

Sanctuary Cities: The other immigration order

CWAG Chair's Initiative
March 16, 2017

Enhancing Public Safety in the Interior of the United States 1/25/17

“Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.”

Sec. 9(a)

- AG and DHS Secretary “shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) **are not eligible to receive Federal grants**, except as deemed necessary for law enforcement purposes”
- Secretary has the authority to designate jurisdiction as a sanctuary jurisdiction.
- AG shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, **or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.**”

Sec. 9(b)

- Secretary shall, each week, publish “a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.”

Sec. 9(c)

- OMB will provide “information on **all Federal grant money** that currently is received by any sanctuary jurisdiction.”

Section 1373

- Linchpin of sanctuary jurisdiction definition in XO:
- Federal, State, or local government entity or official may not prohibit, or in any way restrict:
 - (a) “any government entity or official from sending to, or receiving from, [ICE] **information regarding the citizenship or immigration status**, lawful or unlawful, of any individual”
 - (b) any government entity from sending immigration status information to, or requesting or receiving such information from, [ICE], maintaining such information, and exchanging such information with any other government entity
- Does not impose affirmative obligation to share information, but precludes prohibiting or limiting information sharing
- Only applies to information regarding immigration status
- Can refuse to share other information re. immigrants
- No obligation to collect information, but must maintain information that collect

ICE detainers

- Asks (**voluntary**) state/local law enforcement to hold inmate up to 48 hours after scheduled release
- XO reinstates Securities Communities
 - ICE can seek detainers for any civil immigration violation
 - Replaces Priority Enforcement Program -- ICE detainers only where final order of removal, threat to national security, or certain criminal convictions
 - Between 2011-13, S-Comm responsible for roughly **243,000 deportations** – 40% of total interior removals
 - 50% of detainer requests cancelled because citizen or permanent resident
- Not part of sanctuary city definition, but may prevent/hinder immigration enforcement
- DOJ IG (2016): refusal to cooperate with ICE detainers may be inconsistent with the “intent” of 1373 and impact local officials’ interactions with ICE re. information requests
- Several courts have held that this added detention violates 4th amendment if without probable cause and held jurisdiction liable for damages for wrongful detention

What are Sanctuary policies?

Beyond 1373/ICE detainers

- Oregon state law bars use of state/local funds, equipment or personnel to enforce *civil* federal immigration laws
- District of Columbia Mayor's order (2011): don't ask/don't tell for public safety agencies
- Illinois executive order (2015): LEAs may not "communicat[e] an individual's release information or contact information" based solely on ICE detainer request
- Vermont policy: absent criminal warrant or purpose outside of immigration enforcement, ICE or CBP agents shall not be given access to individuals in [Agency's] custody."
- Seattle: quarterly report showing number of detainers received, types of offenses, and length of stay before the detainer was executed
- New York City prevents collection of information on immigration status unless required for program

What are sanctuary jurisdictions?

- California, Connecticut, New Mexico
- Cities/Counties (and some corrections systems) in:
 - Arizona, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Texas, Virginia, Washington, Wisconsin
- Universities, like University of Pennsylvania:
 - The University of Pennsylvania will not allow Immigration and Customs Enforcement (ICE)/Customs and Border Protection (CBP)/U.S. Citizenship and Immigration Services (USCIS) on our campus unless required by warrant. Further, the University will not share any information about any undocumented student with these agencies unless presented with valid legal process.
- Numerous states considering legislation to ban sanctuary policies
- Texas Governor says he would withdraw state funding from sanctuary campuses

Why sanctuary policies?

- As travel ban reflects how we relate to the world outside of our borders, this XO expresses/reflects how we relate to our neighbors
- Public safety
 - “When local law enforcement officers are perceived as immigration enforcers, the result is a dangerous chilling effect on trust and cooperation from the community. Individuals are less likely to seek police officers’ help . . . Crimes go unreported. Victims and witnesses are hesitant to offer testimony.” (*Santa Clara County v. Trump*)
 - Incarceration rates of native-born **2-5x** higher than immigrants
- Public health: vaccinations, health care
- Public school and social services

Lawsuits

- Within 2 weeks of XO, San Francisco and Santa Clara filed suit in federal court; consolidated in San Francisco
- When a number of states, led by Texas, challenged President Obama's policy on DAPA, began their complaint:
 - "This lawsuit is not about immigration. It is about the rule of law, presidential power, and the structural limits of the U.S. Constitution"
- Sanctuary cities likewise believe that President Trumps' XO exceeded his authority, violated separation of powers, and invaded traditionally local police powers

