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State and Local Officials Can Be Criminally Prosecuted for Protecting Illegal Aliens

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KEY TAKEAWAYS

There is no exception from criminal prosecution for persons who violate anti-harboring or information-exchange provisions of immigration law.

Criminal prosecution over the immigration issue has even been used against a sitting state court judge.

The Justice Department is currently seeking a court order declaring sanctuary laws and ordinances invalid and forbidding their enforcement.

It is a fundamental principle under the Supremacy Clause[1] of the U.S. Constitution that state and local officials are not protected by the doctrine of sovereign immunity from federal criminal prosecution.[2] Governors, sheriffs, and other law enforcement and government officials who conceal, harbor, transport, or take other actions intended to protect aliens illegally in the United States can be criminally prosecuted by the U.S. Department of Justice under applicable federal immigration law.[3] Moreover, any attempts by state or local governments to restrict or limit the ability of their officials or staff to send to, or receive information from, the federal government on the immigration status of any individual is also a civil violation of federal law subject to injunctive issued by a court in any successful litigation brought by the Justice Department.

Federal Law

Under federal immigration law, 8 U.S. Code § 1324 (a)(1)(A)(ii), any person "knowing or in reckless disregard of the fact that an alien" has entered the U.S. "in violation of the law," who "transports, or moves or attempts to transport or move" such an alien is committing a criminal act. Furthermore, under part (iii) of this statute, any person who "conceals, harbors, or shields from detection" such an alien, including in "any means of transportation," is also committing a criminal act.[4] Under part (iv), the statute prohibits encouraging or inducing an alien to illegally enter the country, as well as under part (v) engaging in "any conspiracy" to commit any of these crimes or aiding or abetting the commission of such crimes.[5]

The same anti-harboring law prohibits numerous other crimes involving illegal aliens, including taking any of these prohibited actions for "commercial advantage," which enhances the potential punishment. Those punishments can include fines, a prison sentence, and civil forfeiture. Furthermore, if engaging in these actions "causes serious bodily injury...or places in jeopardy the life of, any person," the punishment can be up to 20 years in prison.[6]

It must be noted that this federal law applies to "any person," private or public. There is no exception from criminal prosecution for someone who happens to be a state or local official, whether that person is a governor, a local law enforcement official such as a sheriff, a university professor, or a member of a charity.[7]

Another provision of federal immigration law, 8 U.S. Code § 1373, provides that 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 federal government information on the "citizenship or immigration status, lawful or unlawful, of any individual."[8] In other words, cities or states that pass so-called "sanctuary policies" that prohibit local officials from exchanging information with the Department of Homeland Security on illegal aliens in their custody or control are violating federal law. Such state laws are void *ab initio*.

Court Decisions

As the Supreme Court has said, the "Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."[9] State laws affecting immigration "are preempted when they conflict with federal law." That includes "those instances where the challenged state

law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[10]

Anti-Harboring Provisions. The anti-harboring statute that is part of the comprehensive federal immigration legal structure has been upheld by the U.S. Supreme Court. In 2023 in *U.S. v. Hansen*, the Court concluded that the prohibition in 8 U.S. Code § 1324 (a)(1)(A)(iv) on encouraging or inducing an alien to illegally enter the country is not a violation of the First Amendment.[11] The U.S. Court of Appeals for the Ninth Circuit had claimed that the statute "criminalizes immigration advocacy and other protected speech," but the Supreme Court disagreed. Because "this provision forbids only the intentional solicitation or facilitation of certain unlawful acts," it held that the statute is not unconstitutionally overbroad.[12] The Court reversed the Ninth Circuit and upheld the criminal conviction of Helaman Hansen for inducing aliens to illegally enter the U.S. through an "adult adoption" fraud scheme.

The ban in part (iii) of the statute on harboring illegal aliens was upheld by the U.S. Court of Appeals for the Fifth Circuit in 2024 in *U.S. v. Rodriguez*.[13] The court upheld the criminal conviction and sentencing enhancements for a cartel smuggler who pleaded guilty to harboring an illegal alien in the United States for commercial advantage.

