

## **What Trump Can Do About ‘Sanctuary Cities’**

*di Alan M. Dershowitz e Andrew Stein*

A constitutional showdown is looming over the incoming administration’s border policies. Tom Homan, who will serve as Mr. Trump’s border czar, has threatened to prosecute local officials in sanctuary cities who hinder efforts to deport dangerous undocumented aliens. Denver Mayor Mike Johnston has said he’d be willing to go to jail to prevent deportations. Others have committed themselves to obstructing immigration enforcement.

How will this be resolved by the courts? Article VI of the Constitution mandates that federal law “shall be the supreme law of the land,” “notwithstanding” the “laws of any state.” The 10th Amendment reserves to the states all powers “not delegated to the United States by the Constitution, nor prohibited by it to the states.” The constitutional question is whether the authority to regulate immigration, including the power to deport illegal aliens, is a “power” delegated to the federal government.

Of course it is. Border crossers can travel from state to state unhindered, so entry anywhere in the U.S. is entry everywhere. Thus the federal government alone has the authority to control the right to enter and remain, as it does the power to exclude, deport and prosecute those who violate immigration laws.

Here’s the rub: The Constitution doesn’t prohibit states from providing food, healthcare, housing, driving privileges and other necessities to everyone within its borders. Nor does it compel the states to employ resources to aid the federal government. The Supreme Court has articulated an “anticommandeering” doctrine that prohibits the federal government from “conscripting the state’s officers directly” to enforce federal law.

The scope of this doctrine has been subject to revision over the years, and there is no clear guidance on how it would precisely apply to sanctuary cities. Much would depend

on the specific state action at issue. The precedents established when some Southern state officials tried to prevent the enforcement of federal courts' desegregation orders strongly suggest that states and cities may not actively block legitimate enforcement of federal law.

In between these extremes are a variety of state actions and refusals to act. These may include refusal to demand immigrants' status documentation as a condition for receiving state benefits, as well as more direct efforts to hinder federal law enforcement. Two considerations may determine whether state or federal powers prevail: the precise actions that local authorities take to hinder deportation and the remedies federal authorities seek against the sanctuary cities.

As to the first, the more active the resistance, the less justifiable it would be under the Supremacy Clause. As to the second, the more active the state involvement demanded by the federal government, the less likely it would be to survive a legal challenge based on the anticommandeering doctrine.

One likely scenario, already threatened by Mr. Homan, would involve cutting federal funding to local agencies—such as law enforcement and licensing providers—that hinder deportation efforts. The American Civil Liberties Union would surely challenge that remedy, arguing that sanctuary cities are being unconstitutionally punished for serving and protecting their residents, but the challenge would be uphill under existing precedents.

There is legitimate concern about the enforcement of deportations, especially those involving families containing both illegal aliens and citizens or permanent residents. There are also concerns about prioritization of those subject to deportation: Considerable differences—legal and moral—exist between criminals and “Dreamers” who have conducted themselves admirably even if they are here illegally. These and other issues are appropriately litigated in courts and administrative agencies, which will likely uphold the power of the federal government to deport illegal aliens, even if they have done good things, and even if they have children who were born here. They are also subject to legislative resolution, and Congress has the power to allow illegal aliens with young children who are citizens to remain, at least until the children become independent. But the rule of law requires that cities and states comply with the

constitutional hierarchy that makes valid federal law supreme over state law. There is no place for state-sponsored civil disobedience. No one is above the Constitution.

Application of the Supremacy Clause may not always produce the most moral results. States and cities may have the better of a given moral or political conflict, but if national issues aren't resolved by federal laws, the nation can't function.

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