986). However, the criminal sanctions are only to be imposed for a pattern and practice of violations by employers of unauthorized workers, 8 U.S.C. § 1324a(f) (1986), and are not relevant to the analysis here that focuses on enforcement activities against noncitizens outside of the employment context.
[prohibiting illegal entry]. Examples include expiration of a visitor’s visa, change of student status, or acquisition of prohibited employment."26 Thus, the "[a]rrest of a person for illegal presence would exceed the authority granted [local] police by state law under the Supremacy Clause."27

In Gonzales v. City of Peoria, the Ninth Circuit reviewed the scope of authority for the Peoria, Arizona police department to make immigration law-related arrests. The Peoria police had made a warrantless arrest of Gonzales and other persons of Mexican descent for violating 8 U.S.C. § 1325 (illegal entry). The Ninth Circuit first ruled that the Supremacy Clause required the local police to enforce the criminal provisions of the INA concurrently with the INS.28 The court found that the criminal provisions of the INA are "few in number and relatively simple in their terms" and "[i]t therefore cannot be inferred that the federal government has occupied the field of criminal immigration enforcement."29

However, the Ninth Circuit then ruled that the same Supremacy Clause prohibited the local police from enforcing the civil provisions of the INA.30 The Ninth Circuit concluded that "the civil provisions of the [Immigration and Nationality] Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration."31

The authority of state and local officials to enforce the criminal provisions of the INA is further restricted by state law limitations on warrantless arrests. As noted by both the courts and the California Attorney General, warrantless arrests by state and local law enforcement officials for such federal crimes are limited by both the Fourth Amendment of the U.S. Constitution and California statute.32 Thus, such warrantless arrests by state or local officials for criminal violations of the INA are limited to arrests for crimes committed in the presence of those state and local officials.33

State and local officials cannot arrest or detain an individual simply because he or she is unable, or unwilling,34 to produce immigration docu-

27. Id.
28. Id. at 474-75.
29. Id. at 475.
30. Id. at 474-75.
31. Id.
32. CAL. PENAL CODE § 836.5 (West 1985) (authorizing warrantless arrests by a state or local official only when there is "reasonable cause to believe that the person to be arrested has committed a misdemeanor in his [or her] presence which is a violation of a statute or ordinance which the officer or employee has the duty to enforce.").
34. The Ninth Circuit recognized that constitutional standards for detention and arrest must be met when it held that "if a passenger in a vehicle stopped by the [local] police cannot, or does not, provide
While the act of entering the United States without proper immigration documentation is a criminal violation of the INA, it is not a "continuing" violation for which a state or local officer could make a warrantless arrest. An individual may not be arrested in a non-border area on the basis that the individual may have entered the United States illegally sometime in the past. In fact, many individuals who are undocumented or "illegal" were lawfully admitted into the United States but have since violated one of the civil provisions of the INA that results in their loss of legal immigration status (e.g., a tourist who overstays a visitor's visa).

It is conceivable, though improbable, that state or local officials in California would be required to make a warrantless arrest for a criminal violation of the INA. Specifically, local officials may be called upon to make such an arrest at the border between California and Mexico, at an international airport or other port of entry. For example, the San Francisco police could have made arrests upon detection of a criminal smuggling operation such as the one involving the freighter "Manyoshi Maru," which brought 180 undocumented Chinese nationals into San Francisco Bay in December, 1992. However, such incidents are rare and usually already involve the INS, which is the more appropriate law enforcement agency to make arrests for immigration law violations.

B. Enforcement of the Civil Provisions of the INA

In contrast to these overlapping duties of the INS and of state and local law enforcement officials over the criminal provisions of the INA, there is a clear separation of authority over the enforcement of the civil provisions of the INA. The Supremacy Clause of the United States Constitution

35. Id. at 476-77 ("Although the lack of documentation or other admission of illegal presence may be some indication of illegal entry, it does not, without more, provide probable cause of the criminal violation of illegal entry.").

36. See United States v. Rincon-Jimenez, 595 F.2d 1192, 1193-94 (9th Cir. 1979)(alleged unlawful entry does not continue after entry completed); Gonzales, 722 F.2d at 477 (lack of immigration documentation or other admission of illegal presence does not, without more, provide probable cause of a criminal violation of INA). See also United States v. Cores, 356 U.S. 405, n.6 (1958); INS v. Lopez-Mendoza, 468 U.S. 1032, 1052 (1984)(White, J., dissenting); United States v. Doyle, 181 F.2d 479, 480 (2d Cir. 1950)(assumption of illegal entry insufficient ground for criminal arrest).

37. See Gonzales, 722 F.2d at 476. Another reason for reserving the authority to enforce the INA to the INS is the complexity of federal immigration law. See Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1987)(INA recognized as "second only to the Internal Revenue Code in complexity") and Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977)(INA bears a "striking resemblance" to "Minos' Labyrinth in ancient Crete"). The Gonzales court noted that local officials have failed to distinguish between the civil and criminal provisions of the Act due to its complexity. See 722 F.2d at 476.


