

Constitutional Corner – Sanctuary Cities and the Constitution

On January 25, 2017, Donald Trump carried through on a campaign promise and signed [Executive Order 13768](#)¹ which declared sanctuary jurisdictions across the United States to be in willful violation of Federal law. Attorney General Jeff Sessions [promised to enforce it](#).² Section 2(c) of the Order sets out to “ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law.” The Order also contained a list of types of illegal aliens that are to be “promptly” deported. These include aliens who:

- Have been convicted of any criminal offense;
- Have been charged with any criminal offense, where such charge has not been resolved;
- Have committed acts that constitute a chargeable criminal offense;
- Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
- Have abused any program related to receipt of public benefits;
- Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or
- In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

In response, the list of U.S. cities declaring that they are sanctuaries, which began growing even during the Obama administration, increased dramatically. There are now estimated to be nearly [300 such cities, counties and even states](#)³ that have made such declarations. Several states are offering illegal aliens state driver’s licenses. Going one step further, Chicago offered “undocumented” immigrants money for legal fees to fight federal deportation. To see if your locality is a sanctuary, the most well maintained list I’ve found is [here](#).⁴

So what are we to make of sanctuary cities and, if California carries through on its recent threat: sanctuary states?

There is [nothing unlawful](#)⁵ in a city *declaring* itself a sanctuary city; the declaration is not the problem, the actions which may follow are. Usually, all a sanctuary city is asserting is that their city’s resources will not be utilized in helping the federal government enforce

¹ <https://www.federalregister.gov/executive-order/13768>.

² www.washingtontimes.com/news/2017/mar/27/jeff-sessions-says-hell-punish-sanctuaries-cities.

³ <http://www.washingtonexaminer.com/map-over-200-sanctuary-cities-in-32-states-and-d.c./article/2567880>.

⁴ <http://www.ojjpac.org/sanctuary.asp>.

⁵ <https://townhall.com/columnists/judgeandrewnapolitano/2016/12/08/are-sanctuary-cities-legal-n2256429>.

federal law, something the Supreme Court has said the federal government cannot force a state or city to do (refusing to cooperate is called “anti-commandeering”).⁶

However, it is a federal felony, punishable by five years in prison for each violation, for any *person* to conceal, harbor, or shield from detection any illegal alien. The word “harbor” is defined as any conduct that tends to substantially facilitate an alien's remaining in the U.S. illegally.

The Supreme Court rejected arguments (in *Reno v. Condon*) that a state or local government’s refusal to supply information requested by the federal government should be protected. Providing requested information was not seen by the court as “enforcing” a federal statute.

Furthermore, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act prohibited any Federal, State or local government entity or official from restricting any other government entity or official from sending to, or receiving from, the [Department of Homeland Security] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”⁷ To get around this, sanctuary localities make it a point not to determine an apprehended person’s immigrant status; they can’t provide information they don’t have, right? Sort of “Don’t ask, don’t ... ask?”

So it appears the sanctuary cities do not have much legal “wobble room.” They can’t be forced to detain individuals at INS request; they can’t be forced to apprehend illegal immigrants who have committed no other crime, but that’s about it. They can be prosecuted for refusing to provide information on aliens in their custody, and they can be prosecuted for shielding aliens they do apprehend, provided they know the alien’s status. But can the federal government withhold funds solely on the basis of a sanctuary declaration?

As [a Reuters study points](#)⁸ out, there is a lot of money at stake; tens of billions of dollars. Here’s [a chart](#)⁹ that will put the funding in perspective for you.

The problem for Mr. Trump is that in some cases Congress expressly authorizes specific amounts to specific locations, in others the Executive branch is given great discretion in terms of where and how the funds are to be allocated. Some examples of programs

⁶ In *Prigg v. Pennsylvania* (1842), the Court ruled that the federal government could not force states to implement or carry out the Fugitive Slave Act of 1793. In *Printz v. United States* (1997) the Court ruled that localities could not be forced to administer part of a firearm background check program.

⁷ 8 U.S.C. § 1371(a).

⁸ <https://www.alipac.us/f12/reuters-largest-10-%91sanctuary-cities%92-may-lose-%242-27-billion-federal-funding-342683/>.

