

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The hourglass is light blue and has a dark blue top cap and bottom base. The globe in the top bulb is dark blue, and the globe in the bottom bulb is light blue. The text is centered within the hourglass.

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"Sanctuary Cities": Legal Issues

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Abstract. In the 110th Congress, several bills have been introduced that attempt to limit formal or informal sanctuary policies and induce greater sharing of immigration information by state and local authorities. These bills include H.R. 1355, H.R. 3494, H.R. 4192, H.R. 4065, S. 850, and S. 2294.

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CRS Report for Congress

“Sanctuary Cities”: Legal Issues

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Summary

Controversy has arisen over the existence of so-called “sanctuary cities.” The term “sanctuary city” is not defined by federal law, but it is often used to refer to those localities which, as a result of a state or local act, ordinance, policy, or fiscal constraints, limit their assistance to federal immigration authorities seeking to apprehend and remove unauthorized aliens. Supporters of such policies argue that many cities have higher priorities, and that local efforts to deter the presence of unauthorized aliens would undermine community relations, disrupt municipal services, interfere with local law enforcement, or violate humanitarian principles. Opponents argue that sanctuary policies encourage illegal immigration and undermine federal enforcement efforts. Pursuant to § 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA, P.L. 104-193) and § 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, P.L. 104-208), states and localities may not limit their governmental entities or officers from maintaining records regarding a person’s immigration status, or bar the exchange of such information with any federal, state, or local entity. Reportedly, some jurisdictions with sanctuary policies take a “don’t ask, don’t tell” approach, where officials are barred from inquiring about a person’s immigration status in certain circumstances. Though this method does not directly conflict with federal requirements that states and localities permit the free exchange of information regarding persons’ immigration status, it results in specified agencies or officers not possessing information that they could potentially share with federal immigration authorities. In the 110th Congress, several bills have been introduced that attempt to limit formal or informal sanctuary policies and induce greater sharing of immigration information by state and local authorities. These bills include H.R. 1355, H.R. 3494, H.R. 4192, H.R. 4065, S. 850, and S. 2294.

Over the past several years, the number of aliens who unlawfully reside in the United States has grown significantly, from an estimated 3.2 million in 1986 to more than 11 million in 2005.¹ Although the federal government is responsible for regulating the entry

¹ See CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since* (continued...)

and removal of aliens from the United States, the impact of unauthorized immigration has arguably been felt most directly in the communities where aliens settle. The response of states and localities to the influx of illegal immigrants has varied. On one end of the spectrum, some jurisdictions have actively sought to deter the presence of illegal immigrants within their territory. Some jurisdictions have assisted federal authorities in apprehending and detaining unauthorized aliens, including pursuant to agreements (287(g) agreements) with federal immigration authorities enabling respective state or local law enforcement agencies to carry out various immigration enforcement functions.² More controversially, some jurisdictions have sought to deter illegal immigration by imposing their own restrictions upon unauthorized aliens' access to housing, employment, or municipal services.³ Moving toward the middle of the spectrum, some states and localities communicate with federal immigration enforcement officers under limited circumstances (e.g., after arresting an unauthorized alien for a criminal offense), but for various reasons do not take a more active role in deterring illegal immigration.

At the other end of the spectrum, some jurisdictions have been unwilling to assist the federal government in enforcing measures that distinguish between legal and non-legal residents of the community. Some of these jurisdictions have adopted formal or informal policies limiting cooperation with federal immigration authorities.⁴ This latter category of jurisdictions is sometimes referred to as "sanctuary cities." Although this term is not defined by federal statute or regulation, it has been used by some in reference to "jurisdictions that may have state laws, local ordinances, or departmental policies limiting the role of local law enforcement agencies and officers in the enforcement of immigration laws."⁵

The very existence of "sanctuary cities" has been the subject of considerable controversy. Supporters argue that immigration enforcement is the responsibility of the federal government, and that local efforts to deter the presence of unauthorized aliens would undermine community relations, disrupt municipal services, interfere with local

¹ (...continued)

1986, by Ruth Ellen Wasem. See also Jeffrey S. Passel, Pew Hispanic Center, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey*, March 7, 2006.

² See the Immigration and Nationality Act (INA) § 287(g), 8 U.S.C. § 1357(g). For additional background, see CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by Blas Nuñez-Neto, Michael John Garcia, and Karma Ester.

³ Many recent local ordinances restricting unauthorized aliens' access to housing and employment have been subject to legal challenge. See, e.g., *Lozano v. City of Hazleton*, 496 F.Supp.2d 477 (M.D.Pa. 2007) (striking down an ordinance restricting the housing or employment of unauthorized aliens on preemption and Fourteenth Amendment grounds).