39. U.S. CONST. art. VI, § 2. The Supremacy Clause reserves for the federal government exclusive jurisdiction over certain areas of legislation and regulation.
reserves such authority for the federal INS, and preempts any authority by state or local officials regarding such activities. Courts have ruled that state and local officials have no authority to arrest, detain or otherwise seek to enforce the INA based solely on violations of the civil provisions of the INA. State and local officials have no duty to report to the INS information they might have about a person's illegal presence in the United States unless that individual has committed a crime.

The INS itself has acknowledged this separation of authority. In 1978, then-Attorney General Griffin B. Bell issued a press release stating:

Attorney General Griffin B. Bell today reaffirmed the Department of Justice policy that the responsibility for enforcement of the immigration laws rests with the Immigration and Naturalization Service and not with state and local police. INS officers are uniquely prepared for this law enforcement responsibility because of their special training and because of the complexities and fine distinctions of immigration laws, Mr. Bell said.

The Attorney General stated that the Department would continue to urge state and local forces to observe the following guidelines:

1. Do not stop, question, detain, arrest or place "an immigration hold" on any persons not suspected of crimes, solely on the grounds that they may be deportable aliens;
2. Upon arresting an individual for a non-immigration criminal violation notify the Service immediately if it is suspected that the person may be an undocumented alien so that the Service may respond appropriately.

INS officials will continue to work with state and local law enforcement officials to carry out this policy.

Moreover, in the settlement of lawsuits against the State of Washington and the City of Monticello, Arkansas, local officials conceded that they were prohibited from enforcing the civil provisions of the federal immigration law. The local officials specifically agreed not to stop, interrogate or detain individuals for the purpose of ascertaining their immigration status or

42. Gates, 193 Cal. App. 3d at 218 (policy of Los Angeles Police Department allowing officers to arrest persons for civil violations of the INA impermissible); 67 Op. Cal. Att'y Gen. at 336 ("there is no duty for state and local officials to enforce the civil aspects of the federal immigration law" (emphasis in original)); Gutierrez v. City of Wenatchee, 662 F. Supp. 821 (E.D. Wash. 1987)(local police cannot detain individual solely on basis of suspicion of violation of immigration law).
44. 60 INTERPRETER RELEASES 172, 172-173 (Mar. 4, 1983). The policy was revised in 1983 by then-Attorney General William French Smith to clarify that INS would engage in joint operations with local law enforcement officials and that in states where local officials had the authority to enforce the criminal provisions of federal law, the INS would encourage assistance by such officials. Id.
enforcing immigration laws. Any notification to the INS regarding an individual arrested and detained on state criminal charges, and suspected to have violated federal immigration laws, was also narrowly prescribed.

Finally, the Ninth Circuit has ruled that prohibiting a local police department from stopping and questioning, arresting or placing an immigration hold on persons "not suspected of crimes or traffic violations solely on the grounds that they may be deportable aliens" is "a correct statement of the law." Indeed, the state or local authority would be liable for any wrongful arrest or detention of an individual under the alleged authority of the federal civil immigration law.

Thus, federal preemption over civil immigration law would actually support a local noncooperation ordinance because it would prohibit local officials from seeking to enforce the civil provisions of the INA. However, the validity of San Francisco's noncooperation ordinance has been subject to legal scrutiny and challenge.

VI. The Lungren Opinion: Challenging the Validity of Noncooperation Ordinances

In the summer of 1992, California State Senator Quentin Kopp (I-San Mateo) requested an opinion from the California Attorney General on the legality of San Francisco's noncooperation ordinance. On November 19, 1992, Attorney General Daniel Lungren issued his opinion, which restated Senator Kopp's request as follows:

May a city prohibit its officers and employees from cooperating in their official capacities with Immigration and Naturalization Service investiga-

46. Gonzales, 722 F.2d at 480. The Ninth Circuit referenced the 1978 Bell policy in its decision. Id. at 473.

47. Gates, 193 Cal. App. 3d at 220-21. A minimal amount was paid in settlement of the Washington state case. 61 INTERPRETER RELEASES at 119. The preceding analysis is unaffected by the decision in American G.I. Forum v. Miller, 218 Cal. App. 3d 859 (1990), holding that inquiry and reporting of the immigration status of arrestees did not violate their federal and state constitutional rights to privacy, due process or equal protection. The finding of an absence of constitutional infirmity cannot transform such inquiry and reporting into an affirmative legal duty.

