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EXPLAINER

“SANCTUARY” POLICIES: WHAT ARE THE DECISIONS FACING STATE AND LOCAL GOVERNMENTS?

by Andy Ayers*

The word “sanctuary” has no legal definition; it can refer to a diverse array of state and local policies on immigration enforcement.

This explainer gives an overview of the kinds of state and local policies that are called “sanctuary.” Policies in this area fall somewhere on a spectrum from full support for immigration enforcement to active resistance. Many jurisdictions are somewhere in the middle—neither supporting nor resisting federal immigration enforcement, but staying neutral.

State and local governments make four kinds of choices about immigration enforcement:

- Should they use their resources (personnel, time, and so on) to participate in federal enforcement activities?
- Should they share information about noncitizens with federal authorities?
- Should they detain noncitizens at the request of the federal government?
- Should they grant federal immigration agents access to physical sites controlled by the state or locality?

It is tempting to think of a “sanctuary” as a jurisdiction that answers “no” to these questions. But real answers are rarely that simple. Every jurisdiction, for example, shares information with federal authorities, regardless of whether it calls itself a “sanctuary.” Thus, the final choice each jurisdiction makes—whether to publicly refer to itself as a “sanctuary”—can be confusing, or even misleading.

No jurisdiction is purely a sanctuary, and no jurisdiction supports federal immigration enforcement to the fullest possible extent. So, to understand the policies behind the word “sanctuary,” we need to understand the range of choices governments make in each category.

I. Whether to Use Investigative Resources to Support Immigration Enforcement

State and local power to participate in immigration enforcement is limited. The federal government has exclusive power over the regulation of immigration, so states and localities can’t make their own immigration-enforcement laws.¹ But state law-enforcement officials can participate in

immigration enforcement if they choose; for example, it’s generally permissible for state law-enforcement officers to ask questions about immigration status.²

Thus, states and localities must make choices about whether to participate directly in federal immigration enforcement by contributing state and local resources like personnel, time, use of equipment, and the money it takes to provide those resources.

The federal government cannot compel local law-enforcement personnel to participate in investigations.³ So local authorities must make choices about the extent to which they will participate in immigration investigations. States and localities have several options.

Becoming ICE deputies: 287(g) agreements. The most aggressive way for localities to participate in immigration enforcement is to partner with the federal agency that enforces immigration law, U.S. Immigration and Customs Enforcement (ICE), in what are known as “287(g)” agreements.⁴ Under the 287(g) program, the federal government deputizes local law-enforcement agents as agents of ICE.

The 287(g) program is voluntary; no jurisdiction can be required to participate in it.⁵ 287(g) agreements are made between ICE and local law-enforcement officials, which means that in New York State, it is independently elected sheriffs who make decisions at the county level. For cities or towns, it is law-enforcement officials who enter the agreement, but those officials are typically subject to oversight from other elected officials. In New York State, Rensselaer County is currently the only 287(g) jurisdiction.⁶

Although localities operating under 287(g) perform federal immigration-enforcement tasks, the agreements do not provide funding to reimburse the costs of those activities, only the cost of training.

Contributing resources without becoming deputies. 287(g) agreements are only one way in which localities can participate in immigration enforcement. Jurisdictions that want to support immigration enforcement can do so informally, without a 287(g) agreement, by riding along with ICE officers, conducting joint investigations, or by sharing investigative information with ICE. Many jurisdictions do so. For example, court officers might help ICE make arrests in state courthouses (advocates have reported this happening in New York State courthouses⁷).

Staying neutral. Most United States jurisdictions have chosen not to enter into 287(g) agreements. Many have adopted policies under which they do not participate in immigration investigations or share information with ICE. But these policies almost always have exceptions. For example, if local authorities are investigating a drug-trafficking network, and ICE is investigating some of the same people, most local policies allow the exchange of information. It is difficult to define “neutrality” or “sanctuary” in such situations.

