Are Sanctuary Policies Unlawful? State and Municipal Prerogatives to Collaborate with Federal Immigration Authorities

Introduction

Sanctuary jurisdictions[1] are, once again, the center of a noteworthy legal and political dispute. On February 6, the Trump administration filed a lawsuit against Chicago, Cook County, and the state of Illinois, alleging that their sanctuary policies obstruct federal immigration enforcement efforts. On February 12, the U.S. Department of Justice filed a lawsuit against New York's Green Light Law, which allows immigrants to obtain driver's licenses regardless of their immigration status while protecting their privacy from federal immigration enforcement agencies. In addition, on February 5, the Office of the Attorney General issued a memorandum highlighting that all "sanctuary jurisdictions" would be denied access to federal funds from the Department of Justice, arguing that their actions are unlawful.

Prior to that, organizations allied with the current administration argued that officials from sanctuary jurisdictions limiting collaboration with federal authorities to enforce immigration laws may be criminally liable. They assert that their actions are tantamount to concealing, harboring, and shielding undocumented immigrants, which is prohibited under federal law. Similarly, recently introduced legislation would broadly define sanctuary jurisdictions and would cut off "any Federal funds that the sanctuary jurisdiction intends to use for the benefit" of the undocumented population. All these actions against sanctuary jurisdictions raise two crucial legal questions:

1. Can state and local jurisdictions limit their involvement in enforcing immigration laws in cooperation with federal authorities?

2. Can the federal government impose funding conditions on state and local jurisdictions to compel them to carry out immigration enforcement activity?

Under current law, the short answer to the first question is "likely yes." Sanctuary jurisdictions have a constitutional right to limit their involvement in enforcing immigration laws. The second question is more complex from a legal standpoint, but the answer under current law is "likely no." The federal government cannot impose funding conditions on sanctuary cities if they are coercive or excessively broad.

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[1] The term "sanctuary jurisdiction" has never been defined by Congress via statute. Although no single definition of the term exists, it has been applied to a wide variety of states, counties, cities, towns, and other municipal governments, including many that do not consider themselves to have "sanctuary" policies. The term is most often applied to jurisdictions that place some formal limits on local enforcement carrying our federal immigration enforcement, including limiting collaboration with federal immigration authorities in some circumstances. Sanctuary jurisdictions are not "law-free zones," nor are such policies bars against federal authorities carrying out enforcement policies. Proponents of sanctuary policies note that such policies encourage victims of crimes and witnesses to cooperate with local law enforcement, benefiting public safety.

To provide more detailed answers to both questions, it is essential to remember that the United States has a federal system of government. Under federalism, power is divided between the federal government and smaller political units – the states. The states are, in turn, subdivided into municipal corporations, which can adopt the form of counties, cities, towns, and villages. These units retain a degree of autonomy under their state constitutions, but they are all subject to the U.S. Constitution.

In the United States, the federal government is in charge of creating and enforcing immigration laws. Under the U.S. Constitution, the Commerce Clause and the Naturalization Clause (both under Article I, Section 8) give the U.S. Congress the power to regulate who can enter the country, remain in, and become a citizen of the United States. The U.S. Supreme Court has further interpreted that the federal administration's executive powers on immigration derive from congressional delegations of authority, as well as the executive branch's authority in setting U.S. foreign policy.

Can the federal government compel states and municipalities to engage in immigration enforcement?

A. Constitutional considerations: Anti-commandeering

Creating and enforcing immigration laws are primarily federal responsibilities according to the U.S. Constitution. This means states and local governments are generally preempted from creating their own immigration laws. For instance, hypothetically, California does not have the authority to create a new visa category. States and municipalities rely on the federal government to set and enforce immigration laws and policies.[2] However, states and municipalities may assist federal authorities in some cases, such as through 287(g) agreements, which – since 1996 – allow local law enforcement agencies to enter into formal agreements with U.S. Immigration and Customs Enforcement (ICE) to train and deputize local officers who can then identify and process removable immigrants. Local law enforcement can also choose to communicate and work with federal officials in a number of other ways, taking part in federal initiatives like Operation Stonegarden – a program that provides funding to state, local, and tribal law enforcement agencies to enhance their capabilities to support joint efforts to secure the United States' borders – electing to honor immigration detainer requests or otherwise communicating and collaborating with federal authorities.

