



# Historical Review, Current Status and Legal Considerations Regarding Sanctuary Cities

by Jennifer C. Critchley and Lisa J. Trembly

**H**istorically, sanctuary cities developed in response to the Central American Sanctuary Movement in the 1980s, when immigrants from Central America sought refuge in the United States but were denied asylum.<sup>1</sup> During the movement, churches and religious organizations sought to hide, shelter and feed Central American immigrants who fled their region's violent civil wars and crossed the Mexican border to enter the United States illegally.<sup>2</sup>

The sanctuary movement was originated by private citizens whose objective was to hinder federal immigration enforcement and deportation of undocumented immigrants.<sup>3</sup> As the movement progressed, it gained the support of certain state and local governments, which implemented laws that

expanded government assistance available to immigrants and required that law enforcement neither ask for nor report an individual's citizenship status.<sup>4</sup> The modern sanctuary movement is a legislative response by states and local governments.

While there is no single definition of a sanctuary city, it generally means a city where local law enforcement will decline to aid the federal government in locating and detaining undocumented immigrants. Sanctuary cities have also been described as municipalities that have adopted "laws or policies that limit government employees, particularly local police officers, from inquiring or disseminating information about the immigration status of immigrants whom they encounter, except in the case of a serious criminal offense."<sup>5</sup>

Over the years, some state and local jurisdictions restricted their agencies and employees from sharing information with

the federal immigration authorities, in large part to prevent federal authorities from using the information to locate and apprehend undocumented aliens.<sup>6</sup> In response to this practice and the growth of sanctuary cities, in 1996 the federal government implemented the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The IIRIRA does not require state and local governmental employees to share information with federal authorities; however, it bars any restrictions that prevent state or local agencies or officials from voluntarily communicating with federal immigration officials.<sup>7</sup>

At the time of its implementation, the most significant policing provision of the IIRIRA was Section 133, often referred to as the 287(g) program of the Immigration and Naturalization Act (INA). That section allowed the United States attorney general to make agreements with state and local authorities allowing local police to carry out federal immigration enforcement. The program included two different models: 1) a 'jail model,' which permitted state and local officers in detention facilities to identify and process removable immigrants who had been convicted of or charged with a crime; and 2) a 'task force model' authorizing police to identify and process immigrants subject to removal while engaged in their normal policing responsibilities.<sup>8</sup>

From its inception, the program was heavily criticized, and "immigrant advocacy groups complained that the program promoted racial profiling, caused a breakdown of trust between police and immigrant communities, and encouraged police to use minor offenses as a pretext for immigration enforcement."<sup>9</sup> The United States Immigration and Customs Enforcement (ICE), the primary federal agency in charge of immigration enforcement and deportation, has since abandoned the task force model.

## Current Status of Sanctuary Cities

After Sept. 11, 2001, the modern sanctuary movement gained momentum due to the heightened focus on national security. In 2008, the Department of Homeland Security (DHS) created the Secure Communities Program, which mandated that local law enforcement agencies run fingerprints through the DHS illegal immigrant database when booking an individual following an arrest. When a match occurred, the secured communities' database would alert ICE, which would issue a detainer or immigration hold while the undocumented immigrant was in local law enforcement custody. The local authorities were then required to detain the immigrant until ICE agents could obtain custody. This program was highly criticized.

DHS issued a statement in Nov. 2014:

[G]overnors, Mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, many have issued executive orders or have signed laws prohibiting such cooperation.<sup>10</sup>

As a result, DHS abandoned the Secure Communities Program and, in 2014, replaced it with the Priority Enforcement Program (PEP), which requires local law enforcement agencies to notify ICE prior to the immigrant's release or transfer, but does not require the individual be detained, except for certain instances where there is a final order of removal or probable cause to find the individual is removable. Even under PEP's less onerous rules, many jurisdictions have refused to acknowledge requests from ICE and have become sanctuary jurisdictions.

On Jan. 25, 2017, President Donald Trump issued an executive order seeking to withhold federal grant money from sanctuary jurisdictions. Trump stated that "[t]hese jurisdictions have caused

immeasurable harm to the American people and to the very fabric of our Republic." His executive order is intended to "ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law."<sup>11</sup> To ensure compliance with this statute, jurisdictions that receive federal funding must certify their compliance with all federal laws.

