Sanctuary Cities and the Second Circuit's Challenge in *New York v. U.S.*

*By Marc M. Harrold**

The existence of "sanctuary cities" in the United States falls in line with the old adage that "all government is local": many cities whose electorate would consistently, even adamantly, favor strict enforcement of immigration laws and border security policies have nonetheless pragmatically enacted local "sanctuary" policies believed to be necessary for the municipal government to provide police services to all its citizens, residents, inhabitants, and visitors.[1]

Sanctuary cities are municipalities that have express ordinances or policies that prohibit local law enforcement officers from inquiring about immigration status generally or reporting this information, if discovered, to federal authorities. Strong arguments for and against this type of policy exist. However, in this article, I will not delve into the substance of these arguments; for my purposes, what is crucial is that, for whatever reason, and regardless of the soundness of the underlying logic, a particular state or municipality has chosen to deem itself a "sanctuary city" thus pitting itself in violation of federal law (explained below).

Most likely, had only a few small communities deemed themselves "sanctuary cities," we would not see the national debate, at times outrage, that has since erupted.[2] But the list of sanctuary cities include three of the most populous cities in the United States: New York, Los Angeles, and Houston, as well as prominent cities like Anchorage, Phoenix, San Diego, San Francisco, Chicago, Baltimore, Detroit, Minneapolis, Albuquerque, Austin, and Seattle.[3] Two states have also enacted sanctuary policies: Alaska in 2003 and Oregon (a pioneer in this regard) in 1987.

Two sections of federal law prohibit "sanctuary city" policies generally and, more specifically, the broad regulation enacted in New York, Executive Order 124. In part, Order 124 "prohibits [New York employees] from voluntarily providing federal immigration authorities with information concerning the immigration status of any alien."[4] In 1996, two federal laws were enacted that contained provisions at odds with Order 124,[5] eventually resulting in the Second Circuit Court of Appeals' ruling in *New York v. U.S.*[6]

Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Welfare Reform Act")[7]:

> Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("Immigration Reform Act")[8]:

> (A) IN GENERAL.—Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
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> (B) ADDITIONAL AUTHORITY OF GOVERNMENT ENTITIES.—Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
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> (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
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> (2) Maintaining such information.
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> (3) Exchanging such information with any other Federal, State, or local government entity.
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> (C) OBLIGATION TO RESPOND TO INQUIRIES.—The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

The Second Circuit expressly acknowledged that their holding was in light of the fact that the City of New York was making a facial challenge to Sections 434 and 642 noting:

> [a] facial challenge to a legislative Act is…the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.[9]

The Second Circuit distinguished the Sections 434 and 642 from the federal programs at issue in *Printz v. United States*[10] and *New York v. United States*[11]:

> Unlike Sections 434 and 642, the federal programs in *Printz* and *New York* conscripted states (or their officers) to enact or administer federal regulatory programs. *See Printz*, 117 S. Ct. at 2376 (distinguishing federal directives to states that "require only the provision of information to the Federal Government" from those that "force [ ] [the] participation of the States' executive in the actual administration of a federal program," even though both kinds of directive leave states with no "choice" but to comply). The central teaching of these cases is that "even where Congress has the authority under the Constitution to pass laws

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requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York*, 505 U.S. at 166, 112 S. Ct. 2408. Congress may not, therefore, directly compel states or localities to enact or to administer policies or programs adopted by the federal government. It may not directly shift to the states enforcement and administrative responsibilities allocated to the federal government by the Constitution. Such a reallocation would not only diminish the political accountability of both state and federal officers, *see New York*, 505 U.S. at 168, 112 S. Ct. 2408; *Printz*, 117 S. Ct. at 2382, but it would also "compromise the structural framework of dual sovereignty," *Printz*, 117 S. Ct. at 2383, and separation of powers, *see id.* at 2378 ("[T]he power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.")….

In the case of Sections 434 and 642, Congress has not compelled state and local governments to enact or administer any federal regulatory program. Nor has it affirmatively conscripted the states, localities, or their employees into the federal government's service. These Sections do not require or prohibit anything. Rather, they prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the INS. *See Printz*, 117 S. Ct. at 2376.[12]

The Question Left Open in *New York v. U.S.*

The Second Circuit, after rejecting the Tenth Amendment sovereignty argument and "republican form of government claim," seemingly threw down the gauntlet and invited New York (or some other sanctuary city) to challenge §§ 434 and 642 "as applied" (not facially) and instead on the affect these provisions of federal law have on the "performance of legitimate municipal functions."[13] This article focuses on police services as "a legitimate municipal function."