Nevertheless, such cooperation between the federal government and state and local jurisdictions is voluntary, a prerogative of the state or locality, not a legal obligation. As a matter of constitutional law, the Tenth Amendment of the U.S. Constitution limits the federal government's authority to require states and localities to carry out these types of activities. As Justice Antonin Scalia wrote for the majority in *Printz v. United States* (1997), the Tenth Amendment creates an anti-commandeering doctrine that limits federal authority over local officials in our federalist form of government: "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. Such commands are fundamentally incompatible with our constitutional system of dual sovereignty." In essence, the

[2] The state and municipal prohibition to create and enforce immigration laws was upheld by the Supreme Court in *Arizona v. United States* (2012). In that case, the Supreme Court struck down state laws that conflicted with federal immigration enforcement, reaffirming that immigration regulation is predominantly a federal matter.

anti-commandeering doctrine says that the federal government cannot require states or municipalities to directly carry out or enforce federal enforcement policies, including immigration law. This doctrine has been upheld in many landmark cases, including *Murphy v. NCAA* (2018). In that case, the Supreme Court concluded that Congress lacks "the power to issue orders directly to the States."

B. Controversy over federal immigration detainers

One of the most contentious topics around sanctuary jurisdictions revolves around federal immigration detainers. Immigration detainers are federal requests to hold individuals suspected of being in the U.S. unlawfully in custody for up to 48 hours.

In recent years, many jurisdictions have opted against honoring detainers for a host of legitimate legal and policy issues.

A central point of controversy surrounding immigration detainers is the prospect of whether states or localities have the discretion to choose to honor immigration detainers. The consensus is that the answer is also in the anti-commandeering principle, which courts have cited in determining the requests are voluntary. *See Galarza v. Szalczyk* (3rd Cir. 2014). The federal government cannot force state and local officials to carry out certain federal enforcement functions, including holding detainees in accordance with federal immigration detainers.

Critics of federal immigration detainers also contend that they lead to racial profiling and undermine community policing. Reflecting these concerns, on top of the prospect of civil liability arising from wrongful detentions, many localities choose not to honor immigration detainers in the absence of a warrant.

C. Understanding the limits of 8 U.S.C. § 1373

Another point of contention in the debate is the scope of 8 U.S.C. § 1373., a provision of the Immigration and Nationality Act (INA) relating to state and local governmental obligations to share information about an individual's citizenship or immigration status. However, in a recent memorandum, the Trump administration attempted to define "sanctuary jurisdictions" as those that fail to cooperate with the federal government as required by 8 U.S.C. § 1373.

Section 1373(a) states that governmental units or officials "may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." Section 1373(b) similarly prohibits restrictions on sending, maintaining or exchanging such information.

The plain text of § 1373, however, does not include an affirmative requirement to collect information regarding citizenship or immigration status. Nor does it cover sharing additional information beyond that concerning citizenship or immigration status. Nor does the provision mention federal immigration detainers, let alone require that localities honor them.

D. Officials from sanctuary jurisdictions are not in violation of criminal laws

Assertions that state and local officials from "sanctuary jurisdictions" may be subject to criminal penalties lack legal grounding. Mayors, police chiefs, sheriffs, and other state and local officials may elect to provide varying levels of cooperation with federal immigration authorities. They may choose to join federal-led task forces, sign up for the 287(g) program, honor immigration detainers, or engage in other forms of cooperation relating to immigration enforcement. Or, they may elect not to.

As stated above, because the federal government is unable to commandeer state and local officials to carry out federal immigration enforcement activities, it is a constitutional prerogative for states and municipalities to set their levels of collaboration with federal immigration agencies. Provided they comply with relevant federal, state, and local laws, local officials have significant discretion in this area. Therefore, the mayors, sheriffs, and other state and local officials are able to determine policy in this area provided that they do not violate federal laws or obstruct or interfere with federal immigration authorities.

Can the federal government impose funding conditions on state and local jurisdictions to compel them to carry out immigration enforcement activity?

As stated above, the federal government cannot compel states to carry out federal immigration enforcement priorities. However, Congress can incentivize states and localities to increase their role in these activities by setting conditions on certain federal funding.