Efforts to undermine federal enforcement. While most “sanctuary” policies aim for a kind of neutrality—that is, nonparticipation in immigration enforcement—there are cases where localities have more directly attempted to undermine federal enforcement efforts.

For example, the mayor of Oakland in February 2018 made a public announcement

warning noncitizens of a planned ICE sweep.⁸ It’s unclear what impact this had; Attorney General Sessions accused the mayor of being responsible for “800 wanted criminals that are now at large in that community,” prompting ICE’s local spokesperson to resign, accusing Sessions and agency officials of lying about the impact of the mayor’s statement.⁹ In any event, this sort of resistance by local officials is very unusual.

II. Whether to Detain Noncitizens at Federal Authorities’ Request

Another choice states and localities must make is whether to detain or hold noncitizens in custody at the request of federal authorities.

In some cases, a noncitizen in local custody is the subject of a criminal warrant—i.e., one issued by a judge upon a showing of probable cause to believe that the noncitizen in question has engaged in criminal conduct. Every jurisdiction of which we are aware honors criminal warrants.

But being present in the United States without authorization is not, by itself, a crime. Therefore, most of the allegedly unauthorized immigrants whom ICE might seek to detain are not subject to criminal warrants. Instead, ICE asks localities to detain them by issuing a document called a “detainer.”¹⁰

Detainers. When a state or locality has incarcerated a noncitizen for non-immigration-related reasons, and ICE becomes aware that the noncitizen is in custody, ICE may issue a detainer. The detainer indicates that there is probable

cause to believe that the noncitizen is “removable” (i.e., deportable).

Detainer requests that the state or locality “maintain custody of the alien for a period not to exceed 48 hours beyond the time when he/she would otherwise have been released from [state or local] custody to allow DHS to assume custody.”¹¹ (The detainer form also requests that the locality give DHS notice before releasing the detainee; see the discussion of information-sharing, below.) Detainers are not a guarantee of deportation; in Texas, for example, only 15% of detainers end up leading to deportation.¹²

Detainers are requests, not commands, so there is nothing unlawful about declining to comply with them. Most “sanctuary” policies include a provision stating that the jurisdiction will not honor detainers. Some other jurisdictions decline to honor detainers simply because it may be unlawful to honor them.

Is it lawful to comply with detainers?

There is a significant legal question about whether it is lawful for a state or locality to hold a noncitizen in custody beyond the time when there is an independent reason to detain them. It is generally a violation of the Fourth Amendment to hold someone in custody without probable cause to believe they have committed a crime, and immigration detainers offer reason to believe only that the person has engaged in a civil offense. Thus, multiple courts have found it unlawful to comply with detainers, including an appellate court in New York State.¹³ The Third Circuit has allowed a person mistakenly held pursuant to an ICE detainer to sue the county for money damages.¹⁴ Because of these precedents, the

New York State Sheriffs’ Association advised sheriffs in 2014 not to comply with detainer.¹⁵ I

It is important not to overgeneralize about jurisdictions’ polices on detainers. Many jurisdictions that generally decline to comply with detainers will comply with them for certain kinds of criminal convictions. For example, New York City (a prominent “sanctuary”) has a policy of complying with detainers for noncitizens convicted of “one of 170 serious crimes within the last five years—including arson, homicide, rape or robbery—and in cases in which a judge has signed a detainer request.”¹⁶

RESOURCES

For more on detainers, see ICE, “Detainer Policy,” <https://www.ice.gov/detainer-policy>; the regulations governing detainers are at 8 C.F.R. § 287.7. Another useful resource is Lazaro Zamora, “Sanctuary Cities and Immigration Detainers: A Primer” (Bipartisan Policy Center), <https://bipartisanpolicy.org/blog/sanctuary-cities-and-immigration-detainers-a-primer/>.

