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Human Rights

The newsletter of the Illinois State Bar Association's Section on Human Rights Law

Cases to watch

BY RONALD S. LANGACKER

The Human Rights newsletter is introducing a new feature called Cases to Watch. In each issue, we will highlight a case recently decided or currently pending before the Supreme Court that could affect issues related to human rights.

Nielsen v. Preap, 138 S. Ct. 2596, 201 L. Ed. 2d 292 (2018).

Nielsen challenges the government's interpretation of a 1996 mandatory detention law requiring that non-citizens be detained for the duration of their deportation proceedings—without a hearing—because they have criminal records.

Nielsen is a class action brought by a group of immigrants in the Ninth Circuit who have been or are being detained under 8 U.S.C. § 1226, a provision of the Immigration and Nationality Act. This section authorizes federal authorities to detain any non-citizen subject to "removal"— i.e. deportation.

The section covers a wide range of immigrants, including tourists or students

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Juliana v. United States: The constitutional side of the fight against climate change

BY BHAVANI RAVEENDRAN

In a surprising development this November, the U.S. Supreme Court heard argument on whether it should stay a group of children and young adults' attempt to hold the federal government accountable for not doing enough to stabilize our climate. Though similar cases or petitions for rulemaking had been filed in state jurisdictions such as Washington, Oregon, Colorado, Florida, North Carolina, Maine, Massachusetts, and New Mexico, *Juliana v. United States* presents the first federal challenge of this kind. The case begs the question—is a habitable and safe climate guaranteed by our constitution?

Juliana v. United States attempts to hold the federal government liable for the infringement of fundamental constitutional rights to life, liberty, and property and discrimination of the young citizens who will disproportionally experience the destabilized climate. Claims include the violation of plaintiffs' due process rights and equal protection rights, among others. The suit names the United States, Barack Obama, the Office of the President of the United States of America, and several federal agencies and their representatives as its defendants, including the Environmental Protection Agency and the Department of the Interior.

Juliana alleges that the United States government has known for 50 years that carbon dioxide causes global warming

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Cases to watch

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who have overstayed their visas as well as lawful permanent residents who have committed certain crimes.

In normal circumstances, a non-citizen who has been detained by ICE is allowed a detention hearing and the opportunity to post bond prior to being allowed a removal hearing.

Non-citizens who have been found guilty of a criminal conviction prior to their removal hearing are not afforded the same opportunity to receive a detention hearing. The relevant portion of the statute states that when the non-citizen who has been convicted is released from imprisonment, the government "shall take [him or her] into custody." These individuals do not receive a bond hearing and are held in detention until their removal case is resolved.

While a majority of non-citizens are detained by ICE immediately after being released from criminal custody, there are thousands of instances where ICE detains individuals for minor convictions from years or even decades prior. Non-citizens with criminal records are not afforded a bond hearing—instead, they are detained during their removal hearing until the court decides on removal, which can take months or even years.

The government currently interprets the law to require detention without a hearing in cases where the person committed an offense and served a sentence regardless of when the sentence was served. The plaintiffs in *Nielsen* allege that if the government wishes to detain an individual, they should do so at the moment of release.

The question is whether a non-citizen released from criminal custody becomes exempt from mandatory detention if ICE does not immediately take the noncitizen into custody. The matter is currently being appealed from the 9th Circuit, which held the mandatory detention provision applied only to aliens detained promptly after their release from custody, and not aliens detained long afterwards. *Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016), *cert*. granted *sub nom*.

Nielsen was argued before the Supreme Court on October 10, 2018, and will be decided this term. The outcome of the case could realistically affect thousands of non-citizens who have been detained post-conviction and have not been afforded the opportunity of bond prior to a deportation hearing.■

Juliana v. United States

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and dangerous climate change which will dangerously destabilize the climate for future generations. The Plaintiffs describe the effects of climate change on their survival, well-being, diet, recreation (including hunting), erosion of their home environments, spiritual practices, and physical, psychological and emotional well-being and how this violates their fundamental rights.

After making it past motions to dismiss, the case was set for trial first in February of 2018 and then in October of 2018. The case has survived three petitions for writ of mandamus to the Ninth Circuit Court of Appeals, two writs of mandamus and applications for stay with the United States Supreme Court, and numerous motions to stay and dispositive motions within the U.S. District Court for Oregon. The most recent stay was denied by the Supreme Court on November 2, 2018. Promptly after the denial from the Supreme Court, the federal government fired yet another motion to stay with the Ninth Circuit Court of Appeals, which was temporarily granted

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while allowing the parties go forward with trial preparations. A trial date has yet to be reset as pretrial motions continue to be filed and heard.