48. Then-San Francisco Supervisor Quentin Kopp voted against the City of Refuge resolution in December 1985.

49. Although Senator Kopp is credited as being the author of the request, it is evident from the language contained in his request that it was the INS, not Senator Kopp, who drafted the request. For example, the request refers to "our" INS special agents and "this office," meaning the INS, not Senator Kopp's office. If the INS did author the request, then the request's alarm that "San Francisco is a spawning ground for anti-INS enforcement in the Bay Area" might be better understood. Letter to Dorothy Ehrlich, ACLU, from Daniel E. Lungren, reproducing Senator Kopp's request (on file with La Raza Law Journal).

tion, detention, or arrest procedures relating to alleged violations of the civil provisions of the federal immigration laws?51

Although both the request and the Lungren opinion are stated in generic terms, it is evident that both the request and the opinion are examining one specific local ordinance, chapter 12H of the San Francisco City and County Administrative Code, or the City of Refuge ordinance enacted in San Francisco in 1989. For example, the Lungren opinion states:

Specifically, the [noncooperation] ordinance prohibits city officers and employees from using, in their official capacities, any city resources to cooperate with INS investigation, detention, or arrest procedures relating to alleged violation of the civil provisions of federal immigration laws or to gather or disseminate information regarding the immigration status of individuals in the city. We are advised that the stated purpose of the ordinance is to encourage persons who are illegally present in this country to report criminal activities which they observe to local law enforcement officers.52

Lungren’s characterization of the purpose of the ordinance is misleading and incomplete. The San Francisco ordinance was passed as a statement of local government opposition to the federal government’s discriminatory treatment of Central American refugees and the city’s own distrust of the INS after the Club Elegante raid. Its purpose was 1) to conserve city and county resources by prohibiting the expenditure of those resources on the enforcement of federal civil immigration laws within the exclusive jurisdiction of the INS,53 and 2) to promote the safety and public interest of all San Franciscans regardless of immigration status.54 The ordi-

51. Senator Kopp had raised several other questions in his request for an Attorney General’s opinion, including whether local officials were criminally liable for not cooperating with the INS and the validity of city-sponsored programs for immigrant day laborers. Curiously, Lungren did not address these related issues in his opinion.


53. The ordinance found:

It has been the policy of the Board of Supervisors of the City and County of San Francisco to decline to commit or expend any City or County financial or other resources to assist the INS in the enforcement of federal immigration laws or to gather and disseminate information regarding the immigration status of individuals in the City and County of San Francisco that is not required by federal or state statute, regulation or court decision.

SAN FRANCISCO, CAL., ORDINANCE No. 375-89, § 1(k). A local government’s right to control its financial resources may override any federal preemption concerns. Cohan, et al., supra note 10, at 597-98.

54. The 1989 ordinance stated:

The City and County of San Francisco desires to foster an atmosphere of trust and cooperation between the San Francisco Police Department and all persons, regardless of immigration status, in San Francisco. That atmosphere has been threatened by a recent incident at the Club Elegante in the Mission district when a joint force of INS, Alcohol Beverage Control (ABC) and San Francisco Police Department (SFPD) officers conducted a raid. The approximate two hundred patrons, including U.S. citizens, were detained for periods of up to two hours. The incident has raised serious concerns in immigrant and refugee communities regarding the involvement of SFPD officers in enforcing federal civil immigration laws.

SAN FRANCISCO, CAL., ORDINANCE No. 375-89, § 1(l). The 1985 resolution similarly found: “It is in the interests of the City and County of San Francisco to encourage all residents, whether crime victims
nance was not intended to encourage persons to stay illegally in the United States nor to invite others to come to San Francisco to gain protection.\textsuperscript{55} It is evident that the ordinance does nothing to impede the INS from doing its job of enforcing the federal immigration laws.

Nevertheless, the Lungren opinion concludes that the Supremacy Clause of the United States Constitution requires federal preemption of any state or local laws relating to the enforcement of immigration laws.\textsuperscript{56} However, the opinion is flawed because federal law does not preempt such a local ordinance governing the uses of local resources and because the local ordinance does not create any actual interference with the full enforcement of federal immigration law by the INS.

\textbf{A. Federal Preemption Analysis}

There are three distinct types of federal preemption of local law: 1) express preemption, 2) pervasive scheme preemption and 3) conflict preemption.\textsuperscript{57} First, Congress may expressly preclude state or local legislation on a particular subject.\textsuperscript{58} Second, Congress may have so thoroughly legislated on a subject that there is no room for supplementary state or local regulation.\textsuperscript{59} Finally, the state or local legislation may create an actual conflict with the federal legislation.\textsuperscript{60}

The United States Supreme Court has ruled that not all state and local laws relating to immigration are preempted and that Congress has neither expressly preempted such legislation nor enacted such a pervasive federal scheme that would preempt all such local legislation.\textsuperscript{61} Indeed, "the Court has never held that every state enactment which in any way deals with

\textsuperscript{55} See Cohan, et al., \textit{supra} note 10, at 596 ("there is no evidence in any of the state or local actions of a purpose to recruit aliens from abroad.").


aliens is a regulation of immigration and thus, *per se* preempted by this constitutional power, whether latent or exercised."