⁴ See Jesse McKinley, *Immigrant Protection Rules Draw Fire*, NY TIMES, November 12, 2006.

⁵ 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, January 2007 (redacted public version) [*hereinafter* "2007 OIG Report"], at 44 (defining "sanctuary" policies).

enforcement, or violate humanitarian principles.⁶ Opponents of sanctuary policies argue that they encourage illegal immigration and undermine federal enforcement efforts.⁷

Applicable Law

The primary federal restrictions on state and local sanctuary policies are § 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA, P.L. 104-193)⁸ and § 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, P.L. 104-208).⁹ PRWORA § 434 proscribes any prohibition or restriction placed on state or local governments to send or receive information regarding immigration status of an individual to or from federal immigration authorities.¹⁰ IIRIRA § 642 is broader in scope, barring any prohibition on a federal, state, or local governmental entity or official's ability to send or receive information regarding immigration or citizenship status to or from federal immigration authorities.¹¹ Furthermore, the statute states that no person or agency may prohibit a federal, state, or local government entity from (1) sending information regarding immigration status to, or requesting information from, federal immigration authorities; (2) maintaining information regarding immigration status; or (3) exchanging such information with any other federal, state, or local government entity.¹²

The constitutionality of the foregoing provisions was challenged by the City of New York. The mayor of the City of New York had issued an Executive Order prohibiting any city officer or employee, in most circumstances, from transmitting information regarding immigration status to federal immigration authorities.¹³ This Executive Order was in direct conflict with both PRWORA § 434 and IIRIRA § 642.¹⁴

The United States Court of Appeals for the Second Circuit held in *New York v. United States (City of New York)* that PRWORA § 434 and IIRIRA § 642, on their face,

⁶ The modern sanctuary movement has roots in efforts by American churches in the 1980s to provide refuge to unauthorized Central American aliens fleeing civil unrest. Several states and municipalities subsequently issued declarations in support of the churches' actions and offered to provide sanctuary to these aliens. *See generally* Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297 (1989).

⁷ *See* Federation for American Immigration Reform, *Non-Cooperation Policies: "Sanctuary" for Illegal Immigration*, at [http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters0173].

⁸ 8 U.S.C. § 1644.

⁹ *Id.* § 1373.

¹⁰ *Id.* § 1644.

¹¹ *Id.* § 1373(a).

¹² *Id.* § 1373(b).

¹³ *City of New York*, 179 F.3d at 31.

¹⁴ *Id.*

do not violate the anti-commandeering doctrine under the Tenth Amendment.¹⁵ The anti-commandeering doctrine prohibits the federal government from commandeering either a state’s legislature (e.g., by requiring that a state enact particular regulatory standards¹⁶) or its executive officers (e.g., by requiring that state officers directly participate in enforcing federal law¹⁷) to achieve federal goals. While this might mean that Congress cannot directly compel states to collect and share information regarding immigration status with federal immigration authorities, merely prohibiting states and localities from sharing with the federal government information already in their possession may be permissible, according to the Second Circuit, absent specific proof of greater interference with state and local functions.¹⁸

State and Local Compliance with Federal Law

Although several localities reportedly have adopted formal or informal policies limiting cooperation with federal immigration authorities, the precise number is unclear.¹⁹ In 2006, Congress required the Office of the Inspector General (OIG) for the Department of Justice to study and report on whether states and localities receiving federal compensation for incarcerating criminal aliens were cooperating with federal immigration enforcement efforts. Among other things, the OIG was required to determine whether any states or localities receiving compensation were in violation of the information-sharing requirements of IIRIRA § 642. In a January 2007 report, the OIG stated that auditors were

able to locate an official “sanctuary” policy for only two jurisdictions that received at least \$1 million in SCAAP [State Criminal Alien Assistance Program] funding, the State of Oregon, which received \$3.4 million, and the City and County of San Francisco, which received \$1.1 million and has designated itself as a “City and County of Refuge.” We also located an Executive Order issued by the Mayor of the City of New York limiting the activities of local law enforcement agencies and officers in the enforcement of immigration law. However, in each instance the local policy either did not preclude cooperation with ICE [Immigration and Customs Enforcement] or else included a statement to the effect that those agencies and officers will assist ICE or share information with ICE as required by federal law.²⁰

¹⁵ 179 F.3d 29 (2d Cir. 1999).

¹⁶ *New York v. United States (State of New York)*, 505 U.S. 144 (1992).

¹⁷ *Printz v. United States*, 521 U.S. 898 (1997).

¹⁸ *City of New York*, F.3d at 35-36. It should also be noted that Congress is constrained by constitutional limitations when attempting to induce information sharing between state and federal authorities. The Constitution limits Congress to either adding financial incentives or conditioning federal funding on compliance with information sharing mandates. *See State of New York*, 505 U.S. at 167.

