



# No, Cities and Counties Can't Keep ICE from Using Their Airports

By Matt O'Brien | July 2019

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## Introduction

On April 23, 2019, Executive Dow Constantine of King County, Washington issued an order directing, “King County International Airport to amend lease practices with the goal of banning flights of immigration detainees chartered by Immigration and Customs Enforcement.”<sup>1</sup>

Constantine’s diktat coincided with the release of a woefully biased report produced by researchers from the University of Washington’s Center for Human Rights. That study, titled “Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation,” makes the outrageous claim that the U.S. Immigration and Customs Enforcement’s (ICE) deportation of immigration violators raises “human rights” concerns.<sup>2</sup>

Parroting the Center for Human Rights report, the King County Order states that:

- Use of King County Airport by ICE is “inconsistent with the County’s obligation to operate the airport in a safe and efficient manner for all persons, not just citizens.”<sup>3</sup>
- “Deportations raise troubling human rights concerns which are inconsistent with the values of King County.”<sup>4</sup>
- Continued use of King County Airport by ICE “could lead to human rights abuses” and “violations in contravention of international treaty obligations concerning human rights.”<sup>5</sup>

But Executive Constantine neglected to explain how deportation is inconsistent with either good airport operations practices or King County's civic values. He further declined to elucidate how the execution of a valid removal order issued by the U.S. Immigration Court might lead to human rights abuses. And he also failed to specify what international treaty obligations might be violated by the removal of immigration violators via a local commercial airport.

The King County order appears to be part of a disturbing new strategy emerging among open-borders agitators: punishing businesses that cooperate with ICE in any way by implying that they are racist, insensitive to the plight of immigrants, and/or somehow violating "rights" – most typically "civil rights" or "human rights" which, in reality, exist neither in law nor in fact for foreign nationals who have violated our immigration laws.

To date, so-called "immigrant's rights groups" have already engaged in libelous (and totally baseless) smear campaigns against Motel 6, 7-Eleven, and Greyhound Bus Lines.<sup>6</sup> Each of those efforts were intended to intimidate targeted businesses into adopting a lawless open-borders agenda. An agenda which would be beneficial only for immigration violators; but not for the bulk of law-abiding customers who regularly patronize these businesses.

In its latest incarnation, this effort to punish businesses for respecting the legitimate authority of the Department of Homeland Security (DHS) to enforce our immigration laws takes the following form: pro-illegal alien protesters, typically in sanctuary jurisdictions, put pressure on local airport authorities to ban ICE from their premises. They do this in hopes that the airport authorities will badger aviation services providers into refusing to do business with ICE.

The end-game is two-fold:

1. The disruption of ICE's safe, orderly removal of immigration violators allows the mainstream media to portray ICE as an inept agency engaged in a legal process that is not supported by the American public.
2. Enabling open-borders organizations like the American Civil Liberties Union and the Southern Poverty Law Center to file bogus lawsuits in activist federal courts in order to obtain baseless, but binding, federal injunctions blocking ICE efforts to remove foreign law-breakers.

Usage of this form of collateral attack against ICE has been spreading. Residents of Yakima, Washington recently asked the Yakima City Council to end ICE use of air transport facilities at McAllister Field.<sup>7</sup> And anti-ICE organizations have protested the

use of the Gary, Indiana airport for deportation flights.<sup>8</sup> (It is also worth noting, protesters at France’s Charles de Gaulle Airport recently called for Air France to cease cooperating with the French government on any deportation flights.<sup>9</sup>)

But, can a local government entity in the U.S. actually ban ICE, a federal law enforcement agency, from operating at a public airport? Is King County’s interference with ICE’s flight operations a violation of federal law? How should ICE respond to actions like that taken by King County? How should the aviation services providers whose business interests are negatively affected by this type of action react? The purpose of this issue brief is to answer the foregoing questions and highlight the controlling federal law applicable to each.

## **Can a local government entity ban ICE from using a public airport for Deportation Flights?**

No. Neither a local government officer, like the King County Executive, nor a local government entity may ban any federal agency from operating at a public airport.

