

CURRENT DEVELOPMENTS

THE LEGALITY OF SANCTUARY CITIES

GRACE BENTON*

I. INTRODUCTION

In an interview with a Seattle radio station in August 2016, then-presidential candidate Donald Trump declared, “sanctuary cities are out. . .sanctuary cities are over.”¹ Bringing an end to sanctuary cities—jurisdictions that limit cooperation with federal immigration authorities—factored prominently into Candidate Trump’s 2016 campaign and was a top-priority when he assumed the presidency. On January 25, 2017, just five days after his inauguration, President Trump signed an executive order that sought to restrict federal funding to jurisdictions that limit cooperation with Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security (DHS) responsible for enforcing federal laws on border control, customs, trade, and immigration.² Citing the “immeasurable harm to the American people and to the very fabric of our republic” resulting from sanctuary cities’ “willful[]” violation of Federal laws in their “attempt to shield aliens from removal from the United States,” the executive order vowed to “ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds. . .”³ Specifically, the Administration sought to condition the Byrne Justice Assistance Grants (Byrne JAG), the State Criminal Alien

* Grace Benton, J.D. Candidate, 2020 Georgetown University Law Center; M.A. Arab Studies, Georgetown University, 2014; B.A. International Studies, Spanish & Arabic, University of Alabama at Birmingham, summa cum laude, 2011. © 2019, Grace Benton.

1. Fred Barbash, *Trump’s Campaign Words Stalk Him in Court on Sanctuary Cities, Just as in Travel Ban Cases*, WASH. POST (Mar. 30, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/03/30/trumpss-campaign-words-stalk-him-in-court-on-sanctuary-cities-just-as-in-travel-ban-cases>.

2. Muzaffar Chishti & Jessica Bolter, *Trump Administration Ratchets up Pressure on “Sanctuary” Jurisdictions*, MIGRATION POLICY INSTITUTE (Feb. 22, 2018), <https://www.migrationpolicy.org/article/trump-administration-ratchets-pressure-sanctuary-jurisdictions>.

3. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (Enhancing Public Safety in the Interior of the United States).

Assistance Program (SCAAP), and the Office of Community Oriented Policing Services (COPS).⁴ In August 2018, the Ninth Circuit found that the executive order did not pass constitutional muster, ruling that it violated the Separation of Powers principle because “the Executive Branch may not refuse to disperse the federal grants in question without congressional authorization.”⁵ While unsuccessful, the executive order marked the beginning of the Trump Administration’s battle against sanctuary jurisdictions and served as a harbinger of the Administration’s broader program to overhaul the American immigration system. This in turn has resulted in multiple rounds of litigation that has left uncertain the ability of local jurisdictions to push back on federal immigration policy.

Sanctuary cities are loosely defined as jurisdictions that limit cooperation with federal immigration authorities regarding the location and removal of unauthorized immigrants.⁶ Such cooperation can range from information-sharing to detaining immigrants who have been charged with or convicted of crimes past their release dates so that federal immigration enforcement agents can come pick them up.⁷ Proponents of sanctuary cities warn that when local law enforcement actors cooperate with immigration authorities, immigrant communities stop reporting crimes and rapport between immigrant communities and local law enforcement suffers, resulting in less safety for everyone.⁸ Detractors contend that sanctuary policies undermine federal law and protect immigrants who have committed crimes, leading to instability and a lack of safety.⁹ This debate implicates the tension between state sovereignty and the power of the federal government. Increasing executive actions against sanctuary cities have forced the judiciary to directly confront the question of whether the federal government can condition funding for local jurisdictions on compliance with a federal regulatory program.¹⁰

4. Chishti & Bolter, *supra* note 2.

5. *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018); *see also* Molly Olmstead, *Federal Appeals Court Finds Executive Order Threatening Sanctuary Cities Unconstitutional*, SLATE (Aug. 1, 2018, 3:06 PM), <https://slate.com/news-and-politics/2018/08/sanctuary-cities-executive-order-ruled-unconstitutional-by-appeals-court.html>.

6. Dara Lind, *Sanctuary Cities, Explained*, VOX (Mar. 8, 2018, 12:00 PM), <https://www.vox.com/policy-and-politics/2018/3/8/17091984/sanctuary-cities-city-state-illegal-immigration-sessions>.

7. *See* Tal Kopan, *Trump and Sessions Lose Another Sanctuary Cities Case*, CNN (Apr. 19, 2018, 4:39 PM), <https://www.cnn.com/2018/04/19/politics/court-rules-against-trump-sessions-sanctuary-cities-chicago/index.html>.

8. Jasmine L. Tyler, *Trump Administration Threatens ‘Sanctuary Cities,’* HUMAN RIGHTS WATCH (Feb. 2, 2018, 1:23 PM), <https://www.hrw.org/news/2018/02/02/trump-administration-threatens-sanctuary-cities>.