The spending power of Congress derives from Article I, Section 8, Clause 1 of the United States Constitution, commonly known as the Spending Clause. This clause grants Congress the authority to – among other things – spend money on programs and initiatives that benefit the general public, such as education, healthcare, infrastructure, and economic development. The spending power of Congress, however, is neither absolute nor entirely discretionary. The Supreme Court has interpreted that Congress's spending powers are subject to some guardrails that prevent the federal government's imposition on states.

The Supreme Court interpreted Congress's spending powers broadly in *South Dakota v. Dole* (1987) and, more recently, *NFIB v. Sebelius* (2012). According to the Supreme Court, Congress can use its spending power to influence state policies by attaching conditions to federal funds. However, the Supreme Court has established four requirements to impose funding conditions on states and municipalities:

1. The conditions must be clearly expressed in law;
2. The conditions must be related to the funding in question;
3. The conditions must not be coercive; and
4. The conditions must not be in violation of any other constitutional provision.

In *Dole*, the Court upheld a statutory condition requiring states to raise their drinking age to 21 or risk losing 5% of their federal highway funding. The majority deemed the condition constitutional, largely due to its modest nature and because there was a close relationship between highway funding and drunk driving – road safety.

However, twenty-five years later, in *Sebelius*, the Supreme Court held that the Affordable Care Act's requirement for states to expand Medicaid was unconstitutionally coercive because it

threatened to withdraw *all* Medicaid funding — a large percentage of state budgets — if states did not comply. In its ruling, the Supreme Court likened the condition to holding "a gun to the head" of the states. The Court ruled that the federal government could not penalize states in this manner but could offer states additional funding as an incentive for expansion.

In that regard, it is possible to infer that any bill or executive order aimed at blocking several categories of federal funding (*i.e.*, any funds "use[d] for the benefit" of undocumented immigrants) to jurisdictions that opt to limit their collaboration with federal immigration authorities could be deemed coercive, and therefore unconstitutional under *Sebelius* ruling. Moreover, the questionable connection between immigration enforcement and unrelated funding for healthcare or nutrition programs appears likely to run afoul of the Supreme Court.

On the other hand, courts are likely to look more favorably upon attempts to condition more modest levels of funding to immigration enforcement collaboration, where the funding is related to the underlying condition – like federal law enforcement grants.

It is important to highlight that the question of the legality of funding conditions on sanctuary jurisdictions has already been extensively litigated, although never resolved the Supreme Court. In 2020, the Trump administration filed a petition in *Wilkinson v. San Francisco*, seeking to overturn a U.S. Court of Appeals for the 9th Circuit decision that ruled the federal government lacked the authority to impose funding conditions. That same year, the state of New York and New York City submitted separate petitions — *New York v. Department of Justice* and *City of New York v. Department of Justice* — requesting the Supreme Court to review a U.S. Court of Appeals for the 2nd Circuit decision that upheld such conditions. However, after President Biden took office in 2021, the cases were dismissed at the request of the parties involved, leaving the Supreme Court without the opportunity to address the issue.

It is also relevant to note that the shifting political context of immigration policy and changes to the composition of the Supreme Court indicate that the federal judiciary may revisit some of the relevant precedents. While existing case law indicates that state and local jurisdictions can limit their collaboration with immigration authorities and that the federal government has limited ability to compel their cooperation, we can expect future legal challenges to revisit these precedents.

Conclusion

The interplay between federal authority and state autonomy remains a complex and evolving area of constitutional law. The anti-commandeering doctrine ensures that states and municipalities retain the discretion to limit their cooperation with federal immigration enforcement without facing criminal liability or funding sanctions. However, the federal government may still incentivize compliance through carefully structured funding conditions as long as these conditions are not overly punitive or coercive and the conditions are related to the funding at issue. This framework reflects the delicate balance of power between federal and state governments enshrined in the U.S. Constitution.

As legal and political landscapes shift, particularly with changes in the composition of the Supreme Court, challenges to established precedents may arise. While current jurisprudence supports the autonomy of state and local jurisdictions to decide whether to collaborate with

immigration authorities, future rulings could redefine the boundaries of federalism and Congress's spending power. Immigration enforcement is – and will continue to be – at the center of the debate over federalism and the role of state and local governments in implementing national policies.