Sanctuary Cities and Immigration Detainers: A Primer

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The issue of sanctuary cities has received heightened attention in Congress and the new Trump administration. In 2015 and 2016, various members of Congress introduced several *legislative proposals* [https://www.congress.gov/bill/114th-congress/senate-bill/3100?q=%257B%2522search%2522%253A%255B%2522%255C%2522s3100%255C%2522%2522%255D%257D&resultIndex=1] to bar federal funds from so-called sanctuary states and localities that limited their cooperation with federal immigration authorities. More recently, following President Donald Trump's executive order denouncing sanctuary cities, the Department of Justice (DOJ) announced that jurisdictions applying for DOJ grants would have to certify compliance with federal *immigration law that prohibits state and local restrictions on voluntarily exchanging* [https://www.law.cornell.edu/uscode/text/8/1373] information with federal authorities regarding a person's immigration status. The executive order has already attracted legal challenges, and a district judge in San Francisco granted a temporary injunction of the sanctuary cities section of the order on April 25.

It must be noted that the DOJ guidance does not *mandate* that jurisdictions honor what are called immigration detainers (explained below) from the federal government, which highlights some of the regulatory and constitutional limitations and challenges involved around the issues of sanctuary cities and the role of states and localities in enforcing federal immigration law. Even the act of withholding federal funds from local jurisdictions can face court challenges if the conditions are so substantive that they could be considered coercion or if they are unrelated to the federal interest or program at hand. Here we explain key terms in this debate, and discuss the challenges involved in addressing sanctuary city policies, including adherence to detainers, through federal legislation, regulation, or anything beyond voluntary federal-local cooperation.

What are "sanctuary" cities?

There is no specific legal or commonly agreed-upon definition of this term. States and localities that adopt formal or informal policies to limit their involvement in enforcing immigration law or their cooperation with federal immigration enforcement agencies are often referred to as

persons, is primarily the purview of the federal government, state and local law enforcement do not generally enforce federal immigration law. However, state and local cooperation with federal immigration enforcement agencies like Immigration and Customs Enforcement (ICE) has been critical to the government's ability to identify and apprehend unauthorized individuals for removal in the interior of the United States, particularly those who have been convicted of serious crimes. In response to early attempts by cities in the 1980s to restrict cooperation with immigration authorities, Congress included provisions in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) to regulate how states and localities share information with federal immigration authorities. Those statutes specifically prohibit state and local practices that bar officials from sharing information on the immigration status of individuals. However, most current debate over sanctuary cities centers on the use of "detainers" – notices that ICE intends to assume custody of an individual in another law enforcement agency's custody for the purposes of putting them in removal proceedings. While there is no statute or law that mandates localities honor detainers, the public discussion of enforcement of the information sharing laws mentioned above is often intentionally or unintentionally confused with mandating cooperation with detainers.

More recently, an executive order signed by President Trump gave DHS and the Attorney General the authority to designate sanctuary jurisdictions based on compliance with federal law on the exchange of information mentioned above, specifically *8 U.S. Code Section 1373* [https://www.law.cornell.edu/uscode/text/8/1373]. Attorney General Jeff Sessions recently announced that DOJ will use compliance with Section 1373 as a precondition to award federal grants to jurisdictions. However, that executive order has been stopped by a federal court in California.

What are detainers?

An immigration detainer is a notice that ICE issues to inform another law enforcement agency —usually state or local—that ICE intends to assume custody of an individual in the law enforcement agency's custody for the purposes of putting them in removal proceedings. ICE recently issued a *new detainer form* [https://www.ice.gov/detainer-policy], partly in response to recent litigation (discussed below) on the nature of detainers. The *detainer is issued* [https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf] when ICE has "determined that probable cause exists that the subject is a removable alien." Once issued, ICE requests that the local jurisdiction notify them at least 48 hours before the individual is released from custody or maintain custody of the individual for a period not to exceed 48 hours after that person would otherwise be released to provide ICE time to assume custody.

ICE has used initiatives like the *Secure Communities* [https://www.ice.gov/secure-communities] program to more easily identify and request the detention of unauthorized persons for removal. Secure Communities uses existing information-sharing programs between local, state, and federal law enforcement agencies to check the immigration status of arrested individuals. Fingerprints from local law enforcement agencies submitted to the Federal Bureau of Investigation (FBI) are automatically forwarded to ICE to check the individual's immigration status. If ICE decides to initiate removal proceedings, they may issue a detainer request to the local jurisdiction. Secure Communities became increasingly divisive during the first part of the Obama administration as more unauthorized persons were being booked for minor offenses and were being turned over to ICE for deportation without a criminal record. Local and state law enforcement officials complained that the program made their job more difficult and had a negative effect on police-community relations because immigrants, fearful of immigration

authorities, began declining to report crimes or cooperate with investigations. Lastly, immigration advocates also argued that the program could lead to racial profiling and *some courts have found* [http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/10/31/more-jurisdictions-defying-feds-on-deporting-immigrants] the prolonged detention of aliens without probable cause or warrant unconstitutional. Due to these issues, the Obama administration ended Secure Communities in favor of a program that negotiated with jurisdictions when ICE would request a detainer. However, President Trump's executive order reinstated Secure Communities, and ICE has increased its issuance of detainers.