9. *See* Nancy Dillon, *Trump Administration’s War on ‘Sanctuary’ Cities Takes Another Hit as Los Angeles Wins Temporary Injunction*, N.Y. DAILY NEWS (Sept. 14, 2018, 5:15PM), <http://www.nydailynews.com/news/ny-news-los-angeles-wins-temporary-injunction-against-jeff-sessions-20180914-story.html>.

10. *See* Sean Illing, *Sessions is Suing California over its “Sanctuary” Laws. I asked 8 Legal Experts who will Win.*, VOX (Mar. 8, 2018, 1:40 PM), <https://www.vox.com/2018/3/8/17092820/california-sessions-sanctuary-cities-lawsuit-doj-immigration>.

II. “SANCTUARY” JURISDICTIONS IN THE UNITED STATES

A. *What is a “Sanctuary City?”*

While the term “sanctuary city” has no official definition, it has come to refer generally to local jurisdictions that in some way limit cooperation with federal efforts to locate and remove unauthorized immigrants.¹¹ While such jurisdictions are colloquially referred to as “sanctuary cities,” sanctuary policies can be enacted at the municipal, county, and state levels.¹² Sanctuary policies vary widely and can include prohibiting local law enforcement from asking people about their immigration status, reporting suspected unauthorized immigrants to federal immigration authorities, or detaining immigrants charged with or convicted of crimes past their release date so that federal immigration authorities can pick them up (known as a “detainer”).¹³ Designation as a sanctuary jurisdiction does not mean that local authorities do not share *any* information about immigrants with federal enforcement agencies. For example, every jurisdiction still shares fingerprint data upon arrest with the Federal Bureau of Investigation (FBI), which in turn shares this information with the DHS for immigration status checks.¹⁴

B. *Local Non-Cooperation as Strategy*

Polities offering refuge or sanctuary from the authorities can trace their roots back to early civilization.¹⁵ For example, the Hebrews created “cities of refuge” that sheltered people who had accidentally killed someone and were pursued by the person’s family, and the Athenians established a right of asylum to “all those who were likely to suffer summary vengeance.”¹⁶ In the United States, sanctuary cities are part of a long history of local non-cooperation with federal authorities to the end of protecting certain groups. Commentators have likened current sanctuary city practices to pre-Civil War era policies of Northern states that aimed to prevent the re-capture of slaves who had fled the South.¹⁷ These policies took the form of personal-liberty laws which restricted the ability of local law enforcement to arrest and return fugitive slaves in certain Northern jurisdictions.¹⁸

11. Lind, *supra* note 6.

12. *See Id.*

13. *Id.*

14. TOM K. WONG, CENTER FOR AMERICAN PROGRESS, THE EFFECTS OF SANCTUARY POLICIES ON CRIME AND THE ECONOMY (Jan. 26, 2017, 1:00 AM). <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/>.

15. Ann Deslandes, *Sanctuary Cities are as Old as the Bible*, JSTOR DAILY (Mar. 22, 2017), <https://daily.jstor.org/sanctuary-cities-as-old-as-bible/>.

16. *Id.*

17. Nicolaus Mills, *History Is on the Side of Sanctuary Cities*, THE DAILY BEAST (Mar. 3, 2018, 9:15 PM), <https://www.thedailybeast.com/history-is-on-the-side-of-sanctuary-cities?ref=scroll>.

18. *Id.*

C. *The Current State of Sanctuary*

Sanctuary policies in the context of U.S. immigration first developed in the late 1970s.¹⁹ The concept is loosely related to the Sanctuary movement in the 1980s, during which religious congregations established protected spaces in their buildings for refugees fleeing persecution in Central America.²⁰ The country's first sanctuary state was Oregon, which adopted state-wide sanctuary policies in 1987.²¹ The number of sanctuary jurisdictions has increased exponentially in recent years. In 2000, there were eleven such jurisdictions.²² By the election of Donald Trump in November 2016, there were approximately 300, and that number nearly doubled after President Trump's inauguration in January 2017. According to the Federation for American Immigration Reform, there currently are 564 sanctuary jurisdictions in the United States.²³ They represent a particularly polarizing issue that has been featured prominently in the media, fuelled by the Trump Administration's focus on sanctuary cities as part of its immigration reform program. One observer described the heated public debate over sanctuary cities as a "culture war," with inflated misrepresentations of the actual state of affairs replete on both sides of the issue.²⁴ The actual effects of declaring an area to be a sanctuary jurisdiction on security and the economy are intensely controversial, but a 2017 national study that adopted a county level of analysis suggests that there is less crime and poverty in sanctuary counties than in non-sanctuary counties.²⁵

III. THE LEGALITY OF SANCTUARY IN TRUMP'S AMERICA

Some of President Trump's earliest campaign statements challenge the legality of sanctuary jurisdictions, and his Administration has aggressively pursued this position through a blend of executive action and litigation, both defensive and offensive, resulting in a labyrinthine series of judicial decisions. The Administration's core argument is that Section 1373 of the U.S. Code squarely prohibits sanctuary jurisdictions' restriction of information to immigration authorities.²⁶ The statute provides, in relevant part, that "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

19. FED. FOR AMERICAN IMMIGR. REFORM, SANCTUARY JURISDICTIONS NEARLY DOUBLE SINCE PRESIDENT TRUMP PROMISED TO ENFORCE OUR IMMIGRATION LAWS, 1 (May 2018), <https://fairus.org/sites/default/files/2018-05/Sanctuary-Report-FINAL-2018.pdf>.