Prosecutorial decisions that cause deportation. Although many jurisdictions refer to themselves as “sanctuaries” because they do not *directly* turn over noncitizens to ICE, states and localities take many other actions that can lead to deportation. As noted below, whenever a noncitizen is arrested and fingerprinted, ICE receives the information. And when local authorities criminally prosecute a noncitizen, their conviction can often lead to deportation. A large number of crimes can result in

noncitizens being removable or inadmissible.¹⁷

Indeed, the risk of deportation resulting from criminal conviction is so significant that the Supreme Court has found criminal defense attorneys obligated to know, and advise their clients of, the potential immigration consequences of a guilty plea.¹⁸

Thus, prosecutors’ decisions about what charges to file can result in noncitizens being deported—even those with legal status. Some prosecutors have adopted policies of trying to charge defendants in a way that minimizes immigration consequences.¹⁹

III. Whether to Share Information with Federal Authorities

Many “sanctuary” policies limit the extent to which states and localities will share information about noncitizens with federal authorities. There are many ways in which states and localities might share information with federal immigration authorities. Some of them are direct, but others are indirect and inadvertent. This section lists some of the main ways in which federal authorities can obtain information about noncitizens from local governments.

Fingerprint checks. When localities submit fingerprints to the Federal Bureau of Investigation (FBI) to check a person’s criminal history, those fingerprints are automatically shared with the Department of Homeland Security (DHS) to check against its immigration records. And localities cannot ask the FBI to refrain from sharing the fingerprints with DHS.²⁰

Thus, every jurisdiction of which we are aware effectively shares noncitizens’

fingerprints with ICE whenever those fingerprints are taken.

Notifying ICE that a detainee will be released. Immigration detainers, discussed above, request not only that localities hold noncitizens in custody, but also that they “[n]otify DHS as early as practicable (at least 48 hours, if possible) before the alien is released from [state or local] custody.”²¹ Again, this is a request, not an order—the federal government lacks the power to compel localities to share information.

Many of the jurisdictions that call themselves “sanctuaries” do not comply with requests for advance notice of release.

The federal government has indicated that it will begin to require, as a condition of grants that many localities receive, that localities certify that they honor requests for advance notice of release.²²

Allowing ICE to see records. It’s not unusual for ICE to ask to see jail records.²³ Some jurisdictions require ICE agents to obtain a sheriff’s approval before seeing jail records. Or they might allow ICE to see some jail records but not others.²⁴

Sharing criminal and surveillance databases. A variety of state and local databases contain information about immigration status. For example, some police departments maintain list of suspected gang members, and share these lists with ICE. These lists can incidentally provide information about suspected immigration violations.

Surveillance databases, too, can represent a form of indirect information-sharing with ICE. Many localities use a company called Vigilant Solutions, which operates license-plate databases that compile information

about cars’ whereabouts from traffic cameras and other scanners.²⁵ Participating localities upload license-plate data from traffic cameras; Vigilant can then check its database to see where a given license plate was last seen. Although several of the jurisdictions that participate in the system are “sanctuaries,” Vigilant shares its database with ICE, which means participating municipalities are indirectly granting ICE access to their traffic cameras and other surveillance data.

RESOURCES

For more information on how municipal data practices make information available to federal enforcement authorities, see Sunlight Foundation, *Protecting Data, Protecting Residents: 10 Principles for Responsible Municipal Data Management*, <https://sunlightfoundation.com/wp-content/uploads/2017/02/Protecting-data-protecting-residents-whitepaper.pdf>.

Access to benefits records. According to the U.S. Government Accountability Office (GAO), federal authorities have used various databases to locate undocumented immigrants, including “[p]ublic and private databases that record information concerning benefits” and “department of motor vehicle records.”²⁶ Indeed, ICE agents told the GAO that there was no need to ask non-immigrants to voluntarily provide their address data, because ICE could already find that data through such records.²⁷

For some programs, federal access to state databases is automatic. Medicaid, for example, is a joint federal-state program;

both federal and state entities have access to shared benefits databases. And student visas are managed by universities through a system called SEVIS, which is designed to ensure that information about noncitizen students is instantly communicated to federal authorities.

