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What Just Happened: Sanctuary Policies and the DOJ Memo's Empty Threat of Criminal Liability

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The Trump administration has come out swinging against state and local sanctuary laws, issuing numerous threats against jurisdictions that limit state and local cooperation with federal immigration enforcement efforts. This was no surprise. Trump transition associates signaled in advance they would take actions like these. The concrete steps the Department of Justice has now taken, however, go far beyond what the law permits. If implemented, they will most likely falter in the courts.

The latest development came yesterday, as the new Acting Assistant Attorney General sent a memo to prosecutors throughout the Justice Department asserting that "the Supremacy Clause and other authorities require state and local actors to comply with the Executive Branch's enforcement initiatives," and that "federal law prohibits state and local actors from resisting, obstructing, and otherwise *failing to comply* with lawful immigration-related *commands and requests*" (emphasis added). The breadth of this assertion is striking. While every state and local law enforcement official should know that resisting or obstructing federal law enforcement could be a crime, simply choosing not to help is very different. The memo instructs U.S. Attorney's offices across the country to conduct investigations of such "misconduct" for potential prosecution.

Is it really true that if federal immigration authorities "command" or "request" that state officers participate in immigration enforcement, they could be prosecuted for refusing to comply? The answer is "no," and the law on the subject is quite clear, although the Justice Department memo fails to cite the controlling cases.

To understand why the answer is so clear, we must first understand what sanctuary laws are, why they matter, and how the relevant criminal prohibitions relate to them. To

summarize, sanctuary statutes require state and local officials *not to act* in certain ways—most often they prohibit gathering immigration-related information, detaining immigrants they would otherwise release, or disclosing information about them to federal immigration authorities. Although some go back decades, many sanctuary statutes arose during the mass deportations of the Obama administration. Those deportations led to a backlash from state and local governments whose constituents were upset by the effects of entanglement with federal immigration authorities. In response, state and local governments passed statutes disconnecting themselves from the federal government's deportation machinery. That in turn led to lawsuits—a number of court cases from both the second Obama and first Trump administrations addressed the legality of sanctuary statutes. Those cases uniformly found non-cooperation statutes lawful. No one has ever been criminally prosecuted for complying with a sanctuary statute, or for otherwise refusing to cooperate with federal immigration enforcement.

Understanding Sanctuary Laws

Sanctuary laws exist at the state, county, and municipal levels across the country. They are not all the same of course, but they typically limit whether and how state or local authorities may cooperate with federal immigration enforcement. The California Values Act is typical. Since 2017 that law has prohibited state or local officials from "[i]nquiring into an individual's immigration status;" "[d]etaining an individual" at the request of federal immigration officials (these are called "immigration detainers"); or "[p]roviding information regarding a person's release date" from criminal custody. (The Act contains exceptions to some of these prohibitions for serious offenses, but we can ignore those exceptions for now). The first Trump administration sued to block that law, alleging it violated the Supremacy Clause. Although the DOJ memo fails to mention it, they lost. The Ninth Circuit upheld the Act, and the Supreme Court declined review. Similar statutes have existed for decades, and have been upheld throughout the country.

It is no surprise that the new Trump administration is targeting these laws again, because they constitute a significant impediment to the administration's plans for "mass deportation." In fact, many of these laws were enacted in response to the largest mass deportation campaign in modern American history, which occurred during the Obama administration. Over those eight years, the government deported more than three million people—more than were deported under the first one hundred years of U.S.

federal immigration law. State and local cooperation were the primary engines of the Obama-era deportations. In routine encounters with law enforcement—like in traffic stops or home searches—state and local officials obtained information about the immigration status of people they saw, transmitted that information to federal immigration officials, and then detained people at ICE's request until federal officials came to get them. Unsurprisingly, deportations skyrocketed under this system, as every state and local police officer came to serve double-duty as an immigration enforcement agent.