Are states and cities required to comply with detainers?

The short answer is no. The Department of Homeland Security's own interpretation of the nature of detainers and four recent court decisions have provided guidance to that end. First, *federal regulation* [https://www.law.cornell.edu/cfr/text/8/287.7] states the following about detainers (emphasis added):

(a) *Detainers in general.* Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency... ***The detainer is a request*** that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.
(d) *Temporary detention* at Department request. Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, ***such agency shall maintain custody of the alien for a period not to exceed 48 hours***, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

In addition to this regulatory language, the only time the INA addresses detainers is in Section 287(d), which authorizes ICE to issue detainers only for violations of any law relating to controlled substances.

DHS interpretation: As CRS points out in its *report on detainers* [http://fas.org/sgp/crs/homesec/R42690.pdf], the word "shall" is usually understood as indicating a mandatory action in other contexts of the law. However, because the use of the word "shall" in this regulatory language is contained under the caption and within the section of the law relating to the *temporary* nature of detention, DHS and its predecessor, INS, have long interpreted that the "shall" language only prescribes the *period of time* for any detention at the request of ICE (48 hours), not that it requires adherence to the detainer or detention of the individual. The *new detainer form* [https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf] itself describes ICE as "requesting" notification of release and/or continued detention.

Legal interpretations: To date, four principal court decision have addressed the issue of the nature of detainers. Notably, the U.S. Court of Appeals for the 3rd Circuit in *Galarza v. Szalcyzk* [http://www2.ca3.uscourts.gov/opinarch/123991p.pdf#page=13] concluded that states and localities were not required to hold aliens for ICE, and agreed with DHS's interpretation of the word "shall" as only prescribing the detention's period of time. In *Morales v. Chadbourne* [https://www.ilrc.org/sites/default/files/resources/detainers_legal_update_october_2016.pdf] and *Miranda-Olivares v. Clackamas County* [https://www.ilrc.org/sites/default/files/resources/detainers_legal_update_october_2016.pdf], the courts found that holding someone beyond their release date constitutes an arrest under the Fourth Amendment and therefore requires ICE to have probable cause to issue a detainer. Lastly, the *Northern District of Illinois* [https://www.ilrc.org/sites/default/files/resources/detainers_legal_update_october_2016.pdf] found that detainers

alone do not provide ICE enough authority to arrest an individual, rather they need a warrant. In response to the latter, ICE has developed two separate administrative warrant forms that are attached to every detainer, a warrant for *arrest* [https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF] and a warrant for *removal/deportation* [https://www.ice.gov/sites/default/files/documents/Document/2017/I-205_SAMPLE.PDF].

Most recently, a U.S. District Court judge in San Francisco a granted *a temporary injunction* [https://www.nytimes.com/2017/04/25/us/judge-blocks-trump-sanctuary-cities.html] of the sanctuary cities section of Trump's interior enforcement EO, essentially blocking the administration's efforts to hold federal funds from places it deemed sanctuary jurisdictions. The decision noted that the government acknowledged that detainers are voluntary not mandatory.

Why can't Congress or DHS just change the law or its interpretation of the law?

This is where the Constitution comes into play. In addition to upholding DHS's interpretation of the voluntary nature of detainers in *Galarza v. Szalcyzk*, the 3rd Circuit ***cited*** [http://www2.ca3.uscourts.gov/opinarch/123991p.pdf#page=19] the 10th Amendment's anti-commandeering principle, which bars the federal government from forcing states and localities to carry out a federal program or enforce federal statutes, such as prohibiting federal entities from requiring states to hold immigrants for them. The recent district court decision on President Trump's EO discussed in the previous section also cited the anti-commandeering principle. Additionally, one of the powers reserved to the states under the 10th Amendment includes "police powers." In the context of immigration—the regulation of which is chiefly reserved to the federal government—states and localities have used their "police powers" to carry out laws or measures that address immigrants in their communities, including whether to participate in federal immigration enforcement and to what extent.

The "supremacy clause" of the Constitution does allow for the federal government to pre-empt certain state actions—even those protected under their police powers—and the federal government has in the past enacted laws that have sought to pre-empt state actions that conflict with its immigration enforcement policies, including, as noted above, IIRIRA and PRWORA. However, these laws only protect the exchange of information relating to a person's immigration and citizenship status between states, localities and federal entities. The *law does not require* [https://www.law.cornell.edu/uscode/text/8/1373] the collection or sharing of this information, it only prohibits jurisdictions from enacting any restriction that prevents state or local government officials from exchanging information with federal immigration authorities.

The decision from the federal judge in California cited all of these cases and precedents in its decision to hold the president's executive order.

What are some possible solutions?

