State and Local “Sanctuary” Policies Limiting Participation in Immigration Enforcement

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Summary

While the power to prescribe rules as to which aliens may enter the United States and which aliens may be removed resides solely with the federal government, the impact of alien migration—whether lawful or unlawful—is arguably felt most directly in the communities where aliens settle. State and local responses to unlawfully present aliens within their jurisdictions have varied considerably, particularly as to the role that state and local police should play in enforcing federal immigration law. Some states, cities, and other municipalities have sought to play an active role in immigration enforcement efforts. However, others have been unwilling to assist the federal government in enforcing measures that distinguish between residents with legal immigration status and those who lack authorization under federal law to be present in the United States. In some circumstances, these jurisdictions have actively opposed federal immigration authorities’ efforts to identify and remove certain unlawfully present aliens within their jurisdictions.

Although state and local restrictions on cooperation with federal immigration enforcement efforts have existed for decades, there has reportedly been an upswing in the adoption of these measures in recent years. Moreover, the nature of these restrictions has evolved over time, particularly in response to the development of new federal immigration enforcement initiatives like Secure Communities, which enable federal authorities to more easily identify removable aliens in state or local custody. Entities that have adopted such policies are sometimes referred to as “sanctuary” jurisdictions, though there is not necessarily a consensus as to the meaning of this term or its application to a particular state or locality.

This report discusses legal issues related to state and local measures that limit law enforcement cooperation with federal immigration authorities. The report begins by providing a brief overview of the constitutional principles informing the relationship between federal immigration authorities and state and local jurisdictions, including the federal government’s power to preempt state and local activities under the Supremacy Clause, and the Tenth Amendment’s proscription against Congress directly “commandeering” the states to administer a federally enacted regulatory scheme.

The report then discusses various types of measures adopted or considered by states and localities to limit their participation in federal immigration enforcement efforts, including (1) limiting police investigations into the immigration status of persons with whom they come in contact; (2) declining to honor federal immigration authorities’ requests that certain aliens be held until those authorities may assume custody; (3) shielding certain unlawfully present aliens from detection by federal immigration authorities; and (4) amending or applying state criminal laws so as to reduce or eliminate the immigration consequences that might result from an alien’s criminal conviction. For discussion of legal issues raised by states and localities seeking to play an active role in enforcing federal immigration law, see CRS Report R41423, Authority of State and Local Police to Enforce Federal Immigration Law, by Michael John Garcia and Kate M. Manuel.
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Introduction

While the power to prescribe rules as to which aliens may enter the United States and which aliens may be removed resides solely with the federal government, the impact of alien migration—whether lawful or unlawful—is arguably felt most directly in the communities where aliens settle. State and local responses to unlawfully present aliens within their jurisdictions have varied considerably, particularly as to the role that state and local police should play in enforcing federal immigration law.

At one end of the spectrum, some states and localities have actively sought to deter unlawfully present aliens from settling within their jurisdictions, including by assisting federal immigration authorities in identifying and apprehending such aliens for purposes of removal. In some cases, this has involved state and local participation in federally coordinated immigration enforcement programs. In recent years, some states and localities have attempted to play an even greater role in the area of immigration enforcement, in many cases due to perceptions that federal efforts have been inadequate. Some have adopted measures that criminally sanction conduct believed to facilitate the presence of unlawfully present aliens, and have also instructed police to actively work to detect such aliens as part of their regular duties. The adoption of such measures has waned considerably, however, in the aftermath of the 2012 Supreme Court ruling in Arizona v. United States, where the Court held that many of the provisions of one such enactment, Arizona’s S.B. 1070, were facially preempted by federal immigration law.

At the other end of the spectrum, some states and localities have been unwilling to assist the federal government’s enforcement of measures that distinguish between those residents with legal immigration status and those who lack authorization under federal law to be present in the United States. In some instances, these jurisdictions have adopted measures that seek to thwart federal efforts to identify and apprehend unlawfully present aliens within the state or locality’s

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1 See, e.g., Arizona v. United States, 132 S. Ct. 2492, 2497 (2012) (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”); De Canas v. Bica, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”); Kleindienst v. Mandel, 408 U.S. 753, 767 (1972) (Congress has “plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden”) (internal citations omitted); Takahashi v. Fish and Game Commission, 334 U.S. 410, 416 (1948) (“The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government.”); Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) (“over no conceivable subject is the legislative power of Congress more complete than it is over” the admission of aliens into the United States).

2 Perhaps most notably, under §287(g) of the Immigration and Nationality Act (INA), the Department of Homeland Security (DHS) is authorized to enter written agreements with state and local jurisdictions that enable specially trained state or local officers to perform specific functions relative to the investigation, apprehension, or detention of aliens, during a predetermined time frame and under federal supervision. 8 U.S.C. §1357(g). For further discussion of state and local participation in the federal government’s immigration enforcement efforts, see CRS Report R41423, Authority of State and Local Police to Enforce Federal Immigration Law, by Michael John Garcia and Kate M. Manuel, and CRS Report R42057, Interior Immigration Enforcement: Programs Targeting Criminal Aliens, by Marc R. Rosenblum and William A. Kandel. For an overview of various cooperative arrangements administered by Immigration and Customs Enforcement (ICE) within DHS, pursuant to which state and local jurisdictions may assist federal immigration authorities, see U.S. Immigration and Customs Enforcement, ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS), available at http://www.ice.gov/news/library/factsheets/access.htm.

jurisdiction. While state and local restrictions on cooperation in federal immigration enforcement efforts have existed for decades, there has been an upswing in the adoption of these measures in recent years. Moreover, the nature of these restrictions has evolved over time, particularly in response to the development of new federal immigration enforcement initiatives like Secure Communities, which enable federal authorities to more easily identify removable aliens in state or local custody.

This report discusses legal issues related to state and local measures limiting law enforcement cooperation with federal immigration authorities. It begins by providing a brief overview of constitutional principles informing the relationship between federal immigration authorities and state and local jurisdictions. The report then discusses various types of measures adopted or considered by states and localities to limit their participation with federal immigration enforcement efforts, including (1) limiting police investigations into the immigration status of persons with whom they come in contact; (2) declining to honor federal immigration authorities’ requests that certain aliens be held until those authorities may assume custody; (3) shielding certain unlawfully present aliens from detection by federal immigration authorities; and (4) amending or applying state criminal laws so as to reduce or eliminate the immigration consequences that might result from an alien’s criminal conviction.

**Legal Background**

Pursuant to its “broad, undoubted power over the subject of immigration and the status of aliens,” the federal government has established an “extensive and complex” set of rules governing the admission and removal of aliens, along with conditions for aliens’ continued presence within the United States. These rules are primarily contained in the Immigration and Nationality Act of 1952, as amended (INA). The INA supplements these rules through an enforcement regime that contains criminal and civil provisions, which sometimes sanction similar conduct. The courts have consistently recognized that the removal of aliens from the United

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5 Arizona, 132 S. Ct. at 2497. See also supra footnote 1 (citing several Supreme Court cases recognizing exclusive federal power over immigration). Federal authority over immigration derives from multiple sources. The Constitution provides Congress with the authority “[t]o regulate Commerce with foreign Nations,” and “[t]o establish an uniform Rule of Naturalization.” U.S. CONST., Art. I, §8, cl. 3-4. Federal authority to regulate the admission and presence of aliens also derives from its authority over foreign affairs. See Toll v. Moreno, 458 U.S. 1, 10 (1982) (discussing various constitutional provisions, as well as authority over foreign affairs, which may serve as a source for immigration regulation by the federal government); Arizona, 132 S. Ct. at 2498 (2012) (similar, and also stating that “[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws”); Kleindienst, 408 U.S. at 767 (discussing Congress’s plenary authority to make rules for admission of aliens).