After a few years, however, many cities and states changed course, as the effects of this policy became increasingly clear. Among those arrested were victims of crimes who called the police, parents who were the sole caretakers of young American children (who were then sent into the foster care system), and many people with no criminal history. Officials also found their local tax dollars subsidizing federal immigration enforcement on a massive scale, but without making their communities safer. As numerous studies have now confirmed, entangling state and local law officials in federal immigration enforcement simply does nothing to decrease crime.

As a result, state and city officials passed laws like the California Values Act. By the time Trump first became president, some of those laws were already in place, and many jurisdictions like California expanded them even further during his presidency. Those laws proved crucial to decreasing deportations under the Trump administration—by about 300,000 compared to Obama's second term—and restoring a degree of local control over how law enforcement resources are utilized. And even though they contributed to a dramatic decrease in deportations, the sanctuary statutes did not lead to increased crime (an unsurprising result, given that instituting state and local cooperation policies hadn't decreased crime in the first place).

Trump's immigration officials no doubt remember this history, and it helps explain why they have worked so hard to undermine sanctuary policies. Although Trump officials have floated other ways of multiplying the number of immigration enforcement agents, including by enlisting the military, the most obvious way to expand the immigration deportation workforce would be to return to something akin to Obama-era state and local cooperation practices. And that is precisely what sanctuary policies prohibit.

Are Sanctuary Laws Illegal?

So are sanctuary laws illegal? Under current law, the answer is clearly "no," at least as to the kinds of non-cooperation provisions found in typical sanctuary laws like California's —rules that limit the gathering of immigration-related information, refuse compliance with federal detainer requests, and prohibit most other common forms of cooperation with federal immigration enforcement.

The DOJ memo suggests that sanctuary policies violate the provision of federal immigration law at 8 U.S.C. 1373, which states that:

> "a … 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."

As should be obvious, nothing in that law *requires* state or local officials "to comply with lawful immigration-related commands and requests," as yesterday's memo asserts. In line with settled constitutional understandings, the federal law leaves state and local officials entirely free to refuse cooperation.

What is slightly less clear, at least initially, is whether Section 1373 might preempt any state statute that stops state or local officials from cooperating with federal immigration enforcement. Does federal law prohibit California from telling local officials—perhaps in pro-Trump cities—that they cannot cooperate? Upon closer look, it does not. The federal law only prevents states from stopping their officials from sharing information "regarding the citizenship or immigration status … of any individual." California's sanctuary statute prevents state officials from *gathering* information about immigration status (subject to some exceptions), but not from *sharing* it. That law also prohibits the sharing of *other* kinds of information, like the date when certain non-citizens will be released from state custody. But as the Ninth Circuit found when it upheld California's sanctuary statute, federal law does not require states to share such information because it is not information "regarding … citizenship or immigration status,"

Other jurisdictions have provisions that appear to go farther. For example, the Los Angeles County Sheriff describes its policy to be that "[i]f a victim's witness' or offender's immigration status is discovered during an investigation, deputies shall not forward that information to US Immigration and Customs Enforcement." Sheriff's Department officials could interpret that law to prohibit them from sharing immigration status information. If they did, that would appear to violate Section 1373. But that would then raise a constitutional question: does the federal government have authority to tell state and local governments *not* to instruct their officials to spend their time on federal immigration enforcement?

As for states, the Tenth Amendment generally does not allow the federal government to tell states how to manage their own officials—a doctrine known as the "anti-commandeering" principle. The federal courts have rejected several federal laws attempting to commandeer state agencies' enforcement resources, stating that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." For example, the Supreme Court struck down a federal law that required local authorities to conduct background checks on gun purchasers, explaining that "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service — and at no cost to itself — the police officers of the 50 States." The Ninth Circuit relied on that principal when it upheld the California Values Act, as did the far more conservative Fifth Circuit when it upheld a state law targeting local sanctuary ordinances in Texas during the first Trump administration. As it explained, "the Tenth Amendment prevents Congress from compelling Texas municipalities to cooperate in immigration enforcement."

