

A TRUMP THREAT ANALYSIS FOR DECLARING OREGON AS AN IMMIGRANT-INCLUSIVE PLACE – COUNTIES & CITIES

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CAN TRUMP PUNISH OREGON?

If an Oregon County or City adopts an immigrant-inclusive resolution, can Trump punish that locality? Donald Trump has a history of punishing people who disagree or challenge him. This document explains why Trump's present options to punish an Oregon locality are limited and legally difficult or impossible to implement.¹

As chief executive of the United States, Trump will have at his disposal options arising from his executive prerogatives over the nation's vast administrative resources and bureaucracy to batter people and institutions he perceives as his enemies. Trump has promised to end all federal funding to so-called "Sanctuary Cities" in his first 100 days. It would be foolish to dismiss his belligerence as campaign-talk – particularly in the realm of immigration control over which the President of the United States has a great deal of power.

Other than Twitter and a bully-pulpit, there are no realistic mechanisms currently available that Trump could use to punish an Oregon locality for declaring itself to be an immigrant-inclusive place through the proposed resolution. Though Trump may tweet that he wants to end all federal funding for everything to punish defiant states, it is nearly impossible to legally execute that threat. The federal government's path dependence on detainers as its mechanism for mass incarceration and mass deportation is already so constitutionally-troubled that it could not realistically be a viable basis on which to punish an Oregon locality.

AN IMMIGRANT-INCLUSIVE RESOLUTION

¹ This memo does not address the political barriers which in reality may be more formidable than the legal ones described herein. What would the headlines read if a Trump-energized federal force took over the Oregon state police or destroyed federal programs that enjoy bipartisan support? California, for example, appears spoiling for a fight. See Adam Nagourney, *California Hires Eric Holder as Legal Bulwark Against Donald Trump*, N.Y. TIMES (Jan. 5, 2017), <http://www.nytimes.com/2017/01/04/us/california-eric-holder-donald-trump.html>.

There are several notable features about the sample immigrant inclusive order. First, while it draws on Oregon statutory law, ORS 181A.820, for key language, it is independent of the statute. It is based on the inherent power of an Oregon locality to organize and maintain its internal affairs. It is directed at the locality's public agencies and does not bind the public. It is intended to disentangle Oregon's public resources from federal immigration enforcement because Oregon has no control over federal immigration policy, therefore, it intends to bring clarity to *who* is enforcing *what* in order to maintain policy accountability. It does not obstruct enforcement, withhold information, or attempt to hide anyone or anything. It is transparent at its core by making federal immigration enforcement visible to the public instead of allowing it to hide behind and use Oregon resources to mask deportation politics. It is structured around the U.S. Constitution's Fourth Amendment, Tenth Amendment, and Fourteenth Amendment.

Besides the benefits of disentanglement from constitutionally-risky deportation practices, the proposed resolution would promote important Oregon policies supporting prosperity, equity and inclusion and public safety.² Immigrant and refugees workers, consumers, and entrepreneurs are integral to Oregon's prosperity and tax base.³ Immigrants make up 1 in 10 Oregonians, wield \$15.6 billion in consumer purchasing power and the businesses they own had sales and receipts of \$4.9 billion and employed more than 40,000 people at last count.⁴ A key commitment of the State of Oregon is to the right of all persons to work and advance on the basis of merit, ability, and potential - the critical concepts of equity and inclusion.⁵ The overwhelming weight of empirically-driven studies demonstrate that inclusive postures toward immigrant communities improve overall public

² See *Framework for an Immigrant-Inclusive Vision of Oregon as a Response to the Proposed Constitutionally-Risky Actions by President-Elect Trump* (Nov. 27, 2016) at 5-8 (describing disentanglement policy).

³ Empirical research and scholarly study overwhelmingly demonstrate the value of immigrant and refugee contributions to the prosperity of Oregon. See *New Americans in Oregon: The Political and Economic Power of Immigrants, Latinos, and Asians in the Beaver State*, AMERICAN IMMIGRATION COUNCIL (June 2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/new_americans_in_oregon_2015.pdf (collecting census and academic study data into factsheet); *Undocumented Workers Are Taxpayers, Too*, OREGON CENTER FOR PUBLIC POLICY (Jan. 2012), http://www.ocpp.org/media/uploads/pdf/2012/01/iss20120125UndocumentedTaxpayers_fnl.pdf (discussing tax contributions to Oregon made by workers without federal immigration status); *The Power of the Purse: The Contributions of Hispanics to America's Spending Power and Tax Revenues in 2013*, PARTNERSHIP FOR A NEW AMERICAN ECONOMY (2014), http://www.renewoureconomy.org/wp-content/uploads/2014/12/PNAE_hispanic_contributions.pdf.