Thus, the Lungren opinion must rely on an application of conflict preemption, where there is an actual conflict between the federal and local law. The earlier Attorney General opinion on the subject of noncooperation with the INS similarly concluded that conflict preemption would be the only type of preemption applicable to the question of the duty of state and local officials to enforce federal immigration law. Although the Lungren opinion fails to reference the preemption analysis in the earlier Attorney General opinion, it reaches the same conclusion through its reliance on a conflict preemption case.

**B. Conflict Preemption Analysis in City of Philadelphia**

In its preemption analysis, the Lungren opinion relies upon and quotes extensively from a Third Circuit case, *United States v. City of Philadelphia,* for the proposition that federal preemption is applicable to a local noncooperation ordinance. Lungren bases his analysis on the apparent similarity between the ordinance in *City of Philadelphia* and a local INS noncooperation ordinance. In the Philadelphia case, the city refused cooperation with federal military recruiters; in San Francisco, the city refused cooperation with the federal INS. However, despite such superficial similarity, the two situations are in fact very distinct. Unlike the circumstances of the Philadelphia case, there is no federal statute or policy requiring local officials to facilitate the enforcement of federal law. More critically, the San Francisco ordinance does nothing to prohibit or interfere with the INS' enforcement of federal law.

In the *City of Philadelphia* case, the city passed an ordinance prohibiting employment discrimination on the basis of several grounds, including sexual orientation. Until earlier this year, it had been the policy and practice of the United States armed forces to reject applicants and discharge members who are gay or lesbian. In light of this discriminatory policy,

---

62. *DeCanas,* 424 U.S. at 355. The U.S. Supreme Court remanded the case in *DeCanas* precisely because it was unclear from the factual record what conflict, if any, arose between the actual operation of the California employer sanctions law and the INA. Id. at 363-65.

65. 798 F.2d 81 (3d Cir. 1986).
66. The Lungren opinion concludes: "By giving the impression that illegal aliens may obtain refuge from such penalties [under the INA] in a particular locale, the ordinance creates localized immigration policy and dissipates enforcement of the federal laws." 75 Op. Cal. Att'y Gen. at 275-76.
the city sought to prohibit the United States armed forces recruiters from violating the nondiscrimination ordinance by recruiting on the city campus of Temple University. The federal government challenged the city's ordinance on the grounds that it conflicted with a federal statute directing the military to "conduct intensive recruiting campaigns to obtain enlistments."

The Third Circuit concluded that the local ordinance "absolutely prohibits the cooperation that Congress intended this legislation to engender and, as a result, military recruiters are denied the access [to college and university campuses] that Congress deemed critical to their ability to conduct 'intensive recruiting campaigns.'" The court found that it would not even be theoretically possible to comply with both the local ordinance and the federal statute. The precise purpose of the federal statute, to conduct "intensive recruiting campaigns" required access to all campuses; implementation of the local ordinance required that such access be denied.

Upon close analysis, several critical distinctions between the City of Philadelphia ordinance and an INS noncooperation ordinance are evident. In the City of Philadelphia case, the Philadelphia ordinance conflicted with explicit congressional intent that there be access for military recruiters to all college and university campuses. In addition to a general statutory directive to "conduct intensive recruiting campaigns," the Department of Defense Authorization Acts of 1971 and 1973 expressly sought to open campuses to military recruiters. In order to ensure such access, the Acts cut off military funding to institutions of higher learning that barred recruiting personnel of the Armed Forces. Moreover, the factual record before the court showed that the Philadelphia area had been a highly successful source for military recruiters in the past. There was no alternative method for gaining access to students if military recruiters were prohibited by the local ordinance from recruiting those students on campus.

68. The specific controversy was whether representatives of the Judge Advocate General Corps of the Army, Navy and Marine Corps could recruit at the Temple University School of Law.
69. 798 F.2d at 87 (citing 10 U.S.C. § 503(a)).
70. 798 F.2d at 87.
71. Id. at 89.
72. Significantly for this analysis, the Third Circuit ruled that in the absence of such a congressional directive, conflict preemption would not be applicable because "Temple has no duty under federal law to cooperate with military recruiters." 798 F.2d at 86, n.6.
73. 798 F.2d at 87.
74. Id. at 86-7.
75. Id. at 86.
76. Id. at 87.
77. The Third Circuit recognized that even despite these clear congressional mandates, "a mere conflict in words is not sufficient" and that if the Philadelphia ordinance "does not significantly impair the military's ability to recruit doctors, lawyers, and other skilled personnel, the fact that it conflicts with Congress' policy of promoting on-campus recruiting by the military would not permit us to invalidate the [ordinance]." 798 F.2d at 87. In contrast, as discussed infra, Lungren fails to cite to any similar
In contrast, there is no explicit congressional policy or intent that local law enforcement officials assist the INS in the enforcement of federal civil immigration laws. In the absence of an explicit congressional policy which conflicts with the local ordinance, Lungren is forced to infer one. In doing so, Lungren fails to consider the admonition of the Third Circuit in the City of Philadelphia case:

"We remain mindful of the fact that "[a]n unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in light of its history remains ambiguous." 78

Although there is no expressed congressional purpose to set aside local non-cooperation ordinances, Lungren bases his opinion on such a legislative command.