Of course, whether *local* governments can gain the benefit of these Tenth Amendment protections raises separate questions—the answer will likely vary depending on the source of the local government's authority. But many probably will. Under California case law, for example, "sheriffs act on behalf of the *state* when performing law enforcement activities." In other words, even if the Justice Department manages to show that some state non-cooperation practices conflict with Section 1373, to persuade a court to strike down a sanctuary statute the government would *also* have to show that Section 1373's directive to state and local officials is constitutional under basic anti-commandeering principles—as several of the court decisions upholding those statutes have noted.

Apart from regulating how state and local officials gather and share certain information, sanctuary statutes also prohibit state officials from *detaining* people at the request of federal immigration officers. Are those provisions illegal under federal law? Here again the answer is clearly "no," for three reasons. First, no federal law has ever—even under the first Trump administration—*required* state officials to detain a noncitizen for immigration purposes. Immigration detainers issued by the federal government are, and have always been, mere requests, not orders. As the Third Circuit put it nearly a decade ago:

> "[I]mmigration detainers do not and cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal."
> …
> "Under the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the request of the federal government. Essentially, the federal government cannot command the government agencies of the states to imprison persons of interest to federal officials."

Second, as the Third Circuit's reasoning makes clear, were the Trump administration to change longstanding detainer practice and assert that detainers are orders rather than mere requests, those orders would be unconstitutional. The Tenth Amendment's anti-commandeering rule clearly prohibits the federal government from ordering state officials to detain people for immigration purposes. Finally, wholly apart from the Tenth Amendment concerns, continuing to jail people without a warrant or probable cause *after* the reason for state custody has lapsed is unconstitutional—whether because the law enforcement investigation has finished, the charges have been dismissed, or the sentence has ended. In another case that the first Trump administration lost, the Ninth Circuit explained that

> "the Fourth Amendment requires a prompt probable cause determination by a neutral and detached magistrate to justify continued detention pursuant to an immigration detainer."

Both Los Angeles County and New York City learned that lesson the hard way, paying millions of dollars in compensation to settle the claims of people illegally held under immigration detainers.

As this litigation history shows, sanctuary statutes are lawful. Because they are, officials cannot face prosecution for doing what those laws require. From the time of Blackstone, our country has refused to punish people for following the law, because "obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt." This principle is subject only to the very rarest of exceptions—think of the My Lai massacre or the Nuremberg trials. I (and others) have searched in vain for any examples of state or local officials being prosecuted under federal law for conduct that was required by state or local law. We haven't found any.

The Criminal "Harboring" Prohibitions

While the analysis above should give comfort to state and local officers who follow the sanctuary statutes that govern them, it does not resolve what risk such officials might face if they go *beyond* what the sanctuary statute in their jurisdiction requires. For example, the California Values Act provides that local officials may, but need not, share information with the federal government where it pertains to non-citizens convicted of a list of "serious or violent" felonies. Some local jurisdictions like the LA County Sheriff's Department have enacted their own laws further restricting that discretion, but others have not. Could officials who exercise their discretion not to cooperate in those cases—where state or local law gives them the choice—be prosecuted?

Under the most likely criminal charge, and one relied upon in the DOJ memo, the answer again is "no." The substantive criminal provision referenced in the Attorney General's memo is 8 U.S.C. 1324, the federal harboring statute. That statute makes it a crime to "conceal, harbor, or shield from detection" an undocumented person, and also to "encourage or induce" someone to come to the United States in violation of law.

These provisions raise a host of complex questions, and again there is already a large body of case law addressing them. Just last year in *United States v. Hansen* the Supreme Court read the "encourage or induce" provision very narrowly, to prohibit only "the purposeful solicitation and facilitation of specific acts known to violate federal law." Two

examples the Court used are helpful in this context. It stated that "[a] minister who welcomes undocumented people into the congregation" and "a government official who instructs 'undocumented members of the community to shelter in place during a natural disaster'" could not be prosecuted for encouragement, because they would not have "intend[ed]" to bring about their unlawful presence. The Court read the statute to "stretch[] no further than speech integral to unlawful conduct."