Critics of the lawsuit decry it as bringing political issues to the courts which are better suited for our legislative bodies. The Department of Justice has actively been attempting to stay, stall, or stop the suit all together—arguing that this is an improper vehicle to change climate policy. The "Youth Plaintiffs", as they dub themselves in the suit, disagree. The Youth Plaintiffs describe their belief that their fundamental rights are at stake in their first amended complaint:

That grant of equitable jurisdiction requires Article III courts to apply the underlying principles of the Constitution to new circumstances unforeseen by the framers, such as the irreversible destruction of the natural heritage of our whole nation. An actual controversy has arisen and exists between Plaintiffs and Defendants because Defendants have placed Plaintiffs in a dangerous situation, continue to infringe upon Plaintiffs' constitutional rights, and have abrogated their duty of care to ensure Plaintiffs' reasonable safety, among other violations of law. Plaintiffs have no adequate remedy at law to redress the harms herein, which are of a continuing nature and which, if left unresolved, will be irreversible.

Are these Plaintiffs' and this creative lawsuit enough to push the United States to clean energy and open up a new avenue to force the government's hand? Caselaw establishing a federal due process right to a habitable and safe climate might be just the thing. ■

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A modern-day dual sword of Damocles: The current threat looming over sanctuary cities

BY JUANITA B. RODRIGUEZ

As immigration reform rises to the top of the nation's political agenda, emphatic rhetoric from both sides centers on sanctuary policies enacted by state and local governments. These innovative policies raise a multitude of legal and political issues that are presently playing out in as many as three hundred sanctuary jurisdictions.[1] This article reviews the current national conflict, which has two distinct threats: the threat of enforcement with courts often caught in the middle of federal obstruction of justice statutes as a sanction against officials in sanctuary jurisdictions; and, the threat of removal of all federal funding to sanctuary cities for noncompliance. This article will review what sanctuary cities are, what their policies provide for, the threats they face, and the root of the conflict that surrounds them. This article also examines certain national cases and centers locally on *City of Chicago v. Sessions* as it may provide key insight as to how the national battle may resolve.

What is a sanctuary city and what do sanctuary city policies provide for?

While there is no single universal definition for a sanctuary city, the broadest definition is that "…it's a city (or a county, or a state) that limits its cooperation with federal immigration enforcement agents in order to protect low-priority immigrants from deportation, while still turning over those who have committed serious crimes."[2] Sanctuary cities in the United States date back to the 1980s, when church groups in the Southwest began to offer sanctuary

in their churches for overwhelming numbers of displaced Central American refugees fleeing violence and being denied sanctuary.[3] Over the decades this spread across the United States and fostered the evolution of a number of sanctuary policies.[4] Sanctuary policies generally include a range of policy innovations governing local government entities and officials, mainly law enforcement, with respect to cooperation with Immigration and Customs Enforcement ("ICE"). Federalism forms the legal foundation for sanctuary policies—there is no duty on any state or local government to assist in the enforcement or even investigation of federal immigration matters under the Anti-Commandeering Doctrine.[5]

The current policy in the city of Chicago ("City") is its Welcoming City Ordinance, which restricts the interactions city police and other city employees may have with ICE.[6] City officials are barred from asking for anyone's immigration status, turning undocumented immigrants over to federal agents, or threatening to reveal the immigration status of a person to federal officials.[7] City officials are even barred from verbally abusing immigrants based on their race, citizenship, or country of origin.[8] In comparison, comprehensive policies, such as the California Values Act, prohibits "state and local law enforcement agencies…from using money or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes," and, subject to exceptions, proscribe other activities such as enforcing "immigration holds" on people in custody absent enumerated exceptions.[9] More discrete policies, such as the City of Boston Trust Act, merely relieve local law enforcement from complying with "non-mandatory" civil immigration detainer requests by ICE and prohibit holding a person in custody who would otherwise be eligible for release, absent a *criminal* warrant (as opposed to an ICE *administrative* warrant).[10] In short, sanctuary policies will variably restrict local law enforcement from sharing information with ICE, restraining people for ICE, or even granting ICE access to local holding facilities to arrest people or review records.

What is the current threat to sanctuary cities and how did this conflict start?