6 Arizona, 132 S.Ct. at 2497.

7 8 U.S.C. §§1101, et seq.

8 For a brief discussion of immigration-related crimes, see CRS Legal Sidebar WSLG563, An Overview of Immigration-Related Crimes, by Michael John Garcia.
States for violating the terms of their admission or continued presence in the country is a civil action, rather than a criminal sanction, because the main purpose is not to punish wrongdoing but to end a continuing violation of the nation’s immigration laws.⁹

While the federal government’s authority over immigration is well established, the Supreme Court has recognized that not “every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted” by the federal government’s exclusive power over immigration.¹⁰ The Tenth Amendment provides that powers “not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”¹¹ Among the powers reserved to the states are traditional “police powers” concerning the promotion and regulation of safety, health, welfare, and economic activity within the state’s jurisdiction.¹² Pursuant to the exercise of these powers, states and municipalities have frequently enacted measures which, directly or indirectly, address aliens residing in their communities.¹³

The exercise of state police powers may be circumscribed by lawful assertions of federal authority. The Supremacy Clause of the Constitution establishes that federal law, treaties, and the Constitution itself are “the supreme Law of the Land.”¹⁴ Accordingly, states and localities may be precluded from taking actions that are “preempted” by federal law, even if such actions are otherwise valid exercises of their police powers.¹⁵ An act of Congress may preempt state or local

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⁹ Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (“We have long recognized that deportation is a particularly severe ‘penalty,’ but it is not, in a strict sense, a criminal sanction.”) (internal quotations and citations omitted); INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984) (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry.... The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws.”).

¹⁰ De Canas v. Bica, 424 U.S. at 355 (1976) (holding that state law regulating employment of unauthorized aliens was not preempted by federal law, in a case decided prior to the INA being amended to comprehensively regulate alien employment and expressly preempting most state sanctions upon unauthorized alien employment). See also, e.g., Arizona, 132 S. Ct. at 2507-2511 (while finding many provisions of state immigration enforcement law were preempted, rejecting facial preemption challenge to provision requiring police to verify immigration status of lawfully stopped persons who were suspected of unlawful status); Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968 (2011) (holding that federal law did not preempt a state measure that authorized or required the suspension or termination of the licenses of businesses that knowingly or intentionally hire unauthorized aliens); Lopez-Valenzuela v. County of Maricopa, 719 F.3d 1054 (9th Cir. 2013) (upholding state law barring state courts from setting bail for unlawfully present aliens charged with certain felony offenses).

¹¹ U.S. CONST., amend. X.

¹² Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907) (“Decisions of this court ... recognize the possession, by each state, of powers never surrendered to the general government; which powers the state, except as restrained by its own Constitution or the Constitution of the United States, may exert not only for the public health, the public morals, and the public safety, but for the general or common good, for the well-being, comfort, and good order of the people.”); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919) (“That the United States lacks the police power, and that this was reserved to the states by the Tenth Amendment, is true.”). See also Kelley v. Johnson, 425 U.S. 238, 247 (1976) (“The promotion of safety of persons and property is unquestionably at the core of the State’s police power....”).

¹³ See supra footnote 10 (citing illustrative cases where state or local measures addressing unlawfully present aliens were upheld against preemption challenges); NCSL Immigration Report, supra footnote 4 (discussing legislation enacted by states in 2013 concerning non-U.S. citizens).

¹⁴ U.S. CONST., art. VI, cl. 2.

¹⁵ Conversely, the federal government’s exertion of its constitutional authority over a matter is permissible even if it targets activities that might also be regulated by a state under its traditional police powers. Kentucky Distilleries & Warehouse Co., 251 U.S. at 156 (“When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose.”); Hodel v. (continued...)
action in one of three ways: (1) the statute expressly indicates its preemptive intent (express preemption); (2) Congress intended to wholly occupy the regulatory field, thereby implicitly precluding supplemental action by a state or local government in that area (field preemption); or (3) state or local action conflicts with or otherwise frustrates the purpose of the federal scheme (conflict preemption). Congressional intent is paramount in the analysis as to whether federal law preempts state or local activity. However, courts’ preemption analysis generally begins with the “assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”

Acting pursuant to its authority over immigration, the federal government has expressly or impliedly preempted a range of state and local activities that potentially undermine or conflict with federal immigration enforcement policies. Of particular relevance to this report, 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, Div. C), Congress has preempted state or municipal measures that bar the exchange of information relating to persons’ immigration status with federal, state, or local authorities.

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. Notably, it may not directly “commandeer” state or local governments into the service of federal immigration authorities. The anti-commandeering doctrine was most prominently defined by the Supreme Court in Virginia Surface Min. and Reclamation Ass’n, Inc., 452 U.S. 264, 291 (1981) (“The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States’ exercise of their police powers.”).

However, in some recent cases, the Court did not deem a presumption against preemption to be applicable in the matter before it. See, e.g., Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247 (2013) (holding that the presumption against preemption does not apply in Election Clause cases); Tarrant Reg’l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2132 (2013) (“There is, however, one interpretive tool that is inapplicable [with respect to interstate compacts]: the presumption against pre-emption.”); Cuomo v. Clearing House Ass’n, L.L.C., 557 U.S. 519, 534 (2009) (“We have not invoked the presumption against pre-emption, and think it unnecessary to do so in giving force to the plain terms of the National Bank Act.”). But see Hillman v. Maretta, 133 S. Ct. 1943 (2013) (applying the presumption with respect to the preemption of state laws governing domestic relations).

Judicial analysis of federal directives to the states has primarily centered on the permissibility of these requirements under the Tenth Amendment. However, such activities might arguably implicate other constitutional provisions, including the Guarantee Clause, which obligates the United States to “guarantee to every State in this Union a Republican Form of Government....” U.S. CONST., art. IV, §4. Traditionally, courts have viewed claims presented under the Guarantee Clause as raising non-justiciable political questions, but in New York v. United States, the Supreme Court expressly left open the possibility that “not all claims under the Guarantee Clause present non-justiciable political questions.” 505 U.S 144, 183-185 (1992) (also citing cases where the Court had rejected Guarantee Clause claims on non-justiciableity grounds). Nonetheless, subsequent legal challenges to federal action that have been premised on the Guarantee Clause have proven unsuccessful. See, e.g., Padavan v. United States, 82 F.3d 23 (2nd Cir. 1996) (challenge by state officials to adequacy of federal immigration enforcement policies, which was premised on violation of the Guarantee Clause, deemed non-justiciable); Chiles v. United States, 69 F.3d 1094 (11th Cir. 1995) (same); City of New York v. United States, 971 F. Supp. 789 (S.D.N.Y., 1997) (claim that federal law barring state and local restrictions on information-sharing with federal immigration authorities violated the Guarantee Clause claim was non-justiciable).
Court in the cases of New York v. United States and Printz v. United States. The decisions were premised on the view that under the federalist system, the states are understood to be sovereign entities distinct from the federal government, and Congress cannot muddy this distinction by commandeering the state political branches to perform functions on the federal government’s behalf. In New York, the Supreme Court ruled that the Tenth Amendment barred the federal government from directly compelling state legislatures to “enact and enforce a federal regulatory program” related to the disposal of low-level radioactive waste. In Printz, the Court considered a Tenth Amendment challenge to an interim requirement under federal law that directed state and local police to conduct background checks on prospective handgun purchases. The Court ruled that the constitutional prohibition on the federal government commandeering states to administer a federal regulatory program was “categorical” in nature and, in addition to barring the commandeering of a state’s legislature, also prevented Congress from “conscripting the State’s officers directly.”