Hansen did not address the harboring provision however, and that provision no doubt covers different conduct than the encouragement provision. But lower courts have generally read the harboring provision consistently with *Hansen*'s reasoning, and they have never read it to punish people for simply refusing to participate in federal immigration enforcement. The Second Circuit, for example, has held that harboring requires "conduct tending substantially to facilitate an alien's remaining in the United States illegally and to prevent government authorities from detecting his unlawful presence." The court affirmed the conviction of an employer who instructed an undocumented employee to use a different name and obtain false identity documents. Similarly, the Fifth Circuit ruled that "[i]mplicit in the wording 'harbor, shield, or conceal,' is the connotation that something is being hidden from detection." It affirmed the conviction of an employer who actively interfered with federal immigration agents to prevent the apprehension of undocumented people working for him by "shov[ing]" the agents when they tried to apprehend the workers, lying to the agents about the workers' immigration status, and then locking them out. Based on these and other facts, the court concluded that his action "was calculated to facilitate the aliens remaining in the United States unlawfully."

In contrast, other courts have read the statute more broadly, holding that to "harbor" is just to afford "shelter for financial gain," which does not require concealment. But even these courts have read the statute not to criminalize merely helping an undocumented person live their life in the United States, without the specific intent to violate the immigration laws. For example, the Ninth Circuit has read the statute to require a specific intent to violate the law. Some district courts in the Ninth Circuit have read that rule to require the jury to find the defendant had "the purpose of avoiding the aliens' detection by immigration authorities," which the Ninth Circuit has affirmed. But its law on the precise intent required by the statute is hardly a model of clarity. It has

acknowledged that there is "tension" in its case law on the issue, and has also posited situations where criminal intent could be shown in other ways, as when a defendant "publicize[s] her harboring of an illegal alien in order to call attention to what she considers an unjust immigration law." Such a defendant, the court hypothesized, "intends to violate the law, even though she does not intend to prevent detection." Similarly, the Seventh Circuit held (albeit in a meandering and at times confusing opinion) that harboring carries the connotation of "deliberately safeguarding members of a specified group from the authorities, whether through concealment, movement to a safe location, or physical protection." That case reversed the conviction of a woman who picked up her previously-deported boyfriend from the bus station, let him live in her apartment, and came to his aid when federal authorities attempted to arrest him (on drug trafficking charges), finding that this conduct could not as a matter of law be prosecuted as harboring.

The caselaw in this area reflects courts struggling to define precisely what it means to "harbor" someone, and it should give rise to serious concerns among some institutions seeking to protect immigrant communities in the years to come—like churches inviting undocumented people to sleep on their premises to avoid arrest. But none of these cases suggest that state and local officials should fear prosecution for simply doing what their sanctuary laws require, or even for going beyond them in *merely refusing to cooperate* with federal immigration enforcement. The DOJ memo and statements by White House officials appear to be trying to flip the law on its head, so that it creates an obligation on state and local officials to assist federal immigration enforcement. No authority supports that attempt. All of the harboring prosecutions my research has uncovered involve *affirmative conduct* that helps the undocumented person stay in the country. Sanctuary policies, in contrast, *prohibit* action. At least in this context of immigration and federal criminal law, choosing not to do what federal officials purport to "command" is not a crime.

Editor's note: This piece is part of the Collection: Just Security's Coverage of the Trump Administration's Executive Actions

IMAGE: A man speaks in support of a proposed "sanctuary city" ordinance as the Los Angeles City Council meets to consider the measure at City Hall in Los Angeles, California, on November 19, 2024. The proposed sanctuary city ordinance would prohibit any city resources from being used to help federal enforcement of immigration laws. (Photo by ETIENNE LAURENT/AFP via Getty Images)

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