The tension between federal immigration agencies and sub-agencies and state and local law enforcement agencies is evident in statistics and news releases by ICE. For example, ICE has reported that despite some improvement in cooperation with state and local jurisdictions following the implementation of PEP, ICE's Enforcement and Removal Operations (ERO) "documented a total of 21,205 declined detainers in 567 counties in 48 states including the District of Columbia between January 1, 2014, and September 30, 2016."<sup>12</sup> According to ICE, "[d]eclined detainers result in convicted criminals being released back into U.S. communities with the potential to re-offend, notwithstanding ICE's requests for transfer of those individuals."<sup>13</sup>

The news release section of ICE's website highlights certain instances in which local enforcement agencies did not cooperate with ICE. For example, a March 10, 2017, headline from Newark reads "ICE arrests Brazilian national released from local custody after detainer request ignored." A statement released by the ERO Newark Field Office director, John Tsoukaris, declares that "as a nation, we must protect the integrity of our immigration system and the removal of illegal aliens especially those with a criminal history—this is one of ICE's top priorities." He further stated that "ICE shares the country's ultimate objective to protect public safety and national security while simultaneously preserving the critical community-place bond. As such, county jails

who fail to work with ICE put their communities at risk.”

Similar news releases concerning New York highlight ICE’s ongoing frustration with the lack of cooperation by state and local government. For example, ICE news releases state: “ICE arrests convicted criminal alien from the Dominican Republic after detainer not honored,” “ICE arrests MS-13 Gang Member released from local custody on an active detainer,” and “ICE arrests convicted Mexican national released from local custody after detainer was ignored.”<sup>14</sup>

### Sanctuary Cities in New Jersey

There is estimated to be somewhere between 300 and 350 sanctuary jurisdictions on both the state and local level, including several in New Jersey.<sup>15</sup> Jersey

City Mayor Steven Fulop was one of the first to reaffirm his city as a sanctuary city after President Trump’s executive order. Fulop’s executive order bars police from honoring immigration detainer requests from ICE unless they involve a judicial criminal warrant; prohibits police from participating or assisting in civil immigration enforcement operations; and bars federal immigration enforcement agents from access to municipal facilities, property or databases without a warrant specifying the information sought.

There are several other sanctuary cities in New Jersey, including Newark, Asbury Park, Camden, East Orange, Linden, New Brunswick, North Bergen, Plainfield, Trenton, Maplewood, Prospect Park and Union City. A small Mercer County borough, Hopewell, also recently voted to declare itself a sanctuary city. Other municipalities, such as Red Bank, are considering whether to do the same.

The term sanctuary is a bit of a misnomer given there is not a 100 percent guarantee that an individual will not be subject to federal immigration enforcement and/or deportation.<sup>16</sup> Some municipalities, recognizing the misnomer, opt to use the term ‘welcoming community’ or ‘fair and welcoming city.’ On March 6, 2017, Leonia adopted a resolution declaring the borough a welcoming community. In fact, on Feb. 22, 2017, the Montclair Township Council approved a resolution declaring Montclair a welcoming community and the neighboring town of Bloomfield is discussing a similar measure. The Montclair resolution reaffirms “Montclair’s continuing commitment to equal, respectful and dignified treatment of all people regardless of their immigration status.”<sup>17</sup>

There are some municipalities in New Jersey that have declined to adopt the sanctuary city designation. For example, the city of Elizabeth has a large foreign population but declined to declare itself a sanctuary city. Mayor J. Christian Boll-

wage explained he believes the sanctuary phrasing would put a target on the backs of unauthorized immigrants. Likewise, the Syrian-born mayor of Montvale, Mike Ghassali, said that he would not declare his municipality a sanctuary city, and in a Facebook post explained he “will not be signing an executive order that will ask our employees to defy federal laws. A mayor should not be advocating the defiance of federal laws.”

In early Feb. 2017, in response to Trump’s executive order, a bill was introduced in both houses of the New Jersey Legislature that would provide funds to sanctuary cities that are denied federal funds. The legislation, S-3007 and A-4590, would allow counties and municipalities that are denied federal funds to apply to the commissioner of the Department of Community Affairs for a “dollar for dollar match of the withheld federal funds.” The bill was sponsored by State Senator Brian Stack, Assemblyman Raj Mukherji and Assemblywoman Annette Chaparro. Stack, who is also the mayor of Union City, said in a statement announcing the bill that “[r]esidents need not fear coming forward to assist law enforcement or calling city agencies to access services...We must do our part to protect them, regardless of documentation, status or national origin.”<sup>18</sup>

Governor Chris Christie recently stated during a radio talk show that there is “no chance” he would provide state funds to so-called sanctuary cities if they lose federal funding.<sup>19</sup> Earlier that same day, U.S. Attorney General Jeff Sessions warned sanctuary cities they would lose federal grants if they refuse to cooperate with immigration authorities.<sup>20</sup> Approximately \$4.1 billion dollars in federal grant money is at issue.<sup>21</sup>

