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Federal and State Affairs

D-8 Sanctuary Jurisdictions

In the wake of the federal repeal of the Deferred Action for Childhood Arrivals (DACA) policy, sanctuary jurisdictions have received more attention. The term has been defined in a U.S. Department of Justice (DOJ) memorandum to include jurisdictions who "willingly refuse to comply with 8 USC 1373" and are not eligible to receive federal grants administered by the DOJ or the Department of Homeland Security (DHS). The same federal law prohibits state and local jurisdictions from restricting communication to federal officials regarding citizenship or immigration status.

Additionally, the term "sanctuary jurisdiction" has been used to refer to jurisdictions with particular policies regarding immigration. Specifically, the term is used to refer to jurisdictions with policies that limit local or state involvement in federal immigration enforcement.

The policies of most sanctuary jurisdictions fall into one of three categories: limiting arrests for federal immigration violations; limiting police inquiries into persons' immigration status; and limiting information sharing with federal immigration authorities.

Limiting Arrests for Federal Immigration Violations

Jurisdictions that limit arrests for federal immigration violations can be described as "Don't Enforce" jurisdictions. Violations of federal immigration law can be classified as either civil or criminal offenses. For example, overstaying a visa is a civil offense, and removal may only be accomplished through a civil proceeding. In contrast, unlawful entry is a criminal offense.

Some jurisdictions prohibit police from detaining or arresting aliens for civil violations of federal immigration law. Others prohibit police from making arrests for criminal violations of federal immigration law. There are also jurisdictions that prohibit detention or arrests for either type of violation. It should be noted, although federal immigration law allows states and localities to engage in enforcement of federal immigration laws, nothing compels participation.

Pursuant to 8 USC 1357 (a), local and state jurisdictions may only enforce immigration laws under an agreement between the U.S. Attorney General and the state or local jurisdiction. These agreements include enforcement activities, such as interrogation

for purposes of determining lawful presence, arrest for certain violations, and searches within reasonable distance of the U.S. border.

Limiting Police Inquiries into Persons' Immigration Status

Jurisdictions that limit police inquiries into a person's immigration status can be described as "Don't Ask" jurisdictions. Examples of restrictions include the following: police may not question persons about their immigration status, except as part of a criminal investigation; police may not initiate police activities for the purpose of determining a person's immigration status; police may not question crime victims and witnesses about their immigration status; and police may not gather information regarding a person's immigration status except as required by law.

Limiting Information Sharing with Federal Immigration Authorities

Jurisdictions that limit information sharing with federal immigration authorities can be described as "Don't Tell" jurisdictions. Examples of restrictions include the following: police may not notify federal immigration authorities about release of aliens unless convicted of certain felonies; police may not disclose information about the immigration status of a person unless that individual is suspected of engaging in criminal activity other than unlawful presence; and police may not disclose information unless required by law.

Role of the Federal Government

Immigration laws are strictly under the jurisdiction of the federal government, as such powers have been found to be within the scope of federal authority by the U.S. Supreme Court. Since that ruling, Congress has expanded federal immigration law and the enforcement of that law. Immigration and Customs Enforcement (ICE) agents handle enforcement under DHS. ICE agents may arrest and interrogate those suspected of unlawful presence. [8 U.S.C. 1357.] In addition, DHS may issue a detainer to a local jurisdiction. A detainer is a request by ICE to hold an arrested individual or convicted criminal being released from state or local jails until ICE can pick them up for deportation. Individuals may not be held for more than 48 hours.

Stakeholders argue that detainers violate the Fourth Amendment of the *U.S. Constitution* because ICE does not have probable cause before issuance of a detainer. Additionally, stakeholders argue that detainers violate the Fifth Amendment because ICE does not provide notice when a detainer is issued. While federal courts have upheld this position, there has been no decision issued by the U.S. Supreme Court.

Recent Federal Legislation

2017 HR 3003—No Sanctuary for Criminals Act

The No Sanctuary for Criminals Act would expand what is required of cities regarding federal immigrant enforcement and allow the government to deny jurisdictions' federal law enforcement funds if they do not comply. The bill has passed the House of Representatives and is awaiting introduction in the Senate as of September 14, 2018.

2015 HR 3009—Enforce the Law for Sanctuary Cities Act

The Enforce the Law for Sanctuary Cities Act would have withheld federal law enforcement funding for those jurisdictions that chose not to enforce federal immigration laws. The bill passed in the House of Representatives and died at the end of the term.