Proper application of the reasoning in the City of Philadelphia case would support a local noncooperation ordinance because that court ruled that where a conflict between state and federal law is alleged, it must be "reasonable" to conclude that Congress would have intended to preclude the state law in question, since "it would make little sense to preempt state law in order to serve the purposes underlying federal legislation if Congress itself would not require or admit of preemption of state authority." 79 Congress has never enacted legislation requiring that state or local governments enforce federal immigration law. 80 The United States Supreme Court noted in DeCanas v. Bica:

"[C]onflicting law, absent repealing or exclusivity provisions, should be preempted . . . "only to the extent necessary to protect the achievement of the aims of" the federal law, since "the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted."" 81

However, an earlier California Attorney General concluded that there was no affirmative duty for local law enforcement officials to report to the INS knowledge they might have that an individual might have violated the fed-

---

78. 798 F.2d at 86 (quoting Penn Dairies v. Milk Control Commission, 318 U.S. at 261, 275 (1943)).
80. Federal legislation nullifying any state or local law prohibiting the transfer of information relating to aliens to the INS was introduced in the 102nd Congress but never enacted. H.R. 5255 102nd Cong., 2d Sess. (1992). As this article was going to print, the Senate passed a provision that would require state and local governments to cooperate with the INS in order to receive federal crime grants. S. 1607, 103rd Cong., 1st Sess. (1993). The provision is now pending before a Senate-House conference committee.
81. 424 U.S. at 357-58, n.5 (quoting Merrill Lynch v. Ware, 414 U.S. 117, 127 (1973)).
eral civil immigration law. According to the local noncooperation laws can be reconciled with the continued enforcement of federal immigration law by the federal INS.

Preemption of the Philadelphia ordinance was necessary in order to achieve what Congress intended. No such preemption of the San Francisco ordinance is required because there is no explicit congressional intent regarding local cooperation with the INS. The fact that local law enforcement officials do not affirmatively cooperate with the INS does not prevent the INS from enforcing federal immigration laws. In fact, the San Francisco ordinance specifically avoids any conflict with federal immigration law. It is one of the premises of the ordinance that the enforcement of the federal civil immigration law is a matter for the INS, and therefore, not for the local police. The ordinance also specifically provides an exception that continues cooperation between the local police and the INS when there is an investigation or arrest involving a criminal violation of the immigration laws, such as smuggling.

C. No Actual Conflict Between San Francisco Ordinance and INS Enforcement of the INA

Most critically, the Lungren opinion overlooks the actual effects — or lack thereof — the San Francisco ordinance has on the relations between the INS and the local police. Specifically, separation between local law enforcement officials and the INS is necessary in order to achieve what Congress intended. No such preemption of the San Francisco ordinance is required because there is no explicit congressional intent regarding local cooperation with the INS. The fact that local law enforcement officials do not affirmatively cooperate with the INS does not prevent the INS from enforcing federal immigration laws. In fact, the San Francisco ordinance specifically avoids any conflict with federal immigration law. It is one of the premises of the ordinance that the enforcement of the federal civil immigration law is a matter for the INS, and therefore, not for the local police. The ordinance also specifically provides an exception that continues cooperation between the local police and the INS when there is an investigation or arrest involving a criminal violation of the immigration laws, such as smuggling.

82. 67 Op. Cal. Att’y Gen. 331. Compare Cal. Health and Safety Code § 11369, which creates a specific statutory obligation for the state or local arresting officer to report to the INS an individual “[w]hen there is reason to believe that any [such] person arrested for a violation of [specified drug-related offenses] may not be a citizen of the United States...” However, the obligation is only triggered after an arrest for a drug-related offense; the statute does not authorize nor provide the basis for a generalized interrogation into any individual’s immigration status. There is an implicit recognition that the local law enforcement official’s only duty is to report the individual to the INS; there is no duty to definitely determine the citizenship or immigration status of the individual appointed.