Lawfulness of policies against information-sharing. Under the Tenth Amendment, the federal government cannot compel states to share information. However, a federal statute (8 U.S.C. § 1373) says that states and localities “may not prohibit, or in any way restrict, any government entity or official from sending” immigration information to ICE. Nor can states and localities prohibiting maintaining immigration status information.²⁸

Attorney General Jeff Sessions issued a memo defining a “sanctuary” jurisdiction as one that “willfully” violates § 1373.²⁹ But no jurisdiction of which we are aware acknowledges an intent to violate § 1373; most “sanctuary” policies prohibit sharing of information “except as required by law,” often specifically providing that the policy should be construed as consistent with § 1373. (This can make it hard to know exactly what information local employees should share.)

RESOURCES

For more information on § 1373, including information about possible consequences of violating it and recently proposed amendments, see Law Enforcement Immigration Task Force, *A Path to Public Safety: Background on 8 U.S.C. § 1373* (Sept. 2017), <https://leitf.org/wp-content/uploads/2017/09/Path-to-Public-Safety-Background-on-8-U.S.C.-1373.pdf>.

Policies against gathering information.

Because of the various ways in which information can be received by federal authorities, many “sanctuary” jurisdictions prohibit their employees from inquiring about immigration status.

Although § 1373 prohibits policies that ban information-sharing, it says nothing about localities’ ability to prohibit their employees from inquiring about immigration status.

IV. Whether to Grant Access to Government-Controlled Sites

Another kind of decision localities must make is to what extent they will allow immigration authorities to access property or facilities owned by the local government.

Sometimes, localities have no choice: if ICE agents have a criminal warrant, the law requires granting them access. And we are aware of no jurisdiction that has attempted to avoid compliance with a judicial warrant.

Also, if the locally-controlled property is generally open to the public, it is unclear whether the law allows the locality to deny access to ICE.³⁰

The most high-profile controversy over ICE access to sites controlled by state and local government involves courthouses.

Controversy has erupted over ICE’s practice of making arrests in or near state courthouses. State officials have called for the practice to end.³¹ But ICE has made clear the practice will continue.

Another kind of government-controlled site includes jails, prisons, and probation offices. Some jurisdictions allow ICE agents to enter their jails or prisons freely, while others

require the agents to get prior authorization from the sheriff or some other official. Still other jurisdictions refuse to allow ICE agents into jails unless they produce a criminal warrant. Because unlawful presence is not a criminal offense, ICE is often unable to produce a criminal warrant.

The federal government has indicated that it will begin to require, as a condition of grants that many localities receive, certification that the locality allows federal agents access to correctional facilities to interview suspected undocumented immigrants.³²

Significant numbers of arrests happen on public sites. For example, 72 percent of ICE arrests in Colorado between October 2016 and May 2017 occurred at courthouses and probation offices.³³ No jurisdiction of which we are aware has altogether attempted to prohibit ICE from accessing government-controlled sites, and even if it were possible to do so, many ICE arrests happen near such facilities when noncitizens leave or arrive. Even in “sanctuary” jurisdictions, noncitizens are regularly arrested on sites controlled by the state or locality.

V. Whether to Use the Word “Sanctuary”

As the discussion above makes clear, the term “sanctuary” is used to apply to a large variety of policies. Because the term “sanctuary” has no legal meaning, the decision whether to refer to a given jurisdiction as a “sanctuary” is a political one, not a legal one. Different jurisdictions may choose to use the term, or not, for different reasons.

Undoubtedly, some jurisdictions choose to refer to themselves as “sanctuaries” to send

a message about their disagreement with federal immigration-enforcement policies. But other jurisdictions may wish to avoid the term precisely because it signals disagreement with those policies. Some jurisdictions may adopt policies similar to those in “sanctuary” jurisdictions for reasons unrelated to immigration policy. For example, they might wish to avoid donating their resources to support federal immigration enforcement, and to avoid potential liability for detaining people pursuant to detainers.