Pursuant to the 10th Amendment, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>10</sup> In plain English, that means that the federal government possesses only those powers specifically given to it.

The purpose of the 10<sup>th</sup> Amendment is to ensure that the federal government does not encroach on the constitutionally defined spheres in which the states have exclusive authority to legislate – in particular, regulations intended to preserve the health, safety, and welfare of citizens. But it also prohibits state actions aimed at interfering with the federal government’s exercise of its assigned powers.

In *Arizona v. United States*, the Supreme Court held that immigration is an exclusively federal realm of authority in which states are prohibited from legislating.<sup>11</sup> Therefore, state regulations prohibiting local cooperation with federal officials who are lawfully going about fulfilling their assigned duties are prohibited by the 10<sup>th</sup> Amendment and therefore totally impermissible.

Furthermore, ICE is a federal law enforcement agency with the authority – pursuant to the Immigration and Nationality Act (INA) – to arrest, detain, and remove illegal aliens and other immigration violators anywhere in the United States. There is nothing remotely inappropriate about ICE contracting with private air carriers or using public infrastructure (e.g. airports) to fulfill its mission.

## Is King County's Interference with ICE's Flight Operations a Violation of Federal Law?

Yes. Efforts to prohibit ICE from using the King County airport violate both federal aviation law and federal criminal law:

### AVIATION LAW

Although covered by only a few media outlets, the General Counsel for the Department of Transportation (DOT) promptly informed King County that Executive Constantine's order violated both federal laws and Federal Aviation Administration (FAA) airport operating requirements.<sup>12</sup>

A number of federal statutes specifically prohibit entities managing commercial airports from placing restrictions on the business activities engaged in by commercial air carriers:

- The Airport Deregulation Act of 1978 prohibits any state or local government from enacting or enforcing any "law, regulation, or other provision having the force or effect of law" dictating the types of services that may be offered by an air carrier.<sup>13</sup>
- The Airport and Airway Improvement Act of 1982, the Federal Aviation Act of 1958 and the Federal Airport Improvement Program require the owner or operator of any airport that has received federal grant money to operate the airport for the use and benefit of the public and to make it available for all types of aeronautical activity.<sup>14</sup>
- The same obligation applies to airports that have received non-surplus government property under 49 U.S.C. § 47125 and prior, related statutes.<sup>15</sup>

Similarly, airports receiving federal grants must make available, "All facilities of the airport developed with Federal financial aid and all those useable for landing and takeoff of aircraft" to the United States Government, "at all times, without charge, for use by Government aircraft in common with other aircraft..."<sup>16</sup>

The authority to run a commercial airport in the United States is conferred by the FAA in the form of an Airport Operation Certificate (AOC). Failure to comply with relevant federal laws, rules, and regulations may result in the revocation of an airport owner's AOC.

## CRIMINAL LAW

In the United States, state and local government entities cannot prohibit the federal government from enforcing federal law. Depending upon the circumstances, hampering ICE flight operations may constitute obstruction of justice or interference with federal officers in the lawful performance of their assigned duties:

- 18 U.S. Code § 111 makes it unlawful to interfere with any federal officer engaged in the performance of official duties.<sup>17</sup> Persons who attempt to prohibit immigration officers from enforcing the Immigration and Nationality Act may be liable to criminal prosecution.
- 18 U.S. Code § 1505 makes it unlawful to impede any pending proceeding before any department or agency of the United States.<sup>18</sup> Individuals who deliberately interfere with efforts to execute a final order of removal may be liable to criminal prosecution for hindering the due and proper administration of the law under which immigration proceedings are conducted.
- 18 U.S. Code § 372 makes it unlawful to conspire to prevent federal officers from discharging their duties or to retaliate against them for so doing.<sup>19</sup> Any group of individuals who form a plan specifically aimed at prohibiting federal immigration officers from executing orders of removal may be liable to criminal prosecution.

Executive Constantine's order, although clothed in the garb of a governmental action, is nothing more than the deliberate – and illegal – obstruction of the federal government's lawful attempts to remove criminal aliens and other immigration violators from the United States.