Department of Justice Grant Conditions

Proposed federal legislation, such as 2017 HR 3003, would condition the receipt of federal grant moneys on cooperation with federal law enforcement in immigration matters. One such grant program is the Edward Byrne Memorial Justice Assistance Grants, administered by the

DOJ. The Byrne Grants provide funds to cities for law enforcement purposes.

On June 25, 2017, U.S. Attorney General Sessions announced new conditions would be imposed on grant recipients of Byrne funds. Namely, grant recipients must:

- Prove compliance with federal law that bars cities or states from restricting communications between DHS and ICE about the immigration or citizenship status of a person in custody;
- Allow DHS officials access into any detention facility to determine the immigration status of any aliens being held; and
- Give DHS 48 hours notice before a jail or prison releases a person when DHS has sent over a detention request so federal agents can arrange to take custody of the alien after he or she is released.

The City of Chicago filed a case in federal court asking for the directive to be struck down as unconstitutional. [*City of Chicago v. Sessions*, No. 1:17-cv-5720 (N.D. Ill. 2017).] On September 15, 2017, a judge issued a preliminary injunction against the directive, striking the latter two conditions as being unconstitutional because only Congress can impose grant conditions. The ruling was later affirmed by a panel of the 7th Circuit (Ct.) Court of Appeals. Attorney General Sessions requested an *en banc* hearing on the limited issue of whether the injunction should extend beyond the City of Chicago. The court stayed the injunction so that it only applied to the City pending a decision on the issue by the *en banc* court.

Additional lawsuits have been filed regarding an executive order issued by President Trump on January 25, 2017, which sought to withhold federal grant moneys from jurisdictions that did not comply with 8 USC 1373. The State of California and the City of San Francisco filed a lawsuit seeking an injunction of the executive order on January 31, 2017. In response to the filing, a federal judge issued an order that directed federal agencies not to follow the executive order. The DOJ has since filed an appeal.

On August 1, 2018, the U.S. 9th Ct. Court of Appeals ruled the federal government could not withhold federal funds from California sanctuary jurisdictions. However, on March 13, 2018, the U.S. 5th Ct. Court of Appeals allowed a Texas law requiring police chiefs and sheriffs to cooperate with federal immigration officials to go into effect.

Role of State Governments

The role of states in immigration enforcement is limited by express or implied preemption due to federal law in the area. In other words, states cannot establish policies related to immigration where federal law has expressly limited such policies or where federal law is so comprehensive that Congress has signaled its intent to wholly occupy the regulatory field. The concept of preemption is what led the U.S. Supreme Court to invalidate several state immigration measures. [*Arizona v. United States*, 132 S. Ct. 2492 (2012).]

On the other hand, the federal government cannot "commandeer" state or local governments into assisting with federal law enforcement. [*Printz v. United States*, 521 U.S. 898 (1997).] However, reporting requirements and other federal measures requiring state or local cooperation may be acceptable in certain circumstances.

Overview of Recent State Actions

According to a Pew Charitable Trusts article, Connecticut, Illinois, Rhode Island, Vermont, and Washington enacted statewide measures to limit law enforcement cooperation with immigration authorities. Iowa, North Carolina, and Tennessee enacted anti-sanctuary laws requiring cities to cooperate with immigration authorities. Sixteen other states proposed but did not pass similar legislation. Oregon placed a measure on the November ballot that would reverse the state's 1987 sanctuary law. This measure did not pass.

Recent Kansas Legislation

2017 SB 158—Prohibiting Adoption of Sanctuary Policies

The bill would have prohibited municipalities and state agencies from adopting a "sanctuary policy." Any municipality that enacted or adopted a sanctuary policy would have been deemed ineligible to receive any moneys from a state agency it was otherwise entitled to and would have remained ineligible until the sanctuary policy was repealed or no longer in effect. The Senate Committee on Federal and State Affairs passed SB 158 out of Committee on March 27, 2017. No further action was taken and the bill died on General Orders on May 4, 2018.

2017 HB 2275—Prohibiting Adoption of Sanctuary Policies

The bill would have prohibited state agencies and municipalities from adopting a "sanctuary policy." Any municipality that enacted or adopted a sanctuary policy would have been deemed ineligible to receive any state funding. The bill was introduced during the 2017 Legislative Session, but died on General Orders on May 4, 2018.

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