Still other jurisdictions might wish to avoid using the term “sanctuary” because it is misleading. As discussed above, even jurisdictions that identify themselves as sanctuaries typically share significant amounts of information with federal authorities, directly and indirectly, and provide no safe harbor for noncitizens on state-owned properties like courthouses and jails. Thus, the term may mislead noncitizens or others into thinking that “sanctuary” jurisdictions are zones in which immigration enforcement does not take place. The term “sanctuary” has many meanings, but in no category does it refer to a complete absence of immigration enforcement.

RESOURCES

For more information about state and local governments’ role in immigration law, visit our website:

albanylaw.edu/glc/immigration

Endnotes

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¹ State and local governments cannot make laws that add punishment for immigration-related offenses to whatever punishment the federal government already imposes. *See* *United States v. South Carolina*, 720 F.3d 518, 532-533 (4th Cir. 2013).

² *See* *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492, 2507-2508 (2012).

³ State sovereignty prevents the federal government from ordering state law-enforcement officers to implement federal programs. *See* *Printz v. United States*, 521 US 898 (1997).

⁴ Section 287(g) of the Immigration and Nationality Act is codified at 8 U.S.C. § 1357(g).

⁵ U.S. Immigration & Customs Enforcement, “Fact Sheet: Delegation of Immigration Authority Section 287(g),” <https://www.ice.gov/287g>.

⁶ All of the jurisdictions participating in the 287(g) program are listed at <https://www.ice.gov/287g>.

⁷ Felipe de la Hoz & Emma Whitford, “Court Officers Are Aiding in Immigration Arrests, Say Lawyers,” VILLAGE VOICE (Nov. 16, 2017), <https://www.villagevoice.com/2017/11/16/court-officers-are-aiding-in-immigration-arrests-say-lawyers/>.

⁸ Hamed Aleaziz, “ICE confirms 150-plus arrests in California sweep, slams SchAAF’s early warning,” SAN FRAN. CHRONICLE (Feb. 27, 2018), <https://www.sfchronicle.com/bayarea/article/Reports-of-California-immigration-sweep-are-true-12714833.php>.

⁹ Meagan Flynn and Avi Selk, “ICE spokesman resigns, citing fabrications by agency chief, Sessions about California immigrant arrests,” WASH. POST (Mar. 13, 2018).

¹⁰ *See* ICE, “Detainer Policy,” <https://www.ice.gov/detainer-policy>; *see also* 8 C.F.R. § 287.7.

¹¹ ICE, Form I-247A, <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf>.

¹² For statistics on the number of detainers leading to deportation, *see* Gus Bova, “Myth-Busting Immigration Detainers: They’re Optional, Costly and Rarely Lead to Deportation,” TEXAS OBSERVER (Feb. 7, 2017), <https://www.texasobserver.org/immigration-sanctuary-cities/>.

¹³ *See* *People ex rel. Wells v. DeMarco*, 88 N.Y.S. 3d 518 (App. Div. 2018). *See generally* *Lunn v. Commonwealth*, 477 Mass. 517 (2017).

¹⁴ *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014); *see also* *Mercado v. Dallas Cnty.*, 2017 U.S. Dist. LEXIS 5785, *15 (N.D. Tex. Jan. 17, 2017). For a compilation of authorities, *see* Christine M. G. Davis, *Immigration Detainers or Holds Issued Pursuant to 8 C.F.R. § 287.7*, 10 A.L.R. Fed. 3d Art. 1 (2016).

¹⁵ Kirk Semple, “New York State Sheriffs Shying Away From Immigration Detention,” N.Y. TIMES (July 31, 2014), <https://www.nytimes.com/2014/07/31/nyregion/new-york-state-sheriffs-shying-away-from-immigration-detention-.html>.