Sanctuary policies are facing two distinct threats from the current administration: the threat of enforcement of federal obstruction of justice statutes as a criminal sanction against officials in sanctuary jurisdictions, and the threat of removal of all federal funding to sanctuary cities. The conflict began when President Trump signed Executive Order 13768 ("Executive Order"), entitled "Enhancing Public Safety in the Interior of the United States" on January 25, 2017.[11] In response to this order, the bulk of litigation has revolved around the threat against the removal of federal funding from sanctuary cities. The threat of sanctions on non-compliant local officials is very real but has yet to result in actual charges or incarcerations—this will be addressed as the First Sword. Sanctuary city advocates decry the prospective "mass arrest" of U.S. mayors.[12]

The First Sword: The threat of enforcing of federal obstruction of justice statues against city officials

Harsh threats have been made to impose criminal sanctions against uncooperative local officials. In January of 2018, acting ICE Director Thomas Homan asserted that the Department of Justice should file charges against municipalities that do not cooperate with federal immigration authorities. "For these sanctuary cities that knowingly shield and harbor an illegal alien in their jail and don't allow us access, that is, in my opinion, a violation of 8 U.S.C. § 1324. That's an alien smuggling statute."[13] More recently, in a Senate Judiciary Committee hearing, Department of Homeland Security Director Kirsten Nielson stated that the justice department was "reviewing what avenues might be available" to hold sanctuary city leaders accountable for their respective policies.[14] It is therefore incumbent upon local sanctuary jurisdictions to fully acquaint themselves with all possible obstruction statutes available to federal authorities to intimidate, threaten or indeed hold criminally liable local officials complying with non-cooperation sanctuary provisions. Under federal law, there are several general obstruction statutes a non-compliant city official may face such as: Obstruction of Proceedings before Departments, Agencies, and Committees (18 U.S.C. § 1505); Destruction, Alteration, or Falsification of Records in Federal Investigations and Bankruptcy (18 U.S.C. § 1519); Conspiracy to Commit Offense or to Defraud the United States (18 U.S.C. § 371); and, Bringing in and Harboring Certain Aliens (8 U.S.C. § 1324).[15]

First, understanding the process by which information is shared between local law enforcement and federal offender databases is important. Several national databases routinely accessed by local law enforcement include gang databases (GangNET). ICE has its own system that accesses GangNET and other investigative systems developed by private contractors."[16] Police officers can also access the National Crime Information Center database.[17] With either database, local police are free to notify ICE of a potential person of interest, but there is no automatic initiation of an official proceeding.[18]

However, the "Secure Communities (S-Comm)" program, restarted on January 25, 2017, by Executive Order is more problematic.[19] S-Comm employs integrated databases and partnerships with local and state jailers to integrate ICE and its deportation procedures.[20] Inquiries using fingerprints or biometric data of a person in custody that results in a "hit" arguably automatically triggers a federal immigration "proceeding."[21] "[T]his happens even in cities that have adopted policies that limit their role in immigration enforcement activities."[22] As such, an official proceeding is now automatically initiated and federal obstruction statutes come into play. While the state and local authorities have no duty to enforce federal immigration law, every person and entity has a duty to not interfere, impede, or corruptly influence a federal proceeding, including investigations. Under obstruction statutes, the term "official proceeding" includes a proceeding before a federal government agency that is authorized by law. 18 U.S.C. § 1515(a)(1)(C). This definition is important because virtually all "obstruction" charges relate to an official proceeding.

Specifically, 18 U.S.C. § 1505 (Obstructing Congressional or Administrative Proceedings) sanctions whoever *corruptly* influences, obstructs, or impedes the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States. "As used in § 1505, the term 'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." 18 U.S.C. § 1515(b).

Likewise, 18 U.S.C. § 1519, Obstruction of Investigations by Destruction of Evidence, criminalizes "whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible item with the intent to impede, obstruct, or influence the investigation of any matter within the jurisdiction of any department or agency of the United States or the proper administration of any matter within the jurisdiction of any department or agency of the United States." In addition, 18 U.S.C. § 371,Conspiracy To Obstruct, imposes fines and imprisonment, "[i]f two or more persons conspire either to commit any offense against the United States . . . or any agency thereof in any manner or for any purpose, and do any act to effect the object of the conspiracy." Finally, 8 U.S.C. § 1324, Bringing and Harboring Certain Aliens, while directed at those who knowingly smuggle and harbor undocumented aliens, also criminalizes any person who "aids or abets the commission of any of the preceding acts"—which include