The U.S. Court of Appeals for the Ninth Circuit has also held that a criminal conviction under the anti-harboring ban is sufficient grounds to deny an asylum claim. The Ninth Circuit did not question the legitimacy of the criminal prohibition on harboring an illegal alien in *Cardenas v. Garland*.[14]

Exchange of Information. The immigration statute prohibiting any restrictions on the exchange of information on aliens between state and local governments and federal immigration authorities was discussed by the U.S. Supreme Court in *Arizona v. U.S.* The Court noted the obligation of the federal government to respond to inquiries from local officials under 8 U.S. Code § 1373 and pointed out that the Department of Homeland Security has a Law Enforcement Support Center that operates "24 hours a day, seven days a week" to provide immigration information.[15]

Moreover, the Court cited 8 U.S. Code § 1644 "regulating the public benefits provided to qualified aliens [that] in fact instructs that 'no State or local government may be prohibited, or in any way, restricted, from sending to or receiving from [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States.'"[16] In upholding Arizona's state law making such contact mandatory by state officials, the Court said that this "federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter."[17] There was no indication by the Court

that it considered this ban on state and local restrictions on immigration information exchanges to be unconstitutional.

States have challenged § 1373, claiming it violates the anti-commandeering doctrine under the Tenth Amendment, which the Supreme Court has enforced in multiple cases.[18] But in two separate Ninth Circuit decisions holding that the Justice Department could not impose conditions related to immigration enforcement such as a certification of compliance with § 1373 on either the State of California or the City of San Francisco when they applied for certain Department of Justice (DOJ) grants, the court specifically found that neither California nor San Francisco were violating § 1373.[19] The Ninth Circuit did not hold that the provision was unconstitutional based on the anti-commandeering challenge. A direct challenge to the constitutionality of § 1373 as violating the anti-commandeering doctrine was dismissed by the U.S. Court of Appeals for the Second Circuit in 2020 in *New York v. U.S. Department of Justice*.[20]

This information exchange provision in § 1373 is one of the bases for the civil lawsuit filed by the U.S. Department of Justice on February 6, 2025, against the State of Illinois, the City of Chicago, and Cook County. The complaint alleges that specific sanctuary laws and ordinances of the defendants "interfere with and discriminate against the Federal Government's enforcement of federal immigration law in violation of the Supremacy Clause of the United States Constitution."[21] The DOJ is seeking a court order declaring those sanctuary laws and ordinances invalid and granting injunctive relief forbidding their enforcement.

Criminal prosecution over the immigration issue has even been used against a sitting state court judge. In 2019, the Justice Department criminally indicted a state court judge in Massachusetts, Shelley M. Richmond Joseph, for helping an illegal alien who was in her courtroom on local charges to avoid being taken into custody by a waiting federal agent under a federal immigration detainer warrant. She instructed her bailiff to release him "through the rear sally-port exit of the courthouse" after ordering the federal agent out of her courtroom.[22] She was charged with obstructing justice, conspiracy to obstruct justice, and obstructing a federal proceeding.[23]

When the judge/defendant filed an appeal in federal court claiming that she was immune from federal criminal prosecution as a state judge, the U.S. Court of Appeals for the First Circuit rejected her appeal, holding that the appeal was premature and that the court had "no jurisdiction to review the merits of the district court's rulings at this stage of the proceedings."[24] Fortunately for the judge, the U.S. Attorney for Massachusetts, Zachary A. Cunha, entered into an agreement to dismiss the federal charges against

her in exchange for the judge submitting herself to the state commission on judicial conduct for her misbehavior.[25]

Conclusion

The U.S. Justice Department has the ability under 8 U.S. Code § 1324 to criminally prosecute any person, including state and local officials, who violate federal immigration law or otherwise attempt to obstruct justice. They are not protected by sovereign immunity from federal prosecution. Civil lawsuits can also be filed under the Supremacy Clause when state or local laws directly violate federal immigration statutes or impose "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in federal immigration laws.