83. The Lungren opinion raises the unfounded prospect that local officials might be criminally liable under the INA for implementing the ordinance because 8 U.S.C. § 1324(a)(1)(C) and (D) prohibit the concealing, harboring or shielding from detection an undocumented individual as well as the encouraging or inducing of entry or residence of an undocumented individual. 75 Op. Cal. Att’y Gen. at 276. However, Lungren only alludes to the statute and does not reach the conclusion that implementation of the San Francisco ordinance constitutes a violation of 8 U.S.C. § 1324(a)(1). Indeed, an earlier Attorney General explicitly considered this argument and rejected it: “Despite its comprehensive prohibition and manifest purpose however, the fact nonetheless remains that the section only prohibits affirmative types of conduct and does not deal with nonactivity. One cannot eke out a duty to act out of a prohibition on activity, no matter how broad a spectrum it might cover.” 67 Op. Cal. Att’y Gen. at 338, n.16.

84. One commentator has noted that Lungren’s preemption analysis is “paradoxical” because “ordinances prohibiting local police enforcement of immigration laws themselves are premised on the idea that enforcement of civil immigration laws is a purely federal concern...such ordinances do nothing to impede the INS from carrying out its duties.” Rebecca Chiao, Fourth Amendment Limits on Immigration Law Enforcement, IMMIGRATION BRIEFINGS, Feb. 1993, at 17.

85. Instead, Lungren may have relied on the unsubstantiated statement made in Senator Kopp’s request alleging that the ordinance had “caused a breakdown in the day to day exchange of vital law enforcement information between local police, the sheriff’s department and the INS.” Lungren fails to
enforcement and the INS had already been established as city and county policy and practice by three actions taken by the San Francisco Sheriff and the San Francisco Police Department prior to the passage of the ordinance.

First, in January 1988, the San Francisco Sheriff wrote to the local INS announcing that the INS would no longer have free access to the San Francisco jails. The San Francisco Sheriff would continue to cooperate fully with any INS request for information about or access to specific individuals held in his custody but would no longer permit the INS to examine otherwise confidential booking records. The sheriff took this position because the INS routinely demanded access to the booking records and then sought to interview arrestees who had Hispanic surnames to determine whether to place INS holds on any of the jail inmates. The sheriff believed that such "fishing expeditions" by the INS were racially discriminatory and of questionable legality.

Second, as a result of the adverse publicity regarding the Club Elegante raid, the San Francisco District Office of the INS and the San Francisco Police Department entered into a Memorandum of Understanding (MOU) regarding their respective jurisdictions in San Francisco. Both the local INS and the San Francisco police department agreed that:

[T]he San Francisco Police Department does not enforce federal immigration law. . . . The San Francisco Police Department will not take any action to impede the Immigration and Naturalization Service' [sic] enforcement of immigration laws nor will the San Francisco Police Department initiate enforcement activity based solely on an individual's immigration status . . . .

Most critically in the context of the Lungren opinion, the INS and the San Francisco Police Department also agreed that:

Except for cooperation in criminal investigation and/or the investigation of criminal aliens, the Immigration and Naturalization Service will not request the assistance of the San Francisco Police Department when solely enforcing immigration laws. . . .

The MOU was signed on August 1, 1989, almost three months before the City of Refuge ordinance was enacted. Thus, even prior to the enactment of the City of Refuge ordinance, the local INS had voluntarily and specifically
declined the assistance of the San Francisco Police Department in enforcing federal civil immigration laws.\(^8\)

Finally, in a recent settlement of litigation regarding joint operations by the INS and local law enforcement agencies, the San Francisco INS Office agreed:

INS agents will not direct, propose, or request that joint operations with state or local law enforcement officers be carried out when INS agents know that these operations will be beneficial only to INS, unless the state or local law enforcement is called upon by INS to provide backup solely for officer safety, crowd or traffic control, or take custody of persons arrested by the INS.\(^9\)

Thus, Lungren's conclusion that San Francisco law enforcement officials provide the local INS with "one of the principal collection points for legally obtainable, non-confidential information about persons who may be unlawfully present in this country"\(^10\) is simply incorrect. There is no evidence to support Lungren's conclusion that "local law enforcement agencies constitute an important component of the overall effort to effectuate the civil provisions of the [Immigration and Nationality] Act."\(^11\) At least since August 1989 and again as recently as September 1992, the local INS has voluntarily declined such assistance from the San Francisco Police Department in legally binding agreements. The ordinance has not interfered in any way with the INS' enforcement of federal immigration law in San Francisco.\(^12\) In fact, the ordinance is consistent with the separation of enforcement powers between the INS and the San Francisco Police Department that existed prior to its passage. Yet Lungren's analysis is based entirely upon an actual conflict between the San Francisco ordinance and the enforcement of the federal immigration law. If such a conflict does not in fact exist, then Lungren's preemption analysis is completely undermined.

The Lungren opinion itself acknowledges that local law enforcement officials do not have the legal authority to detain or arrest an individual for

\(^8\) Such a policy by the San Francisco police is similar to the policy of noncooperation implicitly endorsed by the Ninth Circuit in Gonzales. 722 F.2d at 480.