### **How Should ICE Respond to Actions Like That Taken by King County?**

In the face of King County's questionable executive order, ICE simply moved its flight operations to nearby Yakima Air Terminal/McAllister field.<sup>20</sup> As a short term solution, this course of action has merit. It allows ICE to continue removing dangerous foreign nationals from the United States without significant interruption.

Nevertheless, over the long term, ICE must repel additional attempts to prohibit it from fulfilling its congressionally assigned mission. The most appropriate way to do this is to ask the FAA to seek injunctions prohibiting airport authorities from interfering with deportation operations – and, for that matter, any other legitimate federal business conducted on the premises of commercial airports.

The quickest, easiest way to convince airport operators to stop overstepping the bounds of their authority would be for the President to direct DHS to suspend *all* operations in affected airports:

- All flights, both foreign and domestic, are required to have passengers and baggage screened by the U.S. Transportation Security Administration (TSA).
- International airports, by definition, must house an official port of entry administered by U.S. Customs and Border Protection (CBP). If that port of entry is closed, international flights cannot be allowed to land.

DHS security operations are integral to the financial success of American commercial airports. As such, they give the federal government a significant amount of economic leverage with airport operators who are trying to extend sanctuary policies by interfering with airborne commercial activity. TSA, CBP, and ICE are responsible for enforcing different sections of federal law. However, they are all part of a concerted strategy to protect America's national security and public safety. The federal government should not be hesitant to send a clear message to local airport authorities that the DHS agencies come as a package. Should airport operators attempt to banish ICE, then they will also be deemed to have banished TSA and CBP. And without luggage and cargo screening, and the inspection of international passengers, airports cannot lawfully continue their operations.

If the threat of millions of dollars in lost revenue is not significant enough to prompt compliance with the relevant federal statutes, then the federal government should begin investigating, arresting, and criminally charging state and local officials who continue to engage in attempts to inhibit the enforcement of the INA. While actions like the King County Executive Order are clothed in the garb of legitimate government action, they are, in reality, no different than a group of private citizens storming a county jail and attempting to release the inmates – a criminal interference with the lawful administration of justice.

The “Cease and Desist Letter” promptly issued by the DOT was a good start. However, it will likely prove insufficient to curb further virtue-signaling stunts by airport authorities in pro-open-borders states like Washington, Oregon, New York, and California.

## **How Should the Aviation Services Providers Whose Business Interests Are Negatively Affected by This Type of Anti-ICE Action React?**

Airport business operations are governed by a complex lattice work of leases, contracts and other commercial agreements. Those arrangements impose legally enforceable obligations upon airport owners and operators, as well as firms doing business at airports. None of the laws governing such relationships permit an airport authority to unilaterally prohibit a service provider from contracting with the federal government, merely because said authority does not like certain provisions of federal law.

Rather than knuckling under to meaningless virtue-signaling by open-borders leaning states and local governments, airport service providers should sue airport operators to protect their right to engage in lawful business transactions with ICE, or any other federal agency. Airport service providers may have legitimate grounds to sue for compensation and damages under local, state, and federal business laws (e.g. tortious interference with contract and related offenses, etc.). They may also have actions against airport operators for breach of lease agreements.

Airport services providers who wish to continue doing business with ICE may also have claims against airport operators for violating the Commerce Clause of the United States Constitution.<sup>21</sup> The Commerce Clause authorizes Congress to regulate commerce between the states. It also restricts the authority of states to interfere with the interstate movement of people, goods, and services in a manner that excessively burdens interstate commerce.<sup>22</sup> Attempts by airport authorities to dictate who airport service providers may do business with, and how they may conduct such business, appear to constitute an intrusion into Congress' authority to regulate interstate commercial activity. As such, both private airport service providers and the federal government could sue local airport authorities for violating the commerce clause.