Anti-Commandeering/Tenth Amendment

- Can't "conscript" state officials
 - Printz v. United States* (1997)
 - Congress can't require state law enforcement officers to run background checks for handgun purchases
 - "The Federal Government may . . . [not] command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty."
 - "Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions," leaving states to take "the blame for its burdensomeness and for its defects."
- Can require them to share information
 - Reno v. Condon* (2000):
 - Federal law governing sharing of driver's license information doesn't commandeer state resources because doesn't require state action
- City of New York filed facial challenge to Section 1373, which 2nd Circuit rejected, *City of NY v. US*
 - Could challenge where statute creates "an impermissible intrusion on state and local power to control information obtained in the course of official business or to regulate the duties and responsibilities of state and local governmental employees"
- ICE detainers

Santa Clara's commandeering facts

- Detainers sought for typically 135 inmates/day; \$159/inmate/day = \$7.8M/year
- Individual with detainer less likely to get bail bond
- Defendant in class action relating to overcrowding in County jails
- In 2010, County Counsel asked ICE whether cooperation with detainers was compulsory and whether federal government would reimburse and indemnify the County → no
- County Board of Supervisors adopted Civil Detainer Policy in 2011: honor ICE detainer requests only if ICE would agree to reimburse costs.
 - ICE declined and County has not honored any detainer requests since then.

Separation of Powers/Spending Power

- President can't usurp Congress's appropriation authority or override statutory conditions
- President may veto appropriations bill, but can't amend or repeal only a portion. *Clinton v. City of New York* (1998)
- Limits on Congress's authority, too
- Clear warning
 - *Pennhurst* (1981) doctrine: funding condition must be **clear and predictable**
 - "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"
 - As of 7/7/16, DOJ deems 1373 applicable law (for which must certify compliance) for State Criminal Alien Assistance Program (SCAAP) and Edward Byrne Memorial Justice Assistance (JAG) grants

Anti-coercion

- “Pursuing state policy objectives through financial incentives is generally constitutional” given state’s plenary power over its budget.
- *Except* where state action is financially coercive
- *NFIB v. Sebelius*, financial inducement to encourage states to agree to ACA’s Medicaid expansion was “gun to the head” because price was Medicaid funding (10% of state budgets)
 - Compare *Dole*: losing 5% of highway funds if state fails to raise drinking act “relatively mild encouragement” because federal funding was < 1% of state’s budget
 - Also requires that federal policy is “reasonably related to the purpose of the funding program” (germane)
- *Texas v. United States*: challenged ACA requirement that states pay a provider fee as condition of Medicaid and CHIP funding, claiming lack of clear notice, coercion (*inter alia*)

Sanctuary City coercion facts

- XO broadly refers to federal funds
- White House press release described XO as “halting federal funding for sanctuary cities”
- White House website talks about “ending sanctuary cities”
- Press secretary Spicer, with announcement of the XO: “We are going to strip federal grant money from the sanctuary states and cities that harbor illegal immigrants”
- On campaign trail: “Cities that refuse to cooperate with federal authorities will not receive taxpayer dollars”
- Santa Clara Receives \$1b annually in federal funds, 15% of its budget. Only “small fraction” relates to immigration or law enforcement
 - 2/3 of funding for Office of Emergency Services (911)
 - 40% of funding for its social services agency (child and elder protective services, public benefits, etc.) and public health department (immunization, medical care for HIV/AIDS patients, terrorism)
 - Contingency reserve fund of \$130M
 - 92% of \$1.2B San Francisco receives goes to Medicare, Medicaid, TANF, and SNAP, for which undocumented immigrants ineligible

When states and cities are at odds

- Same spending rules apply
- But also governed by home rule doctrine (in home rule jurisdictions)
- Reserves to municipalities right to adopt and enforce ordinances that **conflict** with state laws in matters of **municipal affairs**
 - Regulates municipal affairs
 - Actually conflicts with state law – can't comply with both
 - State law reasonably related to matter of statewide concern and narrowly tailored to avoid unnecessary interference in local governance
 - If actual conflict and state law does not meet this test, municipal law is “supreme.”