



Immigrant Sanctuary Policies: Threats to Retract Federal Funding are Overblown

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As discussed in the recent report, **SANCTUARY, SAFETY AND COMMUNITY: TOOLS FOR WELCOMING AND PROTECTING IMMIGRANTS THROUGH LOCAL DEMOCRACY** (published jointly by Demos and LatinoJustice PRLDEF), threats to retract funding from “sanctuary” jurisdictions are overblown and should be resisted.¹ The Tenth Amendment of the U.S. Constitution provides that “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.” *U.S. Const., Am. X*. Supreme Court cases clearly demonstrate that **under the Tenth Amendment, the federal government may not coerce state and local governments to enforce federal law through threats to withdraw federal funding, unless the funding is explicitly conditioned on assisting with federal immigration law enforcement** – and minimal, if any, federal funding is conditioned on immigration law enforcement. The major applicable cases include:

- *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), which prohibited funding conditions so coercive that they amount to a “gun to the head” of a state or local government, at 2602; and articulated that if conditions on some funds “take the form of threats to terminate other significant, independent grants, the conditions are properly viewed as [unconstitutional] means of pressuring the State to accept policy changes.” *Id.* at 2604.
- *New York v. United States*, 505 U.S. 144, 167 (1992), which held that spending “conditions must (among other requirements) bear some relationship to the purpose of federal spending.” The *New York* case also held that “the federal government cannot compel the states to enact or administer a federal regulatory program.” *Id.* at 188.
- In *Printz v. United States*, 521 U.S. 898, 935 (1997), an opinion authored by the late conservative Justice Antonin Scalia, the Court added that the federal government cannot compel state employees to participate in the administration of a federally-enacted regulatory scheme.
- The Fourth Circuit, which covers Maryland, has articulated these same rules. *Maryland v. EPA*, 530 F. 2d 215, 226 (4th Cir. 1975).
- Cities and counties may also raise Tenth Amendment claims. *Lomont v. O’Neill*, 285 F.3d 9, 13 (D.C. Cir. 2002); and in the case of sanctuary cities, they have done so. *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000); Complaint, *City and County of San Francisco v. Trump*, No. 3:17-cv-00485 (N.D. Cal. 2017).

There are, of course, limits to states’ rights, such as when states violate fundamental constitutional rights. To be clear, we believe in a principled federalism based on the goal of an inclusive democracy. Yet **even conservative constitutional experts agree that under the Constitution, very few if any federal funds can be cut off because of a jurisdiction’s refusal to enforce federal civil immigration law.**

Professor Ilya Somin of the Cato Institute summarized the law as follows:

Few if any [federal grants to state and local governments](#) are conditioned on cooperation with federal deportation efforts. The Supreme Court has long ruled that conditions on federal grants to state and local governments are not enforceable unless they [are “unambiguously” stated in the text of the law “so that the States can knowingly decide whether or not to accept those funds.”](#) In ambiguous cases, courts must assume that state and local governments are not required to meet the condition in question. In sum, the Trump administration can’t cut off any federal grants to sanctuary cities unless it can show that those grants were clearly conditioned on cooperation with federal deportation policies.²

Accordingly, the threats of withdrawing federal funds in President Trump’s January 25 Executive Order are overblown and do not preclude state and local policies limiting participation in federal immigration enforcement.³

Moreover, even the language of the Executive Order is limited by saying that “[i]t is the policy of the executive branch to... [e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, *except as mandated by law.*”⁴

There are only two federal statutes that restrict the parameters of state and local sanctuary policies, and neither preclude policies such as the Maryland Trust Act. These two statutes (8 U.S.C. §1644⁵ and 8 U.S.C. §1373⁶) only address information-sharing with the federal government. They do not prohibit limits on collecting immigration status information, or shielding such information through privacy protections such that it is not accessible to all state and local employees.⁷ **Numerous “sanctuary” policies are *not* preempted or precluded by these statutes.**⁸

- **Sanctuary policies are needed to protect the most fundamental values of American communities, and to protect jurisdictions against liability for violations of Due Process and Equal Protection that are likely to occur when state or local police, or other state and local institutions such as schools, participate in federal civil immigration law enforcement.**⁹
- Notwithstanding the Trump Administration’s efforts to threaten “sanctuary” policies, there are numerous legal and policy reasons for state and local jurisdictions to adopt them and resist the threats that federal funding may be retracted.

¹ KATHERINE CULLITON-GONZALEZ & JOANNA E. CUEVAS INGRAM, SANCTUARY, SAFETY AND COMMUNITY – TOOLS FOR WELCOMING AND PROTECTING IMMIGRANTS THROUGH LOCAL DEMOCRACY, DEMOS & LATINO JUSTICE 14-15 (JAN. 13, 2017), http://www.demos.org/sites/default/files/publications/Sanctuary%20Cities%20English_0.pdf.

² ILYA SOMIN, FEDERALISM, THE CONSTITUTION, AND SANCTUARY CITIES, WASHINGTON POST, November 26, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/26/federalism-the-constitution-and-sanctuary-cities/?utm_term=.887fb700b0b9.