The federal government should provide no-cost legal assistance to affected aviation services providers who find themselves targeted by anti-ICE airport operators. Nevertheless, some firms will inevitably choose to breach contracts with the federal government and cave to baseless demands that they stop doing business with ICE. In those cases, the federal government should promptly seek restitution and damages from companies that knuckle under. It is beyond preposterous for a state governmental entity to interfere with business relations between a private corporation and a federal law enforcement agency actively engaged in enforcing statutes duly and properly enacted by Congress.

## Conclusion

According to Washington's *KUOW Public Radio*, "Seattle's Boeing Field and the Yakima Air Terminal have a choice: Let ICE flights land at the airport or risk future money from the government."<sup>23</sup> In reality, the choice is not between virtue-signaling and airport funding. It's between obeying the law and breaking it.

King County made a deliberate choice to engage in lawless behavior. Its attempt to deny ICE the use of its airport is pure, unvarnished law-breaking. Executive Constantine selectively disregarded the immigration laws of the United States to pander to the "woke" social justice warriors who reside in his county. And in so doing, he also thumbed his nose at the FAA and the criminal justice system. That is the type of behavior that one expects from tin-pot dictators in lawless republics, not from an elected official in a political sub-division located in the United States.

But, aside from being lawless, King county's actions are an affront to the American way of conducting political business. Immigration is a federal responsibility, and the states have no authority to set immigration policy. If a particular state, county or municipality does not like our immigration laws, it should encourage its federal legislators to change those laws – not willfully disobey them. When state and local leaders declare themselves exempt from federal law, they disregard the very roots of American order – constitutionalism, federalism, and the rule of law.

Rather than tolerate the erosion of our federal system, the Trump administration should bring politicians who break the law, or who incite others to do so, face-to-face with the consequences of their actions. Otherwise, firms that do legitimate business with the federal government will wind up being penalized by overzealous local officials with an ideological axe to grind.

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- <sup>1</sup> “Executive Constantine Directs Actions Against ICE Detainee Flights from King County Airport,” *King County Newsletter*, April 23, 2019, <https://www.kingcounty.gov/elected/executive/constantine/news/release/2019/April/23-ICE-KCIA.aspx>.
- <sup>2</sup> “Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation,” *University of Washington Center for Human Rights*, April 23, 2019, <https://jsis.washington.edu/humanrights/2019/04/23/ice-air/>.
- <sup>3</sup> King County Executive Office, “Executive Order: King County International Airport – Prohibition on Immigrant Deportations,” p. 1, [https://cis.org/sites/default/files/2019-04/King-County-PFC-7-1-EO\\_Signed-4-23-2019.pdf](https://cis.org/sites/default/files/2019-04/King-County-PFC-7-1-EO_Signed-4-23-2019.pdf).
- <sup>4</sup> *Id.* at p. 2.
- <sup>5</sup> *Id.* at p. 1.
- <sup>6</sup> Matt O’Brien, “Washington State Is Persecuting Motel 6 for Cooperating With ICE,” January 5, 2018, *Immigration Reform*, <https://www.immigrationreform.com/2018/01/05/washington-state-persecuting-motel-6-cooperating-ice/>.
- Matt O’Brien, “Motel 6 Succumbs to Open Borders Pressure Tactics,” November 14, 2018, *Immigration Reform*, <https://www.immigrationreform.com/2018/11/14/motel-6-succumbs-to-open-borders-pressure-tactics/>.
- Matt O’Brien, “7-Eleven Obeyed the Law! Oh No!” November 14, 2018, *Immigration Reform*, <https://www.immigrationreform.com/2018/11/14/7-eleven-obeyed-the-law-oh-no/>.
- Matt O’Brien, “Hey ACLU, Stop Throwing Greyhound Under the Bus!” April 2, 2018, *Immigration Reform*, <https://www.immigrationreform.com/?s=greyhound>.
- Matt O’Brien, “The ACLU, Making it Up as it Goes Along,” March 23, 2018, *Immigration Reform*, <https://www.immigrationreform.com/2018/03/23/aclu-making-goes-along/>.
- <sup>7</sup> Lex Talamo, “Community Speaks Out Against ICE-Chartered Flights in Yakima,” *Yakima Herald-Republic*, May 21, 2019, [https://www.yakimaherald.com/news/local/community-speaks-out-against-ice-chartered-flights-in-yakima/article\\_46c4a98e-cbac-5271-a251-e7bae94499c7.html](https://www.yakimaherald.com/news/local/community-speaks-out-against-ice-chartered-flights-in-yakima/article_46c4a98e-cbac-5271-a251-e7bae94499c7.html).
- <sup>8</sup> Meredith Colias-Pete, “No Deportation Flight and No Police as More Than 100 Protest at Gary Airport,” *Chicago Tribune*, July 6, 2018, <https://www.chicagotribune.com/g00/suburbs/post-tribune/ct-ptb-gary-airport-protest-july-6-st-20180705-story.html?i10c.ua=1&i10c.encReferrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8%3d&i10c.dv=9>.