⁴ See *New Americans in the Beaver State*, supra note 3 at 1.

⁵ See State of Oregon, Office of Governor, Executive Order No. 16-09.

safety.⁶ On these three points, it isn't even a close question.⁷ In contrast, there is no perceivable data-driven or policy benefit for using a County or City's resources in constitutionally-risky deportation strategies.

Regarding information sharing, the proposed resolution contains nothing that would engender a violation of federal law, particularly, 8 U.S.C. §§ 1373 or 1644.⁸ These statutes prohibit Oregon from restricting

⁶ See Walter A. Ewing, et al, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES (2015) ("Criminalization of Immigration") at 6, <https://www.americanimmigrationcouncil.org/sites/default/files/research/> (stating that "[f]irst-generation economic immigrants are self-selected risk takers who leave their homes, families, and languages to move to a new country to improve their and their children's lives. They have good reasons to work hard, defer gratifications, and stay out of trouble" and that immigrant communities "tend to display social cohesion among neighbors combined with their willingness to intervene on behalf of the common good."). An important study conducted by researchers at the University of Chicago found that 45 percent of Latinos stated they were less likely to voluntarily offer information about crimes because of police entanglement with immigration enforcement. See Nik Theodore, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT (May 2013) at i, http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF. "The study concludes that "one of the unintended consequences of the involvement of state and local police in immigration enforcement -- a reduction in public safety as Latinos' mistrust of the police increases as a result of the involvement in immigration enforcement." *Id.* at ii.

Another path-breaking study by the Police Foundation itemized the costs of entanglement of federal immigration enforcement as reduced trust and cooperation in immigrant communities undermining public safety, increased victimization and exploitation of undocumented immigrants, police misconduct, large financial costs of immigration enforcement diverts resources from traditional law enforcement activities, and racial profiling, among others and concluding that the costs substantially outweigh any perceived benefit. See Anita Khashu, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties*, POLICE FOUNDATION (April 2009) at 31-34, <https://www.policefoundation.org/wp-content/uploads/2015/07/Khashu-2009-The-Role-of-Local-Police.pdf>.

⁷ See CRIMINALIZATION OF IMMIGRATION, *supra* note 6 at 6. The report explains that "[f]or more than a century, innumerable studies have confirmed two simple yet powerful truths about the relationship between immigration and crime: immigrants are less likely to commit serious crimes or behind bars than the native-born, and high rates of immigration are associated with lower rates of violent crime and property crime. This holds true for both legal immigrants and the unauthorized, regardless of their country of origin or level of education." *Id.*

⁸ The statute states in full,

8 U.S.C. § 1373. Communication between Government agencies and the Immigration and Naturalization Service

(a) In general

Notwithstanding any other provision of Federal, State, or local law, 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

“any government or official” from voluntarily exchanging information with the federal immigration agency. Section 1644 is titled “Communication between State and local government agencies and Immigration and Naturalization Service” and is substantially identical to § 1373.⁹ The proposed resolution prohibits only the use of Oregon resources from being used to enforce federal immigration law. It does not prohibit information sharing. Information exchange is regulated by Oregon law at ORS 181A.820.

TODAY AND TOMORROW – THREAT ANALYSIS

Today, as a matter of pure law, there are no federal dollars at stake. Tomorrow, as a matter of law and politics, the significant impediments to punishing an Oregon locality by restricting federal dollars are practically impermeable. And, in any event, would be signaled far enough in advance for the locality to reflect and consider alternatives with no appreciable risk.

A. Threats Today

The Trump regime has threatened to end federal dollars to “sanctuary”

Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

⁹ The statute provides in full,

8 U.S.C. § 1644. Communication between State and local government agencies and Immigration and Naturalization Service

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

jurisdictions. Trump has indicated that he wants to strike out against anyone who refuses to join in his extreme immigration enforcement plans. But that would require a sustained focus on striking out against a lot of people.