¹⁹ One difficulty is estimating the precise number of jurisdictions is conflicting interpretations as to what constitutes a sanctuary policy. *See* 2007 OIG Report, *supra* note 4, at viii (noting conflicting views found in survey of federal immigration authorities and local jurisdictions as to whether localities were “fully cooperating” with federal efforts to remove undocumented criminal aliens).

²⁰ *Id.*, at viii.

The OIG report identified two jurisdictions receiving at least \$1 million in SCAAP funding that had official sanctuary policies, but it concluded that neither violated federal law. The OIG estimate of jurisdictions with policies in direct violation of IIRIRA § 642, however, is not comprehensive. While the OIG report indicated that few, if any, jurisdictions that received at least \$1 million in SCAAP funding during FY2005 had formal policies violating IIRIRA § 642, the report did not identify, for example, whether any jurisdictions receiving less the \$1 million were in violation of federal law.²¹

Although IIRIRA § 642 prohibits states and localities from barring the transfer or maintenance of information regarding immigration status, it does not require entities to collect such information in the first place. Reportedly, some states and localities seeking to limit assistance to federal immigration authorities have barred agencies or officers from inquiring about persons' immigration status, a practice sometimes described as a "don't ask, don't tell" approach.²² Though this method does not directly conflict with federal requirements that states and localities permit the free exchange of information regarding persons' immigration status, it results in specified agencies or officers not possessing any information about persons' immigration status that they could share with federal authorities.²³

Pending Legislation

In the 110th Congress, legislation has been introduced to enforce the requirements of IIRIRA § 642 and induce states and localities to provide information regarding persons' immigration status to federal immigration authorities. S. 850 and H.R. 1355, both entitled the Scott Gardner Act, mandate that the directors of state and local enforcement agencies collect and report to the Secretary of Homeland Security immigration and DWI information as is collected in the course of the directors' normal duties. State and local compliance is a condition to ensure continued funding under the State Criminal Alien Assistance Program (SCAAP). The bills also include a mandate for a state or local law enforcement officer, who arrests an alien who has been flagged for a

²¹ The OIG Report includes a description of the methodology used to identify jurisdictions with sanctuary policies:

We were guided initially in our research by listings of sanctuary cities posted on the websites of several organizations. Later, we focused our search on jurisdictions that received SCAAP funding of at least \$1 million from the FY 2005 appropriation. We searched the websites for those jurisdictions in an effort to locate policy statements affecting how local law enforcement agencies interact with ICE in the effort to remove criminal aliens from the United States.

Id., at 41. According to the OIG, attempts to identify local policies limiting enforcing of immigration legislation "revealed much anecdotal information, but little in the way of formal policies." *Id.*

²² Lisa Anderson, "Sanctuary Cities" Draw Fire, *No Light*, CHI. TRIB., December 12, 2007, at 6.

²³ Some jurisdictions fear that active collection of immigration data would impair the delivery of services to the community-at-large.

DWI or an immigration offense in the National Criminal Information Center database, to detain the alien until he may be transferred to federal custody.

H.R. 3494, the Charlie Norwood CLEAR Act, contains a provision mandating that state and local officers provide information to the Secretary of Homeland Security concerning apprehended aliens who are believed to have committed a violation of U.S. immigration laws. Moreover, the bill would also provide grants to state and local law enforcement agencies that have written policies to assist in the enforcement of the immigration laws of the United States.

H.R. 4192, the OVERDUE Immigration Reform Act of 2007, and S. 2294, the Immigration Enforcement and Border Security Act of 2007, would make compliance with IIRIRA § 642 a requisite for a state or locality to enter a contractual relationship with the federal government to reimburse the costs for incarcerating or transporting undocumented criminal aliens. H.R. 4065, the Border Enforcement, Employment Verification, and Illegal Immigration Control Act, would amend IIRIRA § 642 by adding a provision making states and localities that are in violation of § 642 ineligible to receive any law enforcement grant administered by the Department of Justice.

There were several appropriations bills pending in the first session of the 110th Congress that made federal funding contingent on compliance with IIRIRA § 642. The House-passed version of H.R. 3093, the Commerce, Justice, Science, and Related Agencies Appropriations Act, FY2008, would have barred any funds made available by the act from being used in contravention of IIRIRA § 642. House-passed H.R. 2638, the Department of Homeland Security Appropriations Act, FY2008, would have prohibited funds made available from being used in violation of IIRIRA § 642. However, these appropriations, as enacted in P.L. 110-161 (the Consolidated Appropriations Act, 2008), no longer have mandates requiring compliance with IIRIRA § 642.