Confidentiality and Police Services: What the Cities Fear

The City's concerns are not insubstantial. The obtaining of pertinent information, which is essential to the performance of a wide variety of state and local governmental functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved.[14]

Order 124, originally issued by Mayor Ed Koch in 1989, was re-issued by Mayor Rudy Giuliani. It seems highly unlikely that the New York City government sought to create a haven for those in disregard of national immigration laws. The primary reason that cities have enacted policies forbidding the police from inquiring into immigration status is to foster an atmosphere of trust between the local police and the immediate community they serve.[15] Intuitively, we can imagine a plethora of situations where crime victims and witnesses might be reluctant or afraid to communicate with police if they expect the police to inquire into their immigration status and turn them over to the Department of Homeland Security.

An incident in Houston provides an example of the legitimacy of local and state law enforcement's concern:

> In July 2002, three people were shot and killed inside a Vietnamese restaurant in Houston. Most of the witnesses fled the scene immediately. Due to their fear of being implicated and the fact that many did not have legal status in the U.S., the witnesses were not willing to talk to police. A police officer from the Vietnamese community asked a local Vietnamese language radio program to interrupt a popular program and let him speak to the Vietnamese community. After assuring witnesses, on the air, that the police only wanted information about the shooting, and not the immigration status of witnesses, more than five witnesses came forward.

Professor David A. Harris, Balk Professor of Law and Values at the University of Toledo College of Law, testified before Congress:

> If local police are forced to become de facto immigration agents, people in their neighborhoods will simply stop talking to them. They will fear officers and hide from them, instead of communicating with them about the problems, the issues, and the wrongdoers in their neighborhoods. Even worse, when they are victims of crimes, they will fear reporting the offenses. This can lead only to increased fear and less safe streets, as predators exploit this fear and repeatedly prey on not only immigrants, but anyone in these neighborhoods.[16]

A final example comes from the statement of Joseph Estey, Chief of Police in Hartford, VT and former President of the International Association of Chiefs of Police (IACP):

> Many leaders in the law enforcement community have serious concerns about the chilling effect any measure of this nature [including requiring non-federal police to inquire into immigration status] would have on legal and illegal aliens reporting criminal activity or assisting police in criminal investigations. This lack of cooperation [between police and the immigrant community] could diminish the ability of law enforcement agencies to police effectively their communities and protect the public they serve.[17]

Can §§ 434 and 642 survive "a constitutional challenge in the context of generalized confidentiality policies that are necessary to the performance of legitimate municipal functions"?

This is the question posed by the Second Circuit in its ruling in *New York v. U.S.* The "legitimate municipal function[s]" at issue for our purposes here is the execution of police services. The "context of generalized confidentiality policies that are necessary" for the performance of this "function" is the non-federal government's interest in fostering trusted communication between its representatives and the immigrant community they are responsible to serve. Obviously, this type of trust and communication will be diminished if police inquire into the immigration status of victims and witnesses and then forward this information to the federal authorities.

Specifically, New York argued that the federal laws at issue caused "disrupt[tion] [of] the actual operation of state and local government."[18] The Second Circuit was clear that its ruling only considered the facial challenge and not any "as applied" challenge under the Tenth Amendment:

> Nevertheless, the City has chosen to litigate this issue in a way that fails to demonstrate an impermissible intrusion on state and local power to control information obtained in the course of official business or to regulate the duties and responsibilities of state and local government employees. On the present record, the only state and local policy proffered by the City as disrupted by Sections 434 and 642 is the Executive Order and that Order alone.[19]

Clearly, in certain instances, a state or local government could "demonstrate" that §§ 434 and 642 ("as applied") do cause "an impermissible [federal] intrusion" on state and local governments.

CONCLUSION

I conclude that the Second Circuit was correct in not invalidating the federal laws at issue (that these federal laws, on their face, did not "commandeer" the NYC government); however, the question left open in *New York v. U.S.* should be answered in opposite fashion: that, due to "generalized confidentiality policies that are necessary to the performance of legitimate municipal functions that include federal immigration status," the federal laws at issue do violate the Tenth Amendment to the United States Constitution and cannot be, consistent with tenets of federalism, allowed to stand.[20]

When examined "as applied," the federal government should be constitutionally barred from enacting provisions such as §§ 434 and 642. As such, cities should be able to designate themselves as "sanctuary cities." The degree of "sanctuary," (with respect to citizenship and immigration status as discussed herein) a particular local or state entity chooses to offer should be determined by the local or state government in light of their compelling interest in providing police services and protection to all of the people within their respective jurisdiction and the equally compelling need to foster an environment of trust between the police and the community they serve.[21]

Endnotes

1 Although other types of services are at issue, and affected, by local sanctuary policies, this article will focus on municipal police services.