⁹ <http://tinyurl.com/kpj3ra7>.

where funds could conceivably be cut: the Community Oriented Policing Services program (COPS) provides grants to pay for school resource officers; the Edward Byrne Memorial Justice Assistance Grant Program (JAG) funds a variety of state and local law enforcement expenses, including court, crime prevention and education programs; the State Criminal Alien Assistance Program (SCAAP) funds a program that helps local police departments with incarcerated undocumented immigrants fund their corrections facilities and the salaries of their officers.

Faced with the potential loss of critical law enforcement funds, some localities have had second thoughts or have even reversed an earlier declaration. Other localities have protested vigorously when their name has shown up on a sanctuary list.

If it weren't for America's history regarding slavery, the sanctuary issue would be much simpler.

The Constitution states¹⁰ that: "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." A 1793 law made it a crime for slaves to escape from a slave state to one where slavery had been banned. Finally, the [Fugitive Slave Law of 1850](#) expanded the authority of federal law enforcement officials in apprehending fugitive slaves. As a result, the [Underground Railroad](#)¹¹ was born. As many as 100,000 escaped slaves may have been "transported" to freedom.

Are today's sanctuary cities and the Underground Railroad morally equivalent? Is a fugitive slave the same as a fugitive illegal immigrant? Some think so; I think not. The slave did not choose his slavery (although he did choose to escape), the immigrant chose to enter the country illegally or overstay his visa.

While harboring a fugitive from justice is often claimed to be an act of conscience, as we have seen, it is also illegal and the offender is subject to prosecution. Because of this, Catholic churches have [been urged](#)¹² to use caution before leaping into the sanctuary pool. As lawyer and Jesuit Father Bryan Pham points out in *On Becoming a Sanctuary: Five Points For Catholic Institutions To Consider*: "The housing of undocumented people is not necessarily covered under the First Amendment."

¹⁰ Article 4, Section 2.

¹¹ https://en.wikipedia.org/wiki/Underground_Railroad.

¹² <https://www.ncronline.org/news/justice/becoming-sanctuary-five-points-catholic-institutions-consider>.

Some in the sanctuary movement, members of other Christian denominations, point to the “cities of refuge” discussed in the Bible:¹³ There it says: “Speak to the people of Israel and say to them, ‘When you cross the Jordan into the land of Canaan, then you shall select cities to be cities of refuge for you, that *the manslayer who kills any person without intent* may flee there.’ The cities shall be for you a refuge from the avenger, that the manslayer may not die *until he stands before the congregation for judgment.*” (Emphasis added)

Notice that refuge cities were established for one circumstance: inadvertent manslaughter. Any “run-of-the-mill” criminal could not claim refuge. Even an inadvertent manslayer could claim refuge only until a trial was conducted (or the High Priest died before a trial could be conducted).

Some Christian churches in America have [a long history](#)¹⁴ of receiving and housing true refugees from oppression, at times even smuggling them into this country. The problem here is determining who are the true refugees from violence or oppression and who are simple economic immigrants; how do you determine who is which? Illegal immigrants know exactly what to say if/when they are apprehended? Even then, the smuggling of true refugees remains a problem.

Pointing to their “venerable role in human history,” Associate Professor of English at UC Irvine, Elizabeth Allen, pleads in [an LA Times OpEd](#)¹⁵ that sanctuary cities must continue to exist since they have “long been an escape valve for society.” “The sanctuary cities of the 2000s are part of this American tradition.” Tellingly, Professor Allen wastes no ink recounting [the economic effect of illegal immigration](#).¹⁶

I think the religious or moral case for providing sanctuary to illegal immigrants is very weak, and thus far I haven’t noticed anyone trying to make a Constitutional case for sanctuary cities, perhaps there’s a lesson there.

“Sanctuary Cities” sounds all lofty and moral, and may even give some citizens a warm-fuzzy that they are “doing their part for the oppressed.” But if you are an official in such a city, don’t be surprised if you are prosecuted for harboring aliens, and don’t complain if you’re incarcerated for doing so. Just saying.

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¹³ Numbers 35 (and other scriptures).

¹⁴ <http://99percentinvisible.org/episode/church-sanctuary-part-1/>.

¹⁵ <http://www.latimes.com/opinion/op-ed/la-oe-allen-sanctuary-cities-20150917-story.html>.

¹⁶ https://en.wikipedia.org/wiki/Economic_impact_of_illegal_immigrants_in_the_United_States.