\(^9\) See Velasquez v. Ackerman, Civ. No. C-84-20723 (N.D. Cal.1992), paragraph IV.A.2. See also ¶IV.A.4:

INS agents will not participate in any joint operation in which the INS agents know, or in the exercise of due diligence should know, that it is anticipated or planned that the state or local law enforcement officers will: a) detain any person (or persons) for the sole purpose of affording INS agents the opportunity to determine his or her immigration status, unless specifically directed to detain the person by an INS agent. . . Id.


\(^11\) Id.

\(^12\) Curiously, the Deputy Attorney General who drafted the Lungren opinion was quoted as stating that what actual assistance to the INS might be lost as a result of San Francisco's ordinance is irrelevant to the preemption analysis. Susan Dianne Rice, S.F. Sanctuary Ordinance Is Unconstitutional, AG Declares, S.F. DAILY J., Nov. 20, 1992, at 6. As argued above, the Deputy Attorney General fails to understand the requirements for conflict preemption.
a violation of the federal civil immigration law. It seems incongruous that local law enforcement officials are prohibited from making arrests for civil violations of the federal immigration law but a city cannot adopt such a prohibition as a formal policy in a noncooperation ordinance. As discussed above, there is no conflict between such absence of local cooperation and the INS’ enforcement of federal immigration law. Without actual conflict between the INS and the local police regarding the enforcement of such federal law, there is neither a legal nor public policy basis upon which to invalidate such noncooperation ordinances.

VII. SB 691: A LEGISLATIVE CHALLENGE TO NONCOOPERATION ORDINANCES

In March 1993, Senator Kopp, who had requested the Lungren opinion, attempted to legislatively implement the conclusions of the otherwise non-binding Attorney General opinion through his introduction of Senate Bill No. 691 into the California Senate. This section analyzes the state and local legislative debate regarding SB 691 that led to its enactment.

The original version of Kopp’s bill would have 1) prohibited any city or county from enacting or enforcing any noncooperation ordinance and 2) expanded the requirement in the California Health and Safety Code to mandate reporting by arresting agencies of any person arrested for any violation of the criminal law if there was reason to believe that the arrested individual may not be a citizen or legal resident of the United States. At its May 4th hearing on SB 691, the Senate Judiciary Committee was sharply divided on the bill and urged Senator Kopp to fashion alternative language. In response, Senator Kopp significantly amended the bill, deleting the prohibition of enactment or enforcement of any city or county noncooperation ordinance and focusing only on expanding the circumstances in which law enforcement officers must report an arrest to the INS. The amended bill required law enforcement officers to identify and report to the INS individuals who were arrested and in custody for the alleged commission of a felony and who were suspected to have violated the civil provisions of the federal immigration law. As amended, the bill passed both the Senate Judiciary Committee and the full Senate.

While SB 691 was pending, the City and County of San Francisco faced renewed pressure regarding its noncooperation ordinance from the California Office of Criminal Justice Planning (OCJP). The California


95. After the introduction of SB 691, Senator Kopp amended the bill, moving the reporting mandate from the Health and Safety Code to the Penal Code and adding a list of crimes for which an arrest would trigger inquiry and reporting to the INS. SB 691, as amended April 28, 1993.
OCJP is the state agency responsible for administering certain federal block grants to local governments. In 1990, Congress added a condition for a state’s receipt of certain federal block grants for crime and drug control that the state provide certified copies, without a fee, of state criminal convictions of “aliens” to the INS within thirty days of the conviction.\textsuperscript{96} Such certified copies of conviction records are required by the INS in deportation proceedings if the criminal conviction is to be used as a basis for deportation.\textsuperscript{97} However, Congress then amended the requirement in 1991 to only require 1) notice by the state to the INS within thirty days of the state criminal conviction of an “alien” and 2) response to an INS request for a certified copy of the conviction record within thirty days.\textsuperscript{98}

After consultation with the INS, the OCJP determined that it would require California recipients of these federal grants to report all individuals to the INS upon arrest rather than conviction. OCJP’s rationale was that the local INS did not have the resources to investigate and follow-up adequately on an individual’s immigration status if only given notice after conviction.\textsuperscript{99} In order to facilitate INS’ ability to place holds and detainers on individuals being processed through the state criminal justice system, OCJP interpreted the federal statute as requiring earlier post-arrest rather than post-conviction reporting to the INS.\textsuperscript{100}

In August 1992 and again in June 1993, OCJP informed the City and County of San Francisco that it would lose its OCJP funding of up to $4 million if the San Francisco City of Refuge ordinance were not repealed because the ordinance, as most recently amended in 1992, only permitted post-conviction reporting for felonies and post-arrest reporting only if there had been a prior felony conviction. Although it was evident that OCJP’s requirement of post-arrest reporting went beyond the federal mandate, San Francisco was caught in a dilemma. San Francisco could not simply argue that OCJP’s interpretation was too broad but would have to argue that the federal statute prohibited OCJP’s requirement of post-arrest rather than post-conviction reporting.