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- <sup>9</sup> Matt O'Brien, "In Fact, Neither France Nor the U.S. Belong to Illegal Aliens," May 21, 2019, *Immigration Reform*, <https://www.immigrationreform.com/2019/05/21/in-fact-neither-france-nor-the-u-s-belong-to-illegal-aliens-immigrationreform-com/>.
- <sup>10</sup> 10th Amendment to the Constitution of the United States, <https://www.archives.gov/founding-docs/bill-of-rights>.
- <sup>11</sup> *Arizona v. United States*, 567 U.S. 387 (2012), <https://supreme.justia.com/cases/federal/us/567/387/#tab-opinion-1970515>.
- <sup>12</sup> U.S. Department of Transportation, "Re: King County International Airport – Restrictions on Certain Air Carrier Services," May 1, 2019, <https://kuow-prod.imgix.net/store/9ced9bda708f52df50ecec46e527314d.pdf>.
- <sup>13</sup> 49 U.S.C. § 41713(b)(1), <https://www.law.cornell.edu/uscode/text/49/41713>.
- <sup>14</sup> 49 U.S.C. § 47101, <https://www.law.cornell.edu/uscode/text/49/47101>.  
49 U.S.C. § 40103(e), <https://www.law.cornell.edu/uscode/text/49/40103>.
- <sup>15</sup> 49 U.S.C. § 47125, <https://www.law.cornell.edu/uscode/text/49/47125>.
- <sup>16</sup> 14 C.F.R Appendix D\_to\_Part 152 – Assurances, [https://www.law.cornell.edu/cfr/text/14/appendix-D\\_to\\_part\\_152](https://www.law.cornell.edu/cfr/text/14/appendix-D_to_part_152).
- <sup>17</sup> 18 U.S.C. § 111, <https://www.law.cornell.edu/uscode/text/18/111>.
- <sup>18</sup> 18 U.S.C. § 1505, <https://www.law.cornell.edu/uscode/text/18/1505>.
- <sup>19</sup> 18 U.S.C. § 372, <https://www.law.cornell.edu/uscode/text/18/372>.
- <sup>20</sup> Nina Shapiro, "ICE Air Shifts from King County to Yakima, Leaving City Officials Scrambling to Find Out Agency's Intentions," *Seattle Times*, May 9, 2019, <https://www.seattletimes.com/seattle-news/ice-air-shifts-from-king-county-to-yakima-leaving-officials-scrambling-to-find-out-agencys-intentions/>.
- <sup>21</sup> "Commerce Clause," *Cornell Legal Information Institute*, [https://www.law.cornell.edu/wex/commerce\\_clause](https://www.law.cornell.edu/wex/commerce_clause).
- <sup>22</sup> *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), <https://supreme.justia.com/cases/federal/us/512/186/#tab-opinion-1959545>.
- <sup>23</sup> Esmey Jimenez, "Two Washington Airports Risk Millions in Funding if They Don't Cooperate With ICE," May 17, 2019, *KUOW Public Radio*, <https://www.kuow.org/stories/two-washington-airports-risk-millions-in-funding-if-they-dont-cooperate-with-ice>.