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Endnotes

1. U.S. Constitution, article VI, clause 2. See also "Supremacy Clause," in David F. Forte et al., eds., *Heritage Guide to the Constitution*, 2nd ed. (Washington, DC: Regnery, 2014), https://www.heritage.org/constitution/#!/articles/6/essays/133/supremacy-clause.
2. See *Snyder v. U.S.*, 603 U.S. _____ (2024), in which the court explained how a federal criminal bribery statute, 18 U.S. Code § 666, applies to state and local officials.
3. See generally 8 U.S. Code § 1324.
4. 8 U.S. Code § 1324(a)(1)(A)(ii) and (iii).
5. 8 U.S. Code § 1324(a)(1)(A)(iv) and (v).
6. 8 U.S. Code § 1324(a)(1)(B)(iii). There is a similar ban in another federal statute, 8 U.S. Code § 1644, which states that "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."
7. Christopher Maag and Eileen Sullivan, "U.S. Says Sheriff Could Face Prosecution for Releasing Immigrant," *New York Times*, January 30, 2025, https://www.nytimes.com/2025/01/30/nyregion/ny-sheriff-ithaca-immigration.html (accessed February 19, 2025), and Carl Campanile and David Propper, "Phil Murphy's Rep Now Claims NJ Guv Is Not Sheltering Migrant at His Home—Despite Daring Feds to 'Try to Get Her,'" *New York Post*, February 3, 2025, https://nypost.com/2025/02/03/us-news/nj-gov-phil-murphys-claim-hes-protecting-migrant-at-his-home-wasmisinterpreted-rep-insists/ (accessed February 19, 2025).
8. 8 U.S. Code § 1373(a).
9. *Arizona v. U.S.*, 567 U.S. 387, 394 (2012).
10. Ibid., p. 399.
11. *U.S. v. Hansen*, 599 U.S. 762 (2023). See also *U.S. v. Riveron-Valdes*, 2024 WL 1599228 (11th Cir. 2024), for a similar type of criminal conviction for encouraging and inducting an alien to illegally enter the United States.
12. Ibid., p. 766.
13. *U.S. v. Rodriguez*, 2024 WL 4471735 (5th Cir. 2024).
14. *Gardenas v. Garland*, 2022 WL 1046209 (9th Cir. 2022).
15. *Arizona v. U.S.*, 567 U.S. 387, 412 (2012).
16. Ibid., pp. 412–413.
17. Ibid., p. 413.
18. See *Printz v. U.S.*, 521 U.S. 898 (1997), and *Murphy v. National Collegiate Athletic Association*, 584 U.S. 453 (2018).
19. *City of San Francisco v. Barr*, 965 F.3d 753 (9th Cir. 2020), and *U.S. v. California*, 921 F.3d 865 (9th Cir. 2019). Similarly, the 7th Circuit held that conditions could not be imposed on certain DOJ grants such as certification of compliance with § 1373, not that § 1373 was unconstitutional. *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020). The 3rd Circuit held that § 1373 was not even applicable in another case challenging the conditions imposed on DOJ grants. *City of Philadelphia v. Attorney General of the U.S.*, 916 F.3d 276 (3rd Cir. 2019).
20. *New York v. U.S. Department of Justice*, 951 F.3d 84 (2nd Cir. 2020).
21. *U.S. v. State of Illinois*, Case No. 1:25–01285 (N.D. Ill. Feb. 6, 2025), complaint, p. 1, https://www.courthousenews.com/wp-content/uploads/2025/02/trump-sues-chicago-sanctuary-cities.pdf (accessed February 19, 2025). A similar lawsuit has been filed against New York and state officials. See *U.S. v. State of New York*, complaint filed February 12, 2025, https://www.scribd.com/document/827453881/United-States-v-New-York-Complaint#fullscreen&from_embed (accessed February 19, 2025).
22. "Before the Commission on Judicial Conduct," Complaint No. 2019–22, Massachusetts Commission on Judicial Conduct, November 19, 2024.
23. 18 U.S. Code §§ 2, 1505, and 1512. The Supreme Court issued a decision in 2024 over the application of § 1512 in *Fischer v. U.S.*, Case No. 23–5572 (2024), https://www.supremecourt.gov/opinions/23pdf/23-5572_l6hn.pdf (accessed February 19, 2025).
24. *U.S. v. Shelley M. Richmond Joseph*, Case No. 20–1787 (1st Cir. Feb. 28, 2022), order, p. 6, https://law.justia.com/cases/federal/appellate-courts/ca1/20-1787/20-1787-2022-02-28.html (accessed February 19, 2025).
25. News release, U.S. Department of Justice, "Statement from United States Attorney Zachary A. Cunha Regarding *United States v. Joseph*," September 22, 2022, https://www.justice.gov/usao-ma/pr/statement-united-states-attorney-zachary-cunha-regarding-united-states-v-joseph#:~:text=%E2%80%9CThis%20case%20is%20about%20the,%2C%E2%80%9D%20said%20U.S.%20Attorney%20Cunha (accessed February 19, 2025).