SB 691 provided a possible compromise between San Francisco and OCJP. The pending version of SB 691 required post-arrest reporting to the INS only for felonies rather than for all state crimes. Moreover, San Franc-

\textsuperscript{97.} 8 C.F.R. §§ 3.41, 287.6(a) (1993).
\textsuperscript{100.} Such earlier reporting enables the INS to obtain not only the criminal conviction records but to place holds and detainers on the individuals to ensure that they are transferred to the custody of the INS upon release from state custody.
san Francisco would have to make such an amendment to its ordinance anyway if SB 691 were enacted. With agreement from OCJP that adoption of an amendment to the San Francisco ordinance similar to the language of SB 691 would resolve this stalemate, the San Francisco Board of Supervisors reluctantly voted to amend the San Francisco ordinance.\textsuperscript{101} Like the pending version of SB 691, the San Francisco amendment would require post-arrest reporting of persons arrested for felonies who were in custody and suspected of having violated the civil provisions of the federal immigration law.\textsuperscript{102}

SB 691 then passed the Assembly with little opposition and was signed into law by the governor in October.\textsuperscript{103} However, many news reports of the enactment of SB 691 misreported that the legislation repealed all sanctuary or noncooperation ordinances, reflecting continuing confusion regarding the actual effect of such ordinances.\textsuperscript{104} The final version of the Kopp legislation does not repeal noncooperation ordinances, but rather creates a limited expansion of the circumstances in which local law enforcement officials may inquire about and report an individual’s immigration status to the INS.

\section*{VIII. Conclusion}

Both the opinion issued by California Attorney General Lungren and the enactment of SB 691 challenged the validity of the San Francisco City of Refuge ordinance. Some may argue that the need for such noncooperation ordinances has diminished with recent political events which have brought some stability to Central America. However, many Central Americans living in the United States are still afraid to return.\textsuperscript{105}

\begin{thebibliography}{99}
\bibitem{102} SF Eases Sanctuary Law Under Threat From State, S.F. Examiner, July 27, 1993 at A4. There still will be difficult questions raised by the implementation of this amendment in determining who is suspected of violating the civil provisions of the federal immigration law. Moreover, neither SB 691 nor the amendment to the San Francisco ordinance affects the continuing obligation under the Health and Safety Code to report non-citizens arrested for drug-related offenses to the INS.
\bibitem{103} Cal. S. B. 691, Ch. 818 enacted Oct. 4, 1993 (codified as Cal. Gov’t Code § 53069.75).
\bibitem{105} The implementation of the peace accords in El Salvador has been fraught with obstacles and delays. The recent findings of the United Nations Truth Commission confirm the widespread human rights abuses perpetrated by the Salvadoran military during the civil war. Meanwhile, the award of the 1992 Nobel Peace Prize to Guatemalan indigenous leader Rigoberta Menchu has only focused international attention on the continuing human rights abuses in Guatemala.

While religious congregations are no longer continuing to declare themselves as sanctuaries, many sanctuary communities continue their work advocating for and supporting Central Americans. Until those Central Americans do return to their countries and as long as other refugees continue to come to the United States, state and local governments will continue to face the question of cooperation with the INS in arresting and deporting refugees and others who have sought sanctuary in the United States.

More importantly, such local ordinances can continue to build and maintain trust and cooperation between immigrant and refugee communities and local government officials. State and local officials must decide whether such cooperation is more important than any actual or perceived cooperation between those local governments and the INS. The answer to that public policy question will determine the future of local noncooperation ordinances.

Reg. 28701 (1992), and 58 Fed. Reg. 32157 (1993). When DED status expires on December 31, 1994, the INS will have to begin re-interviewing all the estimated 150,000 Salvadorans registered under DED and TPS regarding their asylum claims pursuant to the American Baptist Churches settlement.

Meanwhile, asylum interviews for an estimated 50,000 Guatemalans who registered under the ABC settlement have been postponed until at least 1994. In light of the diversion of asylum officers required to respond to Haitian asylum applicants fleeing after the September, 1991 military coup in Haiti and the delay in hiring and training asylum officers, the 150 officers now face a staggering backlog of over 300,000 cases, not counting the Guatemalan ABC and Salvadoran DED/TPS/ABC cases. Thus, it is unlikely that any significant adjudication of the Salvadoran or Guatemalan claims will be completed in 1993.

Finally, there is a national campaign seeking TPS for all the estimated 100,000 Guatemalans living in the U.S. See Protect Guatemalan Refugees, S.F. EXAMINER, Oct. 20, 1992, at A10; Nobel Winner Asks U.S. to Aid Refugees, S.F. EXAMINER, July 29, 1993, at A28.