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- ¹⁶ Liz Robbins, “In a ‘Sanctuary City,’ Immigrants Are Still at Risk,” N.Y. TIMES (Feb. 27, 2018).
- ¹⁷ Shakeer Rahman & Robin Steinberg, “Sanctuary Cities in Name Only,” N.Y. TIMES (Feb. 15, 2017), <https://www.nytimes.com/2017/02/15/opinion/sanctuary-cities-in-name-only.html>.
- ¹⁸ *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).
- ¹⁹ See Corinne Ramey, “Some Prosecutors Offer Plea Deals to Avoid Deportation of Noncitizens,” WALL STREET JOURNAL (July 7, 2017).
- ²⁰ Fingerprints are shared under the “Secure Communities” program. See ICE, “Secure Communities,” <https://www.ice.gov/secure-communities>.
- ²¹ ICE Form I-247A, available at <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf>.
- ²² See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, “State Criminal Alien Assistance Program: FY 2017 Program Requirements and Application Instructions,” at page 7, https://www.bja.gov/Funding/17SCAAP_Program_Requirements.pdf.
- ²³ *Id.* at 6.
- ²⁴ See, e.g., U.S. Department of Justice, Office of the Inspector General, Audit Division, “Cooperation Of SCAAP Recipients in the Removal of Criminal Aliens from the United States,” at p. 5 (Audit Report 07-07, Jan. 2007), <https://oig.justice.gov/reports/OJP/a0707/final.pdf>.
- ²⁵ April Glaser, “Sanctuary Cities Are Handing ICE a Map,” SLATE (Mar. 13, 2018), <https://slate.com/technology/2018/03/how-ice-may-be-able-to-access-license-plate-data-from-sanctuary-cities-and-use-it-for-arrests.html>.
- ²⁶ Government Accountability Office, *Alien Registration: Usefulness of a Nonimmigrant Alien Annual Address Reporting Requirement Is Questionable*, at 3 (Jan. 2005), <https://www.gao.gov/assets/250/245208.pdf>.
- ²⁷ *Id.*
- ²⁸ The statute prohibiting state bans on information-sharing is 8 U.S.C. § 1373. An almost-identical prohibition appears in 8 U.S.C. § 1644.
- ²⁹ Office of the Attorney General, “Implementation of Executive Order 13768, ‘Enhancing Public Safety in the Interior of the United States,’” (May 22, 2017), available at <http://apps.washingtonpost.com/g/documents/politics/implementation-of-executive-order-13768-enhancing-public-safety-in-the-interior-of-the-united-states/2445/>.
- ³⁰ See Noah Manskar, “City Council Members Push Top State Judge To Bar ICE From Courts,” PATCH (Feb. 20, 2018), <https://patch.com/new-york/new-york-city/city-council-members-push-top-state-judge-bar-ice-courts> (quoting Office of Court Administration spokesman Lucian Chalfen as saying that OCA cannot legally “shut down a public building to law enforcement”).
- ³¹ See, e.g., “New York AG Eric Schneiderman and Acting Brooklyn DA Eric Gonzalez Call for ICE to End Immigration Enforcement Raids in State Courts,” (Aug. 3, 2017), <https://ag.ny.gov/press-release/new-york-ag-eric-schneiderman-acting-and-brooklyn-da-eric-gonzalez-call-ice-end>.
- ³² See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, “State Criminal Alien Assistance Program: FY 2017 Program Requirements and Application Instructions,” at page 7, https://www.bja.gov/Funding/17SCAAP_Program_Requirements.pdf.

³³ Tory Johnson, “Immigration Arrests at Courthouses Are Under Fire From State Officials,” IMMIGRATION IMPACT (Sept. 28, 2017), <http://immigrationimpact.com/2017/09/28/immigration-arrests-at-courthouses-fire-state-officials/>.