³ KATHERINE CULLITON-GONZÁLEZ, TRUMP’S ALTERNATIVE FACTS CONTRADICTING THE RIGHTS OF SANCTUARY CITIES TO PROTECT AND WELCOME IMMIGRANTS 3-4 (Dēmos 2017) (explaining and annotating: President Donald J. Trump, EXECUTIVE ORDER: BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS (Jan. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>).

⁴ Exec. Order, *supra*, at §2(c).

⁵ Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), P.L. 104-193, §434 (1996); 8 U.S.C. §1644, provides, “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 [former INS, now DHS]... information regarding the immigration status, lawful or unlawful, of an alien [sic] in the United States.”

⁶ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, Div. C, §642 (1996); 8 U.S.C. §1373. Section 1373(a) provides, “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 Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.” §1373(b) provides: “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.”

⁷ See SANCTUARY, SAFETY AND COMMUNITY, *supra* note 1, at 7-9 (discussing statutory language and relevant case law); ERIK T. SCHNEIDERMAN, GUIDANCE CONCERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT AND MODEL SANCTUARY PROVISIONS 6-7 (Jan. 19, 2017)(emphases added),

https://ag.ny.gov/sites/default/files/guidance.concerning.local_authority.participation.in_immigration.enforcement.1.19.17.pdf at 10-11 (model immigration status information collection and privacy shield in compliance with 8 U.S.C. §1373); U.S. Conference of Mayors, Memo from Hughes, Socol, Piers, Resnick & Dym, Ltd., LEGAL ISSUES REGARDING LOCAL POLICIES LIMITING LOCAL ENFORCEMENT OF IMMIGRATION LAW AND POTENTIAL FEDERAL RESPONSES (Jan. 13, 2017), <http://www.usmayors.org/wp-content/uploads/2017/02/HSPRD-Memo-on-Local-Enforcement-of-Immigration-Laws-and-Federal-Responses-00732386x9D9DD.pdf> at 2 (“[f]ederal legislation or administrative policy seeking to direct local or state governments to take part in immigration enforcement would face significant challenges under current interpretations of the Tenth Amendment of the U.S. Constitution. Similarly, legislative or administrative attempts to cut off wide sources of federal funding to localities unless they partake in immigration enforcement schemes would also face significant challenges under current interpretations of the Tenth Amendment and Spending Clause of the U.S. Constitution.”)

⁸ These include policies with the following objectives:

- “1. LEAs [local law enforcement agencies] should not engage in certain activities [such as stopping, questioning, interrogating, investigating, or arresting an individual] solely for the purpose of enforcing federal immigration laws.
2. Absent a judicial warrant, LEAs should honor U.S. Immigration and Customs Enforcement (“ICE”) or Customs and Border Protection (“CBP”) detainer requests only in limited, specified circumstances.
3. Absent a judicial warrant, LEAs should not honor ICE or CBP requests for certain nonpublic, sensitive information about an individual.
4. LEAs should not provide ICE or CBP with access to individuals in their custody for questioning solely for immigration enforcement purposes.
5. LEAs should protect the due process rights of persons as to whom federal immigration enforcement requests have been made, including providing those persons with appropriate notice.
6. Local agency resources should not be used to create a federal registry based on race, gender, sexual orientation, religion, ethnicity, or national origin.
7. Local agencies should limit collection of immigration-related information and ensure nondiscriminatory access to benefits and services.
8. LEAs should collect and report data to the public regarding detainer and notification requests from ICE or CBP in order to monitor their compliance with applicable laws.” SCHNEIDERMAN GUIDANCE at 1-2.

The legal landscape affecting sanctuary policies will likely evolve in the coming years through litigation. For instance, in the wake of Trump’s January 25 Executive Order, *supra* note 3, San Francisco filed suit seeking a declaratory judgment that its policies are viable under the federal landscape, including policies that limit the use of city resources for immigration enforcement unless required by law, prohibit law enforcement officers from cooperating with non-mandatory ICE detainer requests, and limit when local law enforcement officers may give ICE advance notice of a person’s release from jail. See, e.g., READ SAN FRANCISCO’S LAWSUIT AGAINST TRUMP’S ORDER ON SANCTUARY CITIES, LOS ANGELES TIMES (Jan. 31, 2017), <http://documents.latimes.com/read-san-franciscos-lawsuit-against-president-trump/>. See also SCHNEIDERMAN GUIDANCE at 6-7 (suggesting there may be room for as-applied challenges to Section 1373 under the anti-commandeering doctrine of the Tenth Amendment). This may be in tension with an analysis by the Justice Department Office of Inspector General in May 2016. See generally DOJ INSPECTOR GENERAL, MEMO REGARDING DOJ REFERRAL OF ALLEGATIONS OF POTENTIAL VIOLATIONS OF 8 U.S.C. § 1373 BY GRANT RECIPIENTS (May 31, 2016), <https://oig.justice.gov/reports/2016/1607.pdf>.

⁹ SANCTUARY, SAFETY AND COMMUNITY, *supra* note 1, at 12-22 (discussing federal cases).

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