In response to the announcement by Sessions, Senator Cory Booker, the former mayor of Newark, issued the following statement:

As a former mayor, I know first-hand how

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disastrous these policies would be for American cities, law enforcement officers, and their efforts to protect public safety. Forcing local police to detain undocumented immigrants who are suspected nonviolent offenders wastes limited resources, distracts police officers from fighting serious crimes, and harms the ability of officers to build trust and cooperation with the communities they are sworn to protect. Demanding that cities repay federal funding used to hire officers or otherwise fight crime and arguing this will make communities safer defies logic. There's no doubt that our broken immigration system needs to be fixed, but forcing local police officers to act as ICE agents is not a solution.<sup>22</sup>

## The Legal Debate Over Sanctuary Cities

Both sides of the debate over sanctuary cities cite safety as the number one concern. Proponents argue that sanctuary cities are safer because they encourage good relationships between undocumented immigrants and law enforcement.<sup>23</sup> Supporters maintain that when immigrants are afraid law enforcement officials will ask them questions about their immigration status, they are less likely to report crimes and cooperate with investigations. As a result, an environment where crime can thrive is fostered. Moreover, many local law enforcement agencies report they do not have the training or resources to identify and detain illegal immigrants.<sup>24</sup>

Conversely, opponents maintain that sanctuary cities harbor criminals, creating a dangerous environment.<sup>25</sup> The incident most often cited in support of this argument involves Juan Francisco Lopez-Sanchez, an undocumented immigrant with seven felony convictions who had been deported from the United States on five occasions.<sup>26</sup> Lopez-Sanchez was released by law enforcement in San Francisco, a sanctuary city, despite requests from ICE to detain him.

Shortly after his release, he murdered a United States citizen, Kathryn Michelle Steinle, who was visiting a tourist attraction in the Embarcadero district when she was gunned down. Opponents of sanctuary cities claim DHS immigration initiatives like PEP and Secure Communities would prevent such crimes if every local government adhered to them.<sup>27</sup> In fact, opponents believe that many crimes could be avoided if local law enforcement could arrest undocumented immigrants for their first crime on U.S. soil—illegal entry into the country—and turn them over to federal law enforcement.<sup>28</sup>

Another often-debated issue turns on the extent to which sanctuary policies trigger violations of the law. “While the federal government’s power to preempt activity in the area of immigration is extensive, there are constitutional limits to its power to influence state and local activity.”<sup>29</sup>

The Supreme Court in *Arizona v. United States* struck down an Arizona law that, among other things, made it a crime to be in the United States unlawfully without registering with the government.<sup>30</sup> In striking down this law, the Court invoked preemption principles, explaining that the authority to enforce an immigrant’s failure to carry federally required registration documents belongs exclusively to the federal government.<sup>31</sup>

Notably, the federal government “may not directly ‘commandeer’ state or local governments into the service of federal immigration authorities.”<sup>32</sup> Supporters of sanctuary cities posit ICE detainers raise constitutional concerns.<sup>33</sup> Opponents contend sanctuary policies violate federal laws to which local governments are bound.

Tenth Amendment concerns are rooted in federalism issues. As the Third Circuit Court of Appeals explained in *Galarza v. Szalczyk*, “[u]nder 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.”<sup>34</sup>

Proponents of ICE detainers contend localities that adopt sanctuary policies defy federal law, citing 8 U.S. Code § 1373. This provision states 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 any individual.”

Some sanctuary cities have claimed they are more appropriately named ‘Fourth Amendment cities.’<sup>35</sup> Philadelphia’s Mayor Jim Kenny was quoted as saying “[w]e respect and live up to the Fourth Amendment, which means you can’t be held against your will without a warrant from the court signed by a judge. So, yeah, we will continue to be a Fourth Amendment city abiding by the Constitution.” ICE detainer requests that require state and local officials to detain individuals for an additional 48 hours after a criminal release could mean that an individual is held for five days if he or she is in custody over a holiday weekend. Such a detention may give rise to concerns about the lack of probable cause.<sup>36</sup>

## Conclusion

While there is little certainty regarding the legal implications of sanctuary policies, it is clear the debate will continue to be in the forefront of immigration policy. The impact of sanctuary policies, in addition to federal immigration policies like PEP and Secure Communities, has a tremendous impact on law enforcement officials and communities in New Jersey. The inconsistency in application from one municipality to

the next will almost certainly cause confusion and uncertainty, which will persist until the United States Supreme Court definitively rules on the constitutionality of issues relating to sanctuary cities.