However, not every requirement imposed by the federal government upon sub-federal government entities and officials necessarily violates the anti-commandeering principles identified in Printz and New York. A number of federal statutes provide that certain information collected by state entities must be reported to federal agencies. The Court in Printz expressly declined to consider whether these requirements were constitutionally impermissible. Moreover, the Court distinguished reporting requirements from the case before it, which involved “the forced participation of the States ... in the actual administration of a federal program.”

Federal measures that impose direct requirements on state or municipal authorities appear most likely to withstand an anti-commandeering challenge if they (1) are not directed at a state’s

21 See New York, 505 at 155-160 (discussing division of sovereignty in the federalist system, and stating that although “[t]he actual scope of the Federal Government’s authority with respect to the States has changed over the years ... the constitutional structure underlying and limiting that authority has not”); Printz, 521 U.S. at 518 (“It is incontestible that the Constitution established a system of ‘dual sovereignty.’”). The Court identified this distinction as advancing multiple goals, including better ensuring political accountability by the federal and state governments and reducing the risk of tyranny that might result in the concentration of power with one sovereign. New York, 505 at 181-183; Printz, 521 at 920-921.
22 The Court has repeatedly recognized that the Supremacy Clause contemplates the enforceability of federal law in state court, and that the judicial power afforded under Article III of the Constitution permits federal courts, in appropriate circumstances, to order state officials to comply with federal laws. See, e.g., New York, 505 at 178-179 (discussing these cases and deeming them inapposite to the issue of whether Congress may commander states to perform federal regulatory functions, as the “Constitution contains no analogous grant of authority to Congress” as is granted to the courts under Article III and the Supremacy Clause).
23 505 U.S. at 161.
24 Printz, 521 U.S. at 933-934.
25 See, e.g., 42 U.S.C. §5779 (providing that, when a missing child report is submitted to state or local law enforcement, the agency shall report the case to the National Crime Information Center of the Department of Justice). For discussion of various federal reporting requirements applicable to states, see Robert A. Mikos, Can States Keep Secrets from the Federal Government?, 161 U. PA. L. REV. 103 (2012).
26 Printz, 521 U.S. at 918. See also id. at 936 (O’Connor, J., concurring) (describing the Court as having refrained “from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid”). For criticism of the distinction made by the Printz Court between reporting requirements and situations where the federal government directly compels states to administer federal regulatory programs, see generally Mikos, supra footnote 25.
regulation of the activities of private parties;27 and (2) apply to the activities of private parties as well as government actors. In *Reno v. Condon*, the Supreme Court unanimously rejected a Tenth Amendment challenge to the Driver’s Privacy Protection Act (DPPA), which restricted states from disclosing or sharing a driver’s personal information without the driver’s consent, and also required the disclosure of some collected information.28 The Court distinguished the DPPA from the federal enactments struck down in *New York* and *Printz*, because the DPPA sought to regulate states “as owners of databases” and did not “require the States in their sovereign capacity to regulate their own citizens ... [or] enact any laws or regulations ... [or] require state officials to assist in the enforcement of federal statutes regulating private individuals.”29 The Court also viewed it as significant that the DPPA’s requirements relating to information-sharing covered private entities as well as state governments, though it declined to definitively rule upon whether or not the federal government may directly regulate state conduct only through laws of general applicability.30

While the federal government may be constitutionally barred from conscripting state authorities into assisting in the administration of a federal program, other means may be available to influence states to adopt favored policies. For example, when Congress acts in an area in which it may preempt state activity in its entirety, it might impose “preconditions to continued state regulation” in the otherwise preempted field.31 Congress may also permissibly condition the receipt of federal funds on state compliance with federal policy preferences. Conditioning the receipt of federal funding is generally permissible so long as the conditions “bear some relationship to the purpose of the federal spending,”32 and the conditioned funds are not so

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27 The degree to which the federal law intrudes into a state’s sovereignty might also be a factor. See *supra* footnote 26 (citing Court’s distinction between federal laws that impose reporting requirements upon states and those that directly compel states to administer federal programs); City of New York, 179 F.3d 29 (2nd Cir. 1999) (in case decided after *Printz* and *New York*, dismissing Tenth Amendment challenge to federal law proscribing state or local restrictions on sharing immigration status information with the federal immigration authorities, and suggesting analysis might be different if affected state restriction covered confidential information generally, rather than the sharing of a particular type of information with a particular federal entity).


29 *Id.* at 151. The *Condon* Court also stated that while state compliance with the DPPA would require “time and effort” by state officials, this did not lead to the measure being incompatible with anti-commandeering principles. *Id.* at 150. “That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace [situation] that presents no constitutional defect.” *Id.* (quoting *South Carolina v. Baker*, 485 U.S. 505, 514-515 (1988) (upholding federal prohibition upon states’ issuance of unregistered bonds in the face of a Tenth Amendment challenge)). See also *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (extension of overtime and minimum wage requirements of the Fair Labor Standards Act to public transit company authority did not violate Tenth Amendment).


31 *Printz*, 521 U.S. at 926; *New York*, 505 U.S. at 173-174 (“Where federal regulation of private activity is within the scope of the Commerce Clause, we have recognized the ability of Congress to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.”). See also *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264 (1981) (finding permissible a federal statute that preempted state regulation of surface mining except when it comported with federal standards); *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982) (upholding conditional preemption of state regulation of electricity and gas utilities).

32 *New York*, 505 U.S. at 167. See also *South Dakota v. Dole*, 483 U.S. 203, 207-208 (1987) (discussing constitutional limitations upon the degree to which Congress might conditionally grant federal funds, and upholding the conditioning of state receipt of a portion of federal highway funds upon the adoption of minimum drinking age of 21).
substantial that the inducement to comply with federal preferences is “so coercive as to pass the point at which ‘pressure turns into compulsion.’”

Select State and Local Limitations on Immigration Enforcement Activity

Several states and municipalities have considered or adopted measures intended to limit their participation in federal immigration enforcement efforts. These limitations take several forms. Some states and localities have sought to restrict police cooperation with federal immigration authorities’ efforts to apprehend removable aliens. Other measures have gone further, and attempted to shield certain aliens from detection by federal authorities. Still other measures have sought to ensure that state convictions for certain criminal offenses do not carry immigration consequences for a convicted alien. The following sections discuss some of the notable state and local restrictions upon law enforcement activity in the field of immigration enforcement, including the relationship between these restrictions and current federal law.

Traditional “Sanctuary” Policies

A number of states and municipalities have adopted formal or informal policies which prohibit or substantially restrict police cooperation with federal immigration enforcement efforts. Entities that have adopted such policies are sometimes referred to as “sanctuary” jurisdictions, though there is not necessarily a consensus as to the meaning of this term. In some instances, jurisdictions have self-identified as “sanctuary” sites. In other cases, there might be disagreement regarding the accuracy of such a designation, particularly if state or local law enforcement cooperates with federal immigration authorities in some areas but not others. Any reference by this report to a policy of a particular jurisdiction is intended only to provide an illustrative example of the type of measure occasionally referenced in discussions of “sanctuary” policies.