This memo addresses what he can realistically do now, not what he tweets he can do. The people who are tasked with trying to implement his constitutionally-questionable desires have latched onto whether a jurisdiction has a policy that violates 8 U.S.C. § 1373 as the marker for “sanctuary jurisdictions.” The sample resolution does not.

Federal dollars that flow to Oregon come via multiple channels. The only realistic threats to federal dollars currently would fall on grants received under the Edward Byrne Memorial Justice Assistance Grant Program (Byrne JAG) or the State Criminal Alien Assistance Program (SCAAP).¹⁰

Byrne JAG funds “law enforcement programs, prosecution and court programs, including indigent defense; prevent and education programs, corrections and community corrections programs; drug treatment programs and enforcement programs; planning, evaluation and technology improvement programs; and, crime victim and witness programs (other than compensation).”¹¹ SCAAP authorizes the Governor of Oregon to seek funding from the federal government for noncitizens who have committed serious crimes in Oregon, who were arrested, prosecuted, and convicted and whose sentence required incarceration.¹² This funding is premised on Oregon enforcing Oregon law – not federal immigration law.¹³

Byrne JAG dollars are awarded to both Oregon as a whole (to its Criminal Justice Commission) and to Oregon’s local governments who may make separate grant applications. For the 2015-2017 budget, approximately

¹⁰ None of the federal dollars Oregon *currently* receives is conditioned on Oregon being involved in federal immigration enforcement.

¹¹ See OREGON CRIMINAL JUSTICE COMMISSION, *Grants Management Handbook* (Oct. 2015) at 4.

¹² The statute, 8 U.S.C. § 1231(i) provides,

For purposes of this subsection, the term “undocumented criminal alien” means an alien who— (A) has been convicted of a felony or two or more misdemeanors; and (B) (i) entered the United States without inspection or at any time or place other than as designated by the Attorney General;(ii) was the subject of exclusion or deportation proceedings at the time he or she was taken into custody by the State or a political subdivision of the State; or (iii) was admitted as a nonimmigrant and at the time he or she was taken into custody by the State or a political subdivision of the State has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status.

¹³ Ironically, it is also premised on the federal government failing to enforce federal immigration law. That is, by means of SCAAP dollars, Congress meant to reimburse the States for the incarceration costs of certain noncitizens.

\$8.4 million dollars in Byrne JAG money is projected.¹⁴

SCAAP dollars are mainly awarded to the Oregon Corrections Department. For the 2015-2017 budget, “Federal Funds, which make up 0.4 percent of the budget, are primarily from the State Criminal Assistance Program grant, which provides a *minimal subsidy* to the cost of managing alien offenders. The funds are used to offset medical costs.”¹⁵ For the 2017-2019 budget request, the Oregon Department of Corrections anticipates requesting even less in SCAAP funding.¹⁶

For future requests for Byrne JAG and SCAAP funding, the U.S. Department of Justice already has begun implementing a verification requirement prior to the issuance of a grant that the jurisdiction in question has no “sanctuary” policy, that is, that the jurisdiction does not violate 8 U.S.C. § 1373.¹⁷ This verification requirement does not apply to any previously awarded Byrne JAG or SCAAP funding.¹⁸ And even if it did, as we explain above, the proposed resolution does not violate 8 U.S.C. § 1373 because it does not regulate information sharing.

B. Threats Tomorrow

Tomorrow, as a matter of law and politics, it would be extremely difficult to implement funding restrictions that would punish an Oregon locality for an immigrant-inclusive resolution. No doubt the Oregon locality would receive a Twitter lashing from Trump. And the airwaves and social media might fill with constitutional lunatics and white supremacists berating the locality for recognizing the contributions that immigrants make to Oregon’s prosperity. But the actual act of punishing an Oregon locality via cutting of federal dollars is legally and politically difficult to do – even for a constitutionally-careless administration.

Four principles serve to insulate the Oregon locality. *First*, the federal

¹⁴ See STATE OF OREGON, GOVERNOR’S BUDGET, 2015-2017 at 84, https://www.oregon.gov/das/Financial/Documents/2017-19_gb.pdf.