These constitutional issues include whether a state's or municipality's designation as a sanctuary city and resulting failure to comply with federal immigration law is legal and whether the executive branch has the authority to block federal funding to any jurisdiction that espoused sanctuary policies. Such executive action is no longer an abstract concept. How the Supreme Court rules will have a significant impact on the nation's immigration system in the coming decades. ☞

**Jennifer C. Critchley** is a partner at the law firm of Connell Foley LLP at its Newark office, specializing in commercial litigation.

**Lisa J. Trembly** is of counsel to the law firm of Connell Foley LLP, located in Newark. Her practice focuses on commercial litigation and insurance coverage.

## ENDNOTES

1. See Bridget Stubblefield, Current Development: Development in the Executive Branch Sanctuary Cities: Balancing Between the National Security Directive, Local Law Enforcement Authority and Immigrants' Rights, 29 *Geo. Immigr. L. J.* 541, 542 (Spring 2015).
2. Barbara E. Armacost, 'Sanctuary' Laws: The New Immigration Federalism, 2016 *Mich. St. L. Rev.* 1197, 1199 (2016).
3. *Id.*
4. Stubblefield, *supra* n.1.
5. Stubblefield, *supra* n.1, at 543-44 (citations omitted).
6. Michael John Garcia and Kate M. Manuel, State and Local 'Sanctuary' Policies Limiting Participation in Immigration Enforcement, Congressional Research Service, July 10, 2015, at p. 9.
7. *Id.* at 10.
8. Armacost, *supra* n.2, at 1207.
9. *Id.* at 1207-1208.
10. U.S. Department of Homeland Security, Memo on Secure Communities (Nov. 20, 2014).
11. While many question the legal authority of the executive or legislative branch to deny federal funding to sanctuary jurisdictions, at least some legislative attorneys have indicated that it is permissible and legal, at least for Congress to so do. See Garcia and Manuel, *supra*, n.6, at p.6-7 ("Congress may also permissibly condition the receipt of federal funds on state compliance with federal policy preferences. Conditioning receipt of federal funding is generally permissible so long as the conditions 'bear some relationship to the purpose of the federal spending.' And the conditioned funds are not so substantial that the inducement to comply with federal preferences is 'so coercive as to pass the point at which pressure turns into compulsion.'").
12. Immigration Enforcement, F.Y. 2016 ICE Immigration Removals, available at <https://www.ice.gov/removal/statistics/2016>.
13. *Id.*
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15. Armacost, *supra* n.2, at 1198 n.2.
16. David Matthau, What Towns in New Jersey are Considered Sanctuary Cities? NJ 101.5, available at <http://nj1015.com/what-towns-in-new-jersey-are-considered-sanctuary-cities/>.
17. [www.MontclairNJUSA.org/dmdocuments/\\_17\\_024.pdf](http://www.MontclairNJUSA.org/dmdocuments/_17_024.pdf).
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21. *Id.*
22. [https://www.booker.senate.gov/?p=press\\_release&id=565](https://www.booker.senate.gov/?p=press_release&id=565).
23. Stubblefield, *supra* n. 1, at 544-545 (citations omitted).
24. *Id.*
25. *Id.*
26. See Ming H. Chen, Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities after Secure Communities, 911 *Chi-Kent L. Rev.* 13, 48 (2016).
27. Stubblefield, *supra* n. 1. 544-545 (citations omitted).
28. Heather Mac Donald, The Illegal-Alien Crime Wave, [city-journal.org](http://city-journal.org), Winter 2004.
29. See Garcia and Manuel, *supra*, n.6, at 4.
30. 567 U.S. 387.
31. *Id.*
32. Garcia and Manuel, *supra*, n.6, at p. 4.
33. Stubblefield, *supra* n.1 at 546-547 (citations omitted).
34. 745 F.3d 634, 643 (3d Cir. 2014).
35. See e.g., Julia Terruso, Kenney: Philadelphia stays a "sanctuary city" despite Trump, available at [http://www.philly.com/philly/news/politics/20161111\\_Kenney\\_\\_Philadelphia\\_stays\\_a\\_sanctuary\\_city\\_despite\\_Trump.html](http://www.philly.com/philly/news/politics/20161111_Kenney__Philadelphia_stays_a_sanctuary_city_despite_Trump.html).
36. Stubblefield, *supra* n.1, at 546-547 (citations omitted).