Both the previous Obama administration and the current Trump administration took steps to address sanctuary jurisdictions and state and local cooperation with federal immigration authorities, with mixed results.

Obama administration: During the previous administration, DHS took steps to scrap the controversial Secure Communities program and replace it with the Priority Enforcement Program (PEP) to address some of the concerns of the "sanctuary" jurisdictions. Under *PEP* [http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf], ICE

continued to receive biometric information on arrests from the FBI, but only sought custody from a law enforcement agency if the individual held was convicted (rather than just arrested) of offenses that met Obama's deportation priorities, which included criminal aliens convicted of felonies or multiple misdemeanors and recent border crossers. Additionally, detainer requests were replaced by "requests for notification," described as: "requests that state or local law enforcement *notify* ICE of a pending release during the time that person is otherwise in custody under state of local authority." Former Homeland Security Secretary Jeh Johnson also testified that his agency had been reaching out to the 49 largest "sanctuary" jurisdictions to urge them to cooperate with the PEP program. At the time of that testimony, 33 cities had agreed (including Los Angeles), 11 cities were still deciding, and five had *refused* [http://www.huffingtonpost.com/entry/republicans-urge-obama-administration-to-crack-down-on-sanctuary-cities_55a5370fe4b0b8145f73a258].

Trump administration: Following President Trump's January 25, 2017, *executive order denouncing sanctuary jurisdictions* [https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united], Attorney General Jeff Sessions released a *statement* [https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions] on March 27 announcing that DOJ will require jurisdictions applying for DOJ grants to certify compliance with *8 U.S.C. Section 1373* [https://www.law.cornell.edu/uscode/text/8/1373] (the provisions of PRWORA and IIRAIRA discussed above) as a condition to receive the grants. (The Obama administration issued a similar notice in the summer of 2016 following a DOJ Inspector General report on the issue.) DOJ would also claw back any funds awarded to jurisdictions if they violate Section 1373, and any violations could result in disbarment or ineligibility for future grants. While Sessions cited in his statement over 200 instances of jurisdictions that have refused to honor ICE detainers, Section 1373 does not require that states and localities honor detainers; it only bars jurisdictions from actively prohibiting the exchange of information between state, local or federal agencies regarding an individual's immigration status (as discussed in the previous section). However, the courts have since issued a preliminary injunction against these efforts, so it is unclear what will happen.

Can the administration hold back funds from sanctuary jurisdictions?

The federal government can use its spending power to influence state and local behavior, but there are certain constitutional limits to doing so. In earlier Supreme Court cases, such as *South Dakota v. Dole and NFIB v. Sebelius* [https://fas.org/sgp/crs/misc/R44797.pdf], the court has recognized the federal government's right to set conditions on the distribution of federal funds to states and localities. However, there are certain criteria it must meet: the funds must be related to the particular federal interest or program and cannot be so substantial that withholding them becomes coercion. The latter criterion ensures that conditions set on federal funds do not violate the 10th Amendment's anti-commandeering principle by requiring them to carry out a federal program. Although it is unclear whether the funding identified for withholding in the January 25 executive order or the recent Sessions statement meet the criteria of being unconstitutionally coercive, the threat from the administration has already prompted *legal challenges from several jurisdictions* [https://fas.org/sgp/crs/misc/R44797.pdf#page=16], including Seattle, San Francisco, and cities in Massachusetts. One judge in the Northern District of California has *enjoined* [https://www.washingtonpost.com/local/social-issues/2017/04/25/c9e212c8-29f7-11e7-b605-33413c691853_story.html?hpid=hp_hp-top-table-main_sanctuary-cities-550pm%253Ahomepage%252Fstory&tid=a_inl&utm_term=.cc9e485cfb0f] their enforcement, in part based on these Supreme Court precedents.

Conclusion

The Trump administration and its supporters, including many members of Congress, have called for harsher penalties or polices targeting "sanctuary" cities that do cooperate with federal immigration authorities, specifically those that do not honor detainers. However, as stated above, any effort, whether statutory or by policy, to mandate the honoring of detainers would likely be challenged on the constitutional grounds that have in the past called into question DHS's ability to make adherence to detainers mandatory or take legal action against sanctuary cities. While state and local activities can be pre-empted if they clearly contradict the intent of Congress, current law does not seem to mandate that states and localities adhere to ICE detainers. As stated, several cities are already suing the Trump administration over the executive order, citing the anti-commandeering clause of the 10th Amendment, which has been upheld in the Supreme Court in other areas of law.

The presence of a large unauthorized immigrant population in these jurisdictions will continue to complicate the relationship between federal immigration enforcement agencies and the cities and localities that are directly trying to address this population as they best see fit. Further, legislation or regulation that seeks to withhold funds based on Section 1373 to incentivize jurisdictions to cooperate with federal government programs, while completely within the federal government's rights, is not likely to have an impact on the bigger issues of honoring detainers and fostering cooperation between federal immigration enforcement agencies and local law enforcement.

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