¹⁵ See GOVERNOR’S BUDGET, supra note 5, at D-103 (emphasis added).

¹⁶ See OR. DEP’T CORRECTIONS, 2017-2019 AGENCY REQUEST BUDGET at 354, https://www.oregon.gov/doc/ADMIN/docs/pdf/17_19_arb_revenue.pdf.

¹⁷ See OFFICE OF JUSTICE PROGRAMS, *Additional Guidance Regarding Compliance with 8 U.S.C. § 1373* (Oct. 6, 2016) (Additional Guidance), <https://www.bja.gov/funding/Additional-BJA-Guidance-on-Section-1373-October-6-2016.pdf>; *Memorandum from Michael E. Horowitz, Inspector General to Karol V. Mason, Assistant Attorney General for the Office of Justice Programs* (Mar. 31, 2016), <https://oig.justice.gov/reports/2016/1607.pdf>.

¹⁸ See *Additional Guidance*, supra note 17, at Question 2 (“Does OJP’s guidance on 8 U.S.C. § 1373 impact FY 2016 funding? No FY 2016 or prior year Byrne/JAG or SCAAP funding will be impacted.”)

immigration agencies' path dependency on detainers limits their ability to create funding barriers in the future. If detainers remain the singular program (and the nature of path dependence, especially for a large bureaucracy, suggests it will be for the near future), there is really nothing that the federal government can do to force Oregon's cooperation to act as a force multiplier in a mass incarceration and mass deportation scheme. Presently, federal dollars are *not* conditioned on Oregon detainers. Nearly every court to address the federal government's immigration detainer practices have found them to be illegal – either violating the immigration statute, or worse, violating the U.S. Constitution.¹⁹ In Oregon, the detainer program resulted in a federal court holding Clackamas County liable for such violations.²⁰ The wholesale rejection of the detainer program as constitutionally-questionable and fiscally unsound leaves the Trump regime with a poor mechanism to tie future funding requests to Oregon's participation through the use of its own resources. The federal immigration enforcement bureaucracy is dependent on detainers and will continue to seek ways to make them work in localities that want them and don't have policies against them.

Second, anti-commandeering principles prevent the Trump regime from unilaterally requiring Oregon to use its own resources to enforce federal law. That is to say, the Tenth Amendment of the U.S. Constitution prevents Trump or Congress from commandeering Oregon's public resources to achieve federal goals.

Third, anti-coercion principles impede any near future attempt by the federal immigration agencies to condition already existing funding on federal immigration enforcement. Anti-coercion principles do not prevent Congress (or possibly a federal agency) from creating future conditions to accepting future federal funding. Under these principles, though, it would be difficult for unrelated funding programs to have attached to them conditions related to immigration-enforcement. For example, a housing grant would be unlikely to contain a funding condition that an Oregon

¹⁹ See *Jimenez-Moreno v. Napolitano*, 1:11-cv-05452, 2016 WL 5720465 (Sept. 30, 2016) ("The bottom line is that, because immigration officers make no determination whatsoever that the subject of a detainer is likely to escape upon release before a warrant can be obtained, ICE's issuance of detainers that seek to detain individuals without a warrant goes beyond its statutory authority to make warrantless arrests under 8 U.S.C. § 1357(a)(2)."); *Galarza v. Szalczyk*, 745 F.3d 634 (CA3 2014).

²⁰ See *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *10-11 (D. Or. Apr. 11, 2014) (granting summary judgment on liability for Fourth Amendment violations on the grounds that "[t]here is no genuine dispute of material fact that the County maintains a custom or practice in violation of the Fourth Amendment to detain individuals over whom the County no longer has legal authority based only on an ICE detainer which provides no probable cause for detention.")

locality engage in constitutionally-risky detainer behavior. And, even if it could, the fourth principle below protects the Oregon locality.

Fourth, should any of these barriers fall, the resolution can be revisited and modulated. The point of the resolution is to protect Oregon's immigrant communities and honor their contributions to Oregon's prosperity and protect all of Oregon's social and economic framework from the disaster of mass incarceration and mass deportation.

CONCLUSION

The benefits to Oregon for promulgating an immigrant-inclusive resolution are tangible and immediate. The legal risks are realistically minimal today and unlikely to manifest tomorrow.