20. Deslandes, *supra* note 15.

21. FED. FOR AMERICAN IMMIGR. REFORM, *supra* note 19.

22. *Id.* at 1–2.

23. *Id.*

24. Lind, *supra* note 6.

25. WONG, *supra* note 14.

26. Chishti & Bolster, *supra* note 2.

any individual.”²⁷ This is not the first time the federal government has raised this issue with local sanctuary jurisdictions; in 2012, Obama administration officials warned Cook County, Illinois, that it may be violating Section 1373 by refusing to communicate to ICE the release dates of immigrants detained by local authorities.²⁸ This move suggests a broad reading of the statute, one that the Trump Administration has capitalized on in its move against sanctuary cities.

The litigation that ensued following the January 2017 Executive Order and subsequent Administration attempts to condition federal grant money suggests that the federal government does not have constitutional authority to compel states, counties, and cities to enact the federal immigration program through conditioning federal funding. For example, in July 2018, the Northern District Court of Illinois held that, in light of the recent Supreme Court ruling in *Murphy v. National Collegiate Athletic Ass’n.*, Section 1373 violates the Tenth Amendment on its face under anticommandeering doctrine because it “rob[s] local policymakers of the option to decline to administer the federal immigration programs Section 1373 supports.”²⁹ The court’s ruling joins decisions from other multiple other jurisdictions that question the constitutionality of Section 1373.³⁰

Another major area of contention within the courts is the issuing of injunctions enjoining the Trump Administration from conditioning federal grant money on cooperation with local immigration officials. An Illinois District Court judge issued a nationwide injunction in September 2017, but it was narrowed to Chicago only in a Seventh Circuit ruling in June 2018.³¹ Most recently, on September 13, 2018, the Central District Court of California joined other district courts in granting a preliminary injunction that enjoined the Department of Justice from enforcing its fund-conditioning plan in a sanctuary jurisdiction; at issue in the instant case was the City of Los Angeles’s refusal to cooperate with immigration authorities.³² In his analysis, Judge Manual Real emphasized the policy ramifications of the Administration’s conditioning of funding and concluded that “the public interest is better served if

27. 8 U.S.C. §1373(a), *invalidated by City of Chicago v. Sessions*, 321 F. Supp. 3d 855 (N.D. Ill. 2018).

28. Chishti & Bolster, *supra* note 2.

29. *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 890 (N.D. Ill. 2018).

30. *United States v. California*, 314 F. Supp. 3d 1077, 1101, (E.D. Cal. 2018) (finding the constitutionality of Section 1373 “highly suspect”); *see also City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 328–331 (E.D. Pa. 2018) (holding Section 1373 unconstitutional under the anticommandeering doctrine).

31. Steve Vladeck, *Sanctuary Cities as the Next Nationwide Injunction Test Case*, SCOTUSBLOG (Jun. 19, 2018, 1:52 PM), <http://www.scotusblog.com/2018/06/sanctuary-cities-as-the-next-nationwide-injunction-test-case/>; *see also* Jason Tashea, *7th Circuit Limits National ‘Sanctuary Cities’ Injunction to Chicago*, ABA JOURNAL (Jun. 28, 2018, 4:45 PM), http://www.abajournal.com/news/article/7th_circuit_limits_national_sanctuary_cities_injunction_to_chicago.

32. Martin Macias, Jr., *LA Wins Round in Fight over Justice Department Grant*, COURTHOUSE NEWS SERVICE (September 14, 2018), <https://www.courthousenews.com/la-wins-round-in-fight-over-justice-department-grant/>.

the City is not forced to choose between foregoing the Byrne JAG grant funds and losing its rapport with the immigrant community.”³³

IV. CONCLUSIONS

Sanctuary jurisdictions are part of a long tradition of local non-cooperation with federal authorities to protect certain groups. While they have operated in various forms for decades in the United States, they have only recently come to factor prominently in the public consciousness, playing a major role in the national debate over immigration. While the situation is still developing, recent judicial decisions indicate that sanctuary jurisdictions are operating within their constitutionally-prescribed bounds when they refuse to cooperate with federal immigration authorities. Given the constitutional state-federal powers questions implicated in the fight over sanctuary cities and the proliferation of litigation, many expect the issue to make its way to the Supreme Court.

33. Order Granting Plaintiff’s Application for Preliminary Injunction at 5, *City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087 (C.D. Cal. 2018) (No. CV 17-7215-R).