2 An example of this "outrage" can be seen in popular FOX News personality Bill O'Reilly's television show, website, and blog. (O'Reilly's blog used as a resource to locate and determine the existing "Sanctuary" cities. *See* www.billoreilly.com/blog?action=viewBlog&blogID=88083313171143568 (last visited April 20, 2007)). Further, Congressman Tom Tancredo has received acclaim from certain segments of the American population for highlighting this issue in his bid for the 2008 Republican Presidential nomination.

3 The remaining "sanctuary cities" as of August 2006 include: Fairbanks, AK; Chandler, AZ; Fresno, CA; National City, CA; Sonoma County, CA; Evanston, IL; Cicero, IL; Cambridge, MA; Orleans, MA; Portland, ME; Takoma Park, MD; Ann Arbor, MI; Newark, NJ; Trenton, NJ; Durham, NC; Aztec, NM; Rio Arriba, County, NM; Sante Fe, NM; Ashland, OR; Gaston, OR; Marion County, OR; Katy, TX; Virginia Beach, VA; and Madison, WI.

4 New York v. United States, 179 F.3d 29, 31 (2d Cir. 1999).

5 Executive Order 124 provides in pertinent part:

> Section 2. Confidentiality of Information Respecting Aliens.
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> a. No City officer or employee shall transmit information respecting any alien to federal immigration authorities unless
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> (1) such officer's or employee's agency is required by law to disclose information respecting such alien, or
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> (2) such agency has been authorized, in writing signed by such alien, to verify such alien's immigration status, or
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> (3) such alien is suspected by such agency of engaging in criminal activity, including an attempt to obtain public assistance benefits through the use of fraudulent documents.
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> b. Each agency shall designate one or more officers or employees who shall be responsible for receiving reports from such agency's line workers on aliens suspected of criminal activity and for determining, on a case by case basis, what action, if any, to take on such reports. No such determination shall be made by any line worker, nor shall any line worker transmit information respecting any alien directly to federal immigration authorities.
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> c. Enforcement agencies, including the Police Department and the Department of Correction, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity. However, such agencies shall not transmit information respecting any alien who is the victim of a crime.

6 179 F.3d 29 (2d Cir. 1999).

7 Pub. L. No. 104-193, 110 Stat. 2105 (1996). The "Immigration and Naturalization Service" referred to has been replaced by the Immigration and Customs Enforcement, an agency of the new Department of Homeland Security. *See* http://www.ice.gov/about/index.htm.

8 Pub. L. No. 104-208, 110 Stat. 3009 (1996). The "Immigration and Naturalization Service" referred to has been replaced by the Department of Homeland Security.

9 *New York*, 179 F.3d at 33 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

10 521 U.S. 898 (1997).

11 505 U.S. 144 (1992).

12 *New York*, 179 F.3d at 34-35. ("We therefore hold that states do not retain under the Tenth Amendment an untrammeled right to forbid all voluntary cooperation by state or local officials with particular federal programs.")

13 *Id.* at 37 ("[W]e find on this record that §§ 434's and 642's interference with the city's Executive Order is entirely permissible and in no way alters the form of New York City's government.").

14 *Id.* at 36.

15 Obviously, other pragmatic and political reasons could also exist that spurs a particular governmental entity to enact "sanctuary" provisions.

16 Testimony of Prof. David A. Harris, Senate Judiciary Subcommittee on Immigration, CLEAR Act Hearings (April 22, 2004).

17 InfoNet Doc. No. 04120163 (AILA)

18 *New York*, 179 F.3d at 34.

19 *Id.* at 36.

20 Generally speaking, enforcement of immigration laws has been seen exclusively as a role of the federal government; further the judiciary has seen this authority as a "plenary power" and has rarely interfered through judicial edict. *See, e.g.,* Takahashi v. Fish and Game Commission, 334 U.S. 410, 419 (1948).

> The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.

Id.

21 As indicated earlier in article, my only contention is that "as applied" §§ 434 and 642 could (upon the proper record) violate the Tenth Amendment and tenets of federalism. Simply because a city or state government *could* enact laws designating themselves as "sanctuary" cities (or states) does not mean they necessarily *should*. The merit of this type of designation is outside the scope of this article.