33 National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2604 (2012) (quoting Dole, 483 U.S. at 411, and holding that provision in Affordable Care Act, which permitted withholding of future Medicaid payments to any state that failed to comply with conditions attached to offers for expanded federal Medicaid funding, was impermissibly coercive).

34 See supra footnote 4 (citing sources identifying various state and local restrictions on immigration enforcement activity).

35 The term “sanctuary” jurisdiction is not defined by federal statute or regulation, though it has been used by the Office of the Inspector General at the U.S. Department of Justice to reference “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.” U.S. Dep’t 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), at vii, n. 44 (defining “sanctuary” policies for purposes of study).


policies. These references should not be taken to indicate CRS is of the view that a particular jurisdiction is a “sanctuary” for unlawfully present aliens.

While state or local measures limiting police participation in immigration enforcement existed beforehand, many of the recent “sanctuary”-type initiatives trace their lineage back to actions by U.S. churches that provided refuge to unauthorized Central American aliens fleeing civil unrest in the 1980s. A number of states and municipalities issued declarations in support of these churches’ actions. Others went further and enacted more substantive measures intended to limit police involvement in federal immigration enforcement activities. These have included, among other things, restricting state and local police from arresting persons for immigration violations; limiting the sharing of immigration-related information with federal authorities, and barring police from questioning a person about his or her immigration status.

**Limiting Arrests for Federal Immigration Violations**

As previously noted, violations of federal immigration law may be criminal or civil in nature, with alien removal understood to be a civil proceeding. Some immigration-related conduct potentially constitutes a removable offense and may also be subject to criminal sanction. For example, an alien who knowingly enters the United States without authorization is not only potentially subject to removal, but could also be charged with a criminal offense relating to unlawful entry. On the other hand, some violations of the INA are exclusively criminal or civil in nature. Most notably, an alien’s unauthorized immigration status makes him or her removable, but absent additional factors (e.g., having reentered the United States after being formally removed), unlawful presence does not constitute a criminal offense.

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38 See, e.g., FAIR Compilation of State and Local Restrictions, supra footnote 4 (labeling measures of various jurisdictions as “sanctuary policies”); Orde F. Kittrie, Federalism, Deportation, and Crime Victims Afraid to Call the Police, 91 IOWA L. REV. 1449 (2006) (discussing and describing various state and local law enforcement “sanctuary” policies).

39 For example, in 1979, the Los Angeles Police Department issued Special Order 40, which barred police officers from arresting persons for suspected violations of the federal statute criminalizing illegal entry (reversing a policy contained in a previous police order); prohibited the initiation of police action “with the objective of discovering the alien status of a person”; and established a process and criteria for notifying federal immigration officials when an unlawfully present alien was arrested on criminal charges. Los Angeles, CA Police Dept., Special Order 40: Undocumented Aliens, Nov. 29, 1979, available at http://www.lapdonline.org/assets/pdf/SO_40.pdf (hereinafter “LAPD Order”).


41 See Kittrie, supra footnote 38, at 1455 (surveying local “sanctuary” policies and describing them as doing “one or more of the following: (1) limit[ing] inquiries about a person’s immigration status unless investigating illegal activity other than mere status as an unauthorized alien (‘don’t ask’); (2) limit[ing] arrests or detentions for violation of immigration laws (‘don’t enforce’); and (3) limit[ing] provision to federal authorities of immigration status information (‘don’t tell’)”).

42 See Padilla, 559 U.S. at 365; Lopez-Mendoza, 468 U.S. at 1038-39.

43 INA §212(a)(6)(A)(i), 8 U.S.C. §1182(a)(6)(A)(i) (providing that an alien is inadmissible and subject to removal if he or she is present in the United States without having been admitted or paroled, or arrives in the United States at any time or place other than as designated by the Attorney General (now the Secretary of Homeland Security)).

44 INA §275, 8 U.S.C. §1325.

45 INA §276, 8 U.S.C. §1326. For discussion of other criminal statutes potentially applicable to unlawfully present aliens, see CRS Legal Sidebar WSLG563, An Overview of Immigration-Related Crimes, by Michael John Garcia.
Some jurisdictions have adopted formal or informal measures that restrict or bar police officers from making arrests for violations of federal immigration law. In some cases, these restrictions prohibit police from making arrests for “civil” violations of federal immigration law, such as unlawful presence. In other instances, these restrictions are crafted more broadly and may also restrict arrests for some criminal violations of federal immigration law.

State or local restrictions on police authority to arrest persons for federal immigration law violations do not appear to raise significant legal issues. While the INA expressly allows state and local law enforcement to directly engage in specified immigration enforcement activities within the parameters established by the applicable INA provision, nothing in the INA directly compels such participation (and indeed, any requirement would raise significant anti-commandeering issues under the Tenth Amendment). Moreover, following the Supreme Court’s decision in Arizona v. United States, it appears that states and localities are generally preempted from making arrests for civil violations of the INA in the absence of either specific federal statutory authorization or the “request, approval, or instruction from the Federal Government.”

Limiting Information-Sharing with Federal Immigration Authorities

Over the years, some states and localities restricted government agencies or employees from sharing information with federal immigration authorities, primarily to prevent federal authorities from using such information to identify and apprehend unlawfully present aliens for removal. Some of these restrictions have existed for decades, while others are of more recent vintage.

46 See, e.g., San Jose, CA, Police Department Duty Manual (redacted public version) (2013), at 497 (“Officers will not detain or arrest any person not suspected of a State felony or State or local misdemeanor or infraction violation solely on the basis of the person’s citizenship or status under civil immigration laws.”), available at https://www.sjpd.org/Records/Duty_Manual_Redacted_Electronic_Distribution.pdf; Washington, DC, Mayor’s Order 2011-174 (Oct. 19, 2011), at 2 (“No person shall be detained solely on the belief that he or she is not present legally in the United States or that he or she has committed a civil immigration violation.”), available at http://dcregs.dc.gov/Gateway/NoticeHome.aspx?NoticeID=1784041 (hereinafter “DC Order”); OR. REV. STAT. §181.850 (barring use of Oregon state funds or resources to arrest persons for presence in violation of federal immigration laws). See generally FAIR Compilation of State and Local Restrictions, supra footnote 4 (identifying similar restrictions in other jurisdictions).


48 For discussion of various INA provisions that authorize immigration enforcement activity by states and localities (oftentimes under the direction of federal authorities), see CRS Report R41423, Authority of State and Local Police to Enforce Federal Immigration Law, by Michael John Garcia and Kate M. Manuel.

49 See supra discussion at “Legal Background.”

50 Arizona, 132 S.Ct. at 2507. The Arizona Court’s discussion of states’ authority to enforce federal immigration law was in reference to arrests for non-criminal immigration status violations. The Court did not opine as to whether state law enforcement agencies are also precluded from making arrests for criminal violations of federal immigration law. However, lower courts have generally recognized that state and local police are not preempted from making such arrests. See, e.g., Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983), overruled on other grounds by Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999).

51 See, e.g., San Francisco Ordinance, supra footnote 36 (enacted in 1989, and subsequently amended to permit communication with federal immigration authorities regarding aliens who have committed felonies); New York City, NY, Exec. Order 124, City Policy Concerning Aliens (1989) (limiting transmission of information about an alien to federal immigration authorities except in certain circumstances, including when the alien was suspected of criminal activity) (hereinafter “1989 New York City Ordinance”), available at http://www.ny courts.gov/library/queens/ (continued...)
In 1996, Congress sought to end these restrictions on information-sharing through provisions contained in the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)\(^\text{52}\) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).\(^\text{53}\) Neither PRWORA nor IIRIRA require state or local government entities to share immigration-related information with federal authorities.\(^\text{54}\) Instead, these provisions bar any restrictions that prevent state or local government entities or officials from voluntarily communicating with federal immigration authorities regarding a person’s immigration status.\(^\text{55}\)

PRWORA §434 bars state and local governments from imposing any prohibition or restriction on a state or local government entity that prevents it from sending or receiving information, to or from federal immigration authorities, regarding the “immigration status” of an individual. IIRIRA §642 is broader and more detailed in scope. It bars any restriction 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.\(^\text{56}\) It further provides 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.\(^\text{57}\)

Shortly after these measures were enacted, the City of New York, which had in effect a policy that limited the sharing of information with federal immigration authorities,\(^\text{58}\) brought suit challenging the constitutionality of PRWORA §434 and IIRIRA §642. Among other things,\(^\text{59}\) the city alleged

\textit{(continued...)}
that the provisions facially violate the Tenth Amendment, because they bar states and localities from controlling the degree to which their officials may cooperate with federal immigration authorities. A federal district court dismissed this claim in City of New York v. United States, and a three-judge panel of the U.S. Court of Appeals for the Second Circuit affirmed this ruling in a 1999 decision.

The circuit court observed that unlike the statutes struck down in New York and Printz, the information-sharing provisions in PRWORA and IIRIRA did not directly compel state authorities to administer and enforce a federal regulatory program. Instead, these provisions protected “the voluntary exchange” of immigration information between federal and state authorities. According to the circuit court, “informed, extensive, and cooperative interaction of a voluntary nature” between states and the federal authorities is an integral feature of the American system of dual sovereignty, and the information-sharing provisions of PRWORA and IIRIRA were consistent with these principles.

The Second Circuit raised the possibility that the federal government might, in some circumstances, impermissibly intrude upon state and local entities’ authority to control information in their possession. However, the court found that the City of New York had not provided evidence that this was such an instance, as the affected city policy only limited the sharing of a particular type of information (i.e., a person’s immigration status) with a particular federal agency (i.e., the agency responsible for enforcing federal immigration law). According to the circuit court, the Tenth Amendment does not provide states and local entities with the “untrammeled right to forbid all voluntary cooperation by state or local officials with particular federal programs.” The court therefore rejected the city’s constitutional challenge to the information-sharing provisions of PRWORA and IIRIRA, finding that they did not facially violate the Tenth Amendment.

The City of New York sought to appeal the decision to the Supreme Court, but its petition for certiorari was denied. A few months later, however, the Court issued its decision in Reno v. Condon, discussed in more detail earlier in this report, where it found that another federal
statute that regulated the dissemination of information collected by state authorities did not violate the Tenth Amendment. While it might be argued that the Condon decision provides support for the constitutional validity of PRWORA §434 and IIRIRA §642, no court appears to have assessed the implications of the Condon decision upon these measures. Since the Second Circuit’s ruling, it appears that there have been no judicial rulings that have questioned the validity of the information-sharing provisions in PRWORA and IIRIRA. Although some state and local measures that purport to limit officials from sharing immigration-related information with federal immigration authorities remain in effect, any attempt by the state or locality to enforce these restrictions on information-sharing could be challenged on preemption grounds.

Limiting Police Inquiries into Persons’ Immigration Status

Most traditional “sanctuary” policies place restrictions upon police inquiries or investigations into a person’s immigration status. Some policies provide, for example, that police should not question a person about his or her immigration status except as part of a criminal investigation. Other policies might provide more specific restrictions that focus upon law enforcement’s questioning of crime victims and witnesses. Still other policies more broadly limit state or local officials from gathering information about persons’ immigration status.

68 Although the federal statute upheld in the Condon case is in some ways similar to the information-sharing provisions in IIRIRA and PRWORA, the statutes are not wholly analogous. While each statute regulates information collected by states, the statute upheld in Condon was characterized by the Court as one of general applicability, regulating both states, as suppliers of motor vehicle information, and private parties that resold the information in interstate commerce. Condon, 528 U.S. at 151. The information-sharing provisions in IIRIRA and PRWORA, however, only address information collected and shared between government entities. But see Dep’t of Justice, Brief on Opposition of Petition to Grant Cert., City of New York v. United States, 528 U.S. 115 (No. 99-328), at 12 (characterizing the information-sharing provisions of IIRIRA and PRWORA as components of larger regulation schemes that also addressed private activity). While there is judicial support for the constitutionality of federal regulation of state conduct through laws of general applicability, the Condon court expressly declined to “decide whether general applicability is a constitutional requirement for federal regulation of the States…” Condon, 528 U.S. at 151.

69 See, e.g., New York City, NY, Exec. Order 41, City-Wide Privacy Policy (2003) (restricting disclosure of immigration-related information); San Francisco Ordinance, supra footnote 36 (barring the request or dissemination of immigration status information). A common feature of many state or local information-sharing restrictions is language permitting communication when it is required by law. Arguably, such language could be interpreted to allow compliance with the information-sharing provisions of IIRIRA and PRWORA, as these measures “require” voluntary communication to be permitted.

70 See, e.g., LAPD Order, supra footnote 39 (“Officers shall not initiate police action with the objective of discovering the alien status of a person.”); DC Order, supra footnote 46 (public safety employees “shall not inquire about a person’s immigration status … for the purpose of initiating civil enforcement of immigration proceedings that have no nexus to a criminal investigation.”); San Francisco Ordinance, supra footnote 36 (barring law enforcement from stopping or questions persons solely on the basis of immigration status).


72 See, e.g., San Francisco Ordinance, supra footnote 36 (general prohibition on gathering information about immigration status subject to exceptions, including for aliens who have committed felonies); Chicago, IL, Chicago Municipal Code Chapter 2-173, Welcoming City Ordinance (subject to specific exceptions, including as required by law, “[n]o agent or agency shall request information about or otherwise investigate … the citizenship or immigration status of any person….”).
Although PRWORA §434 and IIRIRA §642 prevent state or local restrictions on sharing information about a person’s immigration status with federal immigration authorities, these provisions do not require state or local police to actually collect such information. Restricting the authority of police to question a person about his or her immigration status helps ensure that law enforcement lacks any information that could be shared with federal immigration authorities.

It could be argued that, even though state or local restrictions on police questioning of persons regarding their immigration status is not expressly preempted by federal statute, these measures are nonetheless impliedly preempted by the information-sharing provisions of IIRIRA and PRWORA. However, this argument was rejected by a California state appellate court in the context of a legal challenge to the Los Angeles Police Department’s restrictions on investigations into persons’ immigration status. The federal courts have not directly considered this issue. In Arizona v. United States, the Supreme Court found that a provision of an Arizona statute, which required police to contact federal authorities to verify the immigration status of certain stopped individuals, was not facially preempted. In reaching this conclusion, the Court did not suggest that federal law might preempt states or localities from restricting the circumstances in which police might question individuals about their immigration status. Indeed, given that the Arizona Court held that state and local police were largely preempted from making arrests for immigration status violations, it seems unlikely that a federal court would find that state or local measures that limited police questioning of persons about their immigration status would be viewed as preempted by the INA.

Declining to Honor Immigration Detainers

An immigration detainer is a document by which U.S. Immigration and Customs Enforcement (ICE) advises other law enforcement agencies of its interest in individual aliens whom those agencies are currently holding in relation to criminal violations. ICE and its predecessor, the Immigration and Naturalization Service (INS), have used detainers as one means of obtaining custody of aliens for purposes of removal proceedings since at least 1950. However, the recent

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73 See 8 U.S.C. §1373(b) (barring state or local restrictions on sending, maintaining, or exchanging immigration status information with federal immigration authorities).


75 Arizona, 132 S. Ct. at 2508-2509. The Supreme Court’s analysis turned primarily on the issue of whether Arizona’s requirement that police communicate with federal immigration authorities was preempted by federal law, rather than the issue of when it might be appropriate to question stopped individuals about their immigration status. Indeed, the Court suggested that immigration status investigations by Arizona police could be subject to as-applied challenges. Id. at 2509.

76 To the contrary, the Arizona Court construed federal immigration law as generally permitting state and local police to play a limited role in immigration enforcement. Id. at 2506 (state police were generally preempted from arresting aliens for suspected immigration violations in the absence of an authorizing federal statute).

77 The standard detainer form (Form I-247) allows ICE to indicate that it has taken certain actions that could lead to the alien’s removal (e.g., initiating removal proceedings or an investigation into the alien’s removability). The form also allows ICE to request that the other agency take certain actions that could facilitate removal (e.g., holding the alien temporarily, notifying ICE prior to releasing the alien). See, e.g., U.S. Dep’t of Homeland Security, Immigration Detainer—Notice of Action, DHS Form I-247 (12/12), available at http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf. ICE also obtains custody of aliens for removal purposes through means other than detainers. See CRS Report R42690, Immigration Detainers: Legal Issues, by Kate M. Manuel, at p. 1 n.3.

78 See, e.g., Slavik v. Miller, 89 F. Supp. 575, 576 (W.D. Pa. 1950) (stating, of an alien whom immigration officials sought for purposes of removal, that “a detainer has been lodged for the body of the petitioner at the time that the (continued...)
nationwide implementation of the Secure Communities program has raised concerns, among some, about the use of immigration detainers.\textsuperscript{79} Secure Communities relies upon information sharing between various levels and agencies of government to identify potentially removable aliens.\textsuperscript{80} Detainers may then be issued for these aliens. The Department of Homeland Security (DHS) has indicated that through Secure Communities it prioritizes the removal of “criminal aliens”; those who pose a threat to public safety; and repeat immigration violators,\textsuperscript{81} but there have been media reports of other aliens (and even U.S. citizens) being subject to detainers after having been identified pursuant to the Secure Communities program.\textsuperscript{82}

Some jurisdictions, concerned about the manner in which Secure Communities is being employed, have adopted policies or practices of declining to honor immigration detainers. In many cases, these jurisdictions will honor immigration detainers for aliens who are being held for felony crimes or who are otherwise believed to pose a threat to the community, but will decline to honor immigration detainers issued for other aliens (e.g., those who have committed non-violent misdemeanor offenses).\textsuperscript{83} In other cases, however, the measure appears to sweep more broadly, for example, barring officials from honoring immigration detainers absent a “written agreement with the federal government by which all costs incurred by [the jurisdiction] in complying with the ICE detainer shall be reimbursed.”\textsuperscript{84} The detainer policy may also restrict other aspects of the fulfillment of the sentence has expired”).

\textsuperscript{79} See, e.g., Brizuela v. Feliciano, No. 3:12CV226, Memorandum of Law in Support of Motion for Order to Show Cause and Leave to Propound Precertification Discovery Requests, at 7 (filed D. Conn., Feb. 22, 2012) (copy on file with the authors) (“Immigration detainers are an integral part of the Secure Communities program; indeed, the program depends on immigration detainers to work.”); Nat’l Day Laborer Organizing Network v. U.S. ICE, No. 1:10-cv-3488, Declaration of Ann Benson in Support of Plaintiffs’ Opposition to Defendants’ Motion for Stay (filed S.D.N.Y., Nov. 18, 2011) (“The belief among the advocacy community is that if a local jurisdiction refuses to honor detainer requests, then the consequences of Secure Communities can be averted.”).


\textsuperscript{81} Id. In a 2011 memorandum, then-Director of ICE John Morton further indicated that, among “criminal aliens,” the focus should be upon those convicted of “aggravated felonies,” as defined in the INA; those convicted of other felonies; and those convicted of three or more misdemeanors. See U.S. ICE, Memorandum, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, Mar. 2, 2011, available at http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.


\textsuperscript{83} See, e.g., Mazzei, supra footnote 82 (reporting Miami-Dade county’s adoption of a policy of honoring detainers only for “dangerous criminals and repeat immigration-law breakers”); California Assembly Bill No. 4, enacted Oct. 5, 2013, available at http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/ab_4_bill_20131005_chaptered.pdf (permitting law enforcement officers to honor immigration detainers only in certain circumstances (e.g., the individual has been convicted of a “serious or violent felony”); Connecticut Adopts Law to Limit Immigration Detainers, NEW HAVEN REGISTER NEWS, June 6, 2013, available at http://www.nhregister.com/general-news/20130626/connnecticutadopts-law-to-limit-immigrant-detainers-2 (honoring detainers only for “immigrants who have felony convictions, belong to gangs, show up on terrorist watch lists, are subject to deportation orders or meet other safety risks”).

jurisdiction’s response to federal efforts to identify and/or obtain custody of aliens for purposes of removal.85

Although criticized by some for impeding federal immigration enforcement efforts,86 state or local policies of declining to honor at least some immigration detainers would appear to be permissible under federal law. Nothing in the INA purports to require that states and localities honor immigration detainers.87 Indeed, construing the regulatory provision to require states and localities to honor immigration detainers would likely raise significant Tenth Amendment issues on the grounds that the regulatory command violates the anti-commandeering doctrine.88

The question of whether federal law and regulation compel states and localities to honor immigration detainers has oftentimes focused on the wording of a provision in DHS regulations concerning detainers. This provision states that “[u]pon 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 [generally] not to exceed 48 hours ... in order to permit assumption of custody by the Department.”89

This language has been construed by at least one reviewing federal district court as requiring states and localities to honor immigration detainers.90 However, other courts appear to have taken

85 Cook County, Illinois, for example, includes in its detainer policy a prohibition upon county personnel “expending their time responding to ICE inquiries or communicating with ICE regarding individuals’ incarceration status or release date while on duty.” Id. This prohibition appears intended to avoid situations wherein immigration officials learn of an alien’s upcoming release and are present outside the county facility to take him or her into custody. The prohibition seems to have been drafted as it was—i.e., restricting the sharing of information about “incarceration status or release date while on duty”—in order to avoid conflicts with §434 of PRWORA and §642 of IIRIRA, both of which expressly prohibit states and localities from enacting measures that would limit the ability of state and local governments or officials to share information regarding “immigration or citizenship status” with federal officials. Insofar as Cook County’s detainer policy restricts only the sharing of information about aliens’ incarceration status or release date while officers are on duty, an argument could be made that it does not run afoul of PRWORA and IIRIRA because it does not absolutely bar sharing of information about immigration or citizenship status. However, in 2012 the Director of ICE claimed that the Cook County restriction and related measures could be impermissible, insofar as they prohibit local officials from responding to ICE inquiries or sending immigration data to ICE. See Letter from U.S. ICE Director John Morton to Cook County President Toni Preckwinkle, Jan. 4, 2012, available at http://legacy.cookcountygov.com/secretary/committees/LegislationIntergov/FY2012/reports/legis02-09-12%20%28incl.%20attachments%29.pdf#page=39.


87 The only express mention of detainers in the INA is in §287(d)(1)-(3), 8 U.S.C. §1357(d)(1)-(3), which discusses the issuance of detainers for aliens arrested for offenses relating to controlled substances. For further discussion of this provision and, particularly, whether it restricts ICE’s authority to issue detainers for other offenses, see generally CRS Report R42690, Immigration Detainers: Legal Issues, by Kate M. Manuel, at pp. 9-11.

88 See supra discussion at “Legal Background.”

89 8 C.F.R. §287.7(d) (emphasis added).

90 See Rios-Quiroz v. Williamson County, 2012 U.S. Dist. LEXIS 128237, at *11-*12 (M.D. Tenn., Sept. 10, 2012) (interpreting the DHS regulation as requiring state and local compliance with immigration detainers, but declining to reach the issue of whether the regulation violated the Tenth Amendment because such a challenge “should be addressed to the federal government, which is not a party to this case”). A second district court reached the same conclusion, but was reversed on appeal. See Galarza v. Szalczyk, 2012 U.S. Dist. LEXIS 47023, at *54 (E.D. Pa., Mar. 30, 2012), rev’d, 2014 U.S. App. LEXIS 4000 (3rd Cir., Mar. 4, 2014). In both of these cases, the state and local defendants had claimed that they were acting as “required” by federal regulations to avoid liability for alleged violations of aliens’ constitutional rights. In one case, the plaintiffs even argued that the defendants were not required to comply with immigration detainers, and that “Defendant’s choice to detain Plaintiffs after the booking process was without legal (continued...)
a contrary view,91 and DHS has repeatedly indicated that it does not construe the provision in question as requiring states and localities to honor immigration detainers.92 Those taking the view that the DHS regulation requires states and localities to comply with immigration detainers have emphasized the use of the word “shall” in the provision. “Shall” is generally construed to indicate a mandatory action, as opposed to a discretionary one.93 However, DHS and others who view detainers as requests rather than commands point to other language in DHS regulations that refers to detainers as “requests.”94 In light of this language, DHS, in particular, has asserted that the word “shall” is to be read as prescribing the maximum period of any detention when state and local officials accede to a detainer request, not as requiring detention upon DHS’s request.95 Insofar as the provision is seen as ambiguous, courts may defer to DHS’s interpretation of it.96 DHS also recently amended the standard detainer form (Form I-247) so that it now clearly states that detainers are “requests.”97 Previous versions of the form had included language which could potentially have been construed to mean that states and localities were required to honor detainers.98

(...continued)


91 See Buquer v. City of Indianapolis, 797 F. Supp. 2d 905, 911 (S.D. Ind. 2011) (characterizing detainers as “voluntary requests” when enjoining enforcement of an Indiana law that authorized state and local officers to make warrantless arrests of certain persons, including those subject to immigration detainers); Ortega v. U.S. ICE, 737 F.3d 435, 437 (6th Cir. 2013) (quoting, with apparent approval, language from Carchman v. Nash, 473 U.S. 716, 719 (1985), describing detainers as “requests,” when upholding a lower court decision that found government officials enjoyed qualified immunity when sued for improperly detaining a U.S. citizen pursuant to an immigration detainer).


94 See, e.g., 8 C.F.R. §287.7(a) (describing detainers as “requests” to “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”); 8 C.F.R. §287.7(d) (caption referring to “[t]emporary detention at Department request”).

95 See, e.g., Frequently Asked Questions about Immigration Detainers, supra footnote 92, at 1.

96 See, e.g., Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) (holding that, when a regulation is ambiguous, courts must defer to an agency’s interpretation of its own regulation unless this interpretation is “plainly erroneous”). For more on “Seminole Rock deference,” see generally CRS Report R43153, Seminole Rock Deference: Court Treatment of Agency Interpretation of Ambiguous Regulations, by Daniel T. Shedd.

97 See Immigration Detainer—Notice of Action, DHS Form I-247 (12/12), supra footnote 77.

98 See, e.g., U.S. Dep’t of Justice, Immigration Detainer—Notice of Action, Form I-247 (Rev. 4-1-97) (copy on file with the authors) (“Federal regulations (8 C.F.R. 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for INS to assume custody of the alien.”); U.S. Dep’t of Homeland Security, Immigration Detainer—Notice of Action, DHS Form I-247 (12/11) (copy on file with the authors) (“This request flows from federal regulation 8 C.F.R. §287.7, which provides that a law
Even more importantly, the anti-commandeering doctrine would appear to support the view that states and localities are not required, by DHS regulation or otherwise, to comply with immigration detainers.\(^9^9\) Requiring state and local officers to maintain custody of an individual, who would otherwise have been released for any criminal offense, at the request of federal officials would appear to be comparable to requiring state and local officers to conduct background checks on handgun purchasers, as in \textit{Printz}. The fact that DHS officials, not state and local officials, determine who should be kept in custody pursuant to an immigration detainer seems unlikely to change this analysis, given that the Supreme Court in \textit{Printz} noted that “[i]t matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”\(^1^0^0\)

\section*{Shielding Unlawfully Present Juveniles from Federal Detection}

One way in which the INA regulates immigration is by establishing the conditions under which aliens may enter and remain in the United States. Along with these conditions, it imposes sanctions to deter unlawful entry or presence in the United States. In particular, INA §274 imposes criminal penalties upon those who would transport unlawfully present aliens to or within the United States, or shield such aliens from detection by federal immigration authorities.\(^1^0^1\) Some activities by state or local governments or private parties have the potential to run afoul of these “anti-transportation” and “anti-harboring” provisions because the traditional conception of sanctuary entails providing material assistance—most notably, a place of refuge—to those in need.\(^1^0^2\) Indeed, several individual participants in the sanctuary movement in the 1980s were convicted of violating §274 because of their efforts to move unlawfully present aliens within the United States and ensure they were not detected by federal immigration officials.\(^1^0^3\)

At least as a general rule, state or local measures that restrict involvement with federal immigration enforcement efforts typically would not appear to implicate the anti-harboring provisions of federal immigration law. However, a state or local policy under which government officials affirmatively took steps to prevent the federal government from removing a particular
alien might raise more serious concerns, particularly if the officials within the jurisdiction know (or have reason to know) that specific individuals are unlawfully present and play a “key role” in furthering the aliens’ unlawful presence (in the case of transportation), or “substantially facilitate” their continued presence in the United States (in the case of harboring).

Such policies or practices would appear to be most likely to develop vis-à-vis specific segments of the unlawfully present alien population which are seen as particularly vulnerable to mistreatment, such as juveniles. For example, beginning in 2008, San Francisco’s practice of flying unlawfully present aliens in the juvenile justice system who do not have a parent or guardian in the United States back to their home countries, or placing them in group homes in southern California, was subject to a federal grand jury investigation of potential violations of §274. Whether such policies did indeed run afoul of the anti-harboring provisions in the INA was not definitively determined, as San Francisco reportedly abandoned its policy and federal criminal charges were not pursued.

**Modifying Criminal Sentences to Avoid Immigration Consequences**

An alien’s conviction for a crime under state law may also carry consequences for the alien under federal immigration law. A criminal conviction may, depending on the circumstances, subject the alien to removal under the INA, disqualify the alien from obtaining relief from removal (e.g., asylum) or an immigration benefit, and potentially result in the alien being barred from re-entering the United States once removed. Because states are responsible for the vast majority of

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104 Compare United States v. Powell, 498 F.3d 890 (9th Cir. 1974) (defendant need not know the names of individual aliens to know that they are unlawfully present), *cert. denied*, 419 U.S. 866 (1974) *with* United States v. Camacho-Davalos, 468 F.2d 1382 (9th Cir. 1972) (defendant cannot be said to know that individuals are unlawfully present aliens based on the facts that they are “Mexican appearing,” speak Spanish, and could not produce immigration documents upon request).

105 See, e.g., United States v. Velasquez-Cruz, 929 F.2d 520 (8th Cir. 1991) (defendant’s actions must be more than incidental to the alien’s unlawful presence, they must have played a key role); United States v. Barajas-Chavez, 134 F.3d 1444 (10th Cir. 1998) (transportation in furtherance of an alien’s unlawful presence refers to the defendant’s purpose in providing transportation, not the logical result or effect of providing transportation); United States v. Salinas-Calderon, 585 F. Supp. 599 (D. Kan. 1984) (requiring a direct and substantial relationship between providing transportation and the furtherance of an alien’s unlawful presence).

106 See, e.g., United States v. Vargas-Cordon, 733 F.3d 366 (2nd Cir. 2013); United States v. Lopez, 521 F.3d 437 (2nd Cir. 1975), *cert. denied*, 423 U.S. 995 (1975). It should also be noted that harboring need not involve clandestine sheltering, or concealment of unlawfully present aliens from the general public. See, e.g., United States v. Acosta De Evans, 531 F.2d 428 (9th Cir. 1976) (harboring involves shelter from detection, not necessarily clandestine sheltering), *cert. denied*, 429 U.S. 836 (1976); United States v. Smith, 112 F.2d 83 (2d Cir. 1940) (concealment need only be from immigration officials, not from the general public).

107 See City and County of San Francisco, Legal Issues in Connection with Proposed Amendment to Sanctuary City Ordinance, Aug. 18, 2009 (copy on file with the authors) (noting that the investigation was still ongoing at the time this memorandum was written).


109 Id. The most significant immigration consequences attach to any crime designated as an “aggravated felony” under the INA. INA §101(a)(43); 8 U.S.C. §1101(a)(43). The list of criminal offenses identified as aggravated felonies includes both general categories of crimes (e.g., theft, crimes of violence) and many specific criminal offenses (e.g., specific federal tax offenses). The definition also includes some misdemeanor offenses (i.e., offenses punishable by a maximum sentence of imprisonment for less than a year and a day), as well as traditional felonies (i.e., offenses punishable by more than a year imprisonment).
criminal prosecutions in the United States,110 they have a substantial influence on the size and make-up of the alien population who are removable on criminal grounds.

Some state authorities have sought to reduce or eliminate the immigration consequences of certain criminal convictions. In many instances, whether an alien’s criminal activity makes him removable under the INA depends both upon the nature of the criminal offense for which the alien was convicted and the sentence that was imposed.111 A few states have lowered the maximum available sentence for certain offenses to 364 days’ imprisonment,112 so that aliens will not be subject to removal under those grounds of the INA requiring the alien to have been sentenced to at least a year’s imprisonment.113

State courts may consider the immigration consequences of a criminal conviction or sentence during the course of criminal proceedings against a foreign national.114 In some situations, state courts (possibly with the recommendation of the state prosecutor) might resolve a criminal case in a manner that avoids triggering immigration consequences for the criminal defendant. For example, the court might authorize the parties to enter an agreement that resolves the case in a manner that does not constitute a “conviction” for INA purposes.115 If an alien is convicted of a

110 See U.S. Dep’t of Justice, Felony Sentences in State Courts, 2004, BUREAU OF JUSTICE STATISTICS BULLETIN (Jul. 2007) (estimating that 1,079,000 adults were convicted of a felony by a state court in 2004, compared to 66,518 persons in federal court that same year).

111 In some instances, however, a conviction for a specified offense constitutes a ground for removal regardless of the sentence imposed. See, e.g., INA §237(a)(2)(A)(v), (a)(2)(B) (providing that aliens convicted of most controlled substance offenses, or for failing to register as a sex, offender are removable), 8 U.S.C. §1227(a)(2)(A)(v), (a)(2)(B).

112 See WASH. REV. CODE §9A.20.021 notes (2011) (explaining intent behind reduction of the maximum sentence for gross misdemeanor offenses to 364 days was to ensure that a single conviction for such an offense could not make an alien removable under INA provisions making a listed offense a ground for removal when the alien is sentenced to at least a year’s imprisonment); NEV. REV. STAT. §193.140 (2013).

113 For example, a crime of violence or theft constitutes an “aggravated felony” making a convicted alien removable if he was sentenced to at least a year’s imprisonment. INA §101(a)(43)(F)-(G), 8 U.S.C. §1101(a)(43)(F)-(G); INA §237(a)(2)(A)(iii), 8 U.S.C. §1227(a)(2)(A)(iii). See also INA §237(a)(2)(A)(i) (providing that a conviction for a crime of moral turpitude within five years of admission is a removable offense if the alien had been sentenced to imprisonment for one year or more). As noted previously, some criminal convictions constitute grounds for removal regardless of the sentence imposed. See supra footnote 111. Moreover, two or more convictions of crimes of moral turpitude, not arising out of the same scheme of conduct, make an alien removable. INA §237(a)(2)(A)(ii), 8 U.S.C. §1227(a)(2)(A)(ii).


115 For INA purposes, a “conviction” refers to:

a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

INA §101(a)(48)(A), 8 U.S.C. §1101(a)(48)(A). “[T]he question of what constitutes a “conviction” [under the INA]… is a question of federal, not state, law.” Griffiths v. I.N.S., 243 F.3d 45, 49 (1st Cir. 2001). Accordingly, whether or not the disposition of a criminal case constitutes a “conviction” under state law has no bearing on whether the disposition constitutes a “conviction” for federal immigration purposes. Some state courts or bar associations have issued instruction manuals that provide guidance as to when state courts’ dispositions of criminal cases might constitute “convictions” for purposes of the INA. See Washington Immigration Guide for Judges, supra footnote 114, at chapter 7 (discussing deferred adjudications and other alternative forms of case resolution available under state law, and when these resolutions might constitute “convictions” for INA purposes).
crime that constitutes a removable offense under the INA only when the alien is sentenced to a specified length of imprisonment, the court might opt to sentence the alien to a lesser term that does not result in removability. A court might also choose to modify an already-imposed sentence so that it no longer has immigration consequences. Federal legislative proposals have occasionally been considered that would negate the effects of some of these actions by state courts, but none of these bills have been enacted.

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116 When assessing whether a criminal sentence gives rise to removability, immigration authorities will give full faith and credit to a court reduction to an alien’s criminal sentence nunc pro tunc, even if the reduction was made solely to prevent the criminal sentence from having immigration consequences. See In re Cota-Vargas, 23 I. & N. Dec. 849 (2005). On the other hand, a conviction that is vacated solely to avoid immigration consequences, rather than because of a procedural or substantive defect in the criminal proceedings that had resulted in the conviction, is treated as still being effective for removal purposes. See In re Pickering, 23 I. & N. Dec. 621 (BIA 2003); Cruz-Garza v. Ashcroft, 396 F.3d 1125, 1129 (10th Cir. 2005) (citing agreement with Board of Immigration Appeals construction of the INA’s definition of “conviction” by several federal circuits). But see Garcia-Maldonado v. Gonzales, 491 F.3d 284 (5th Cir. 2007) (conviction deemed in effect for immigration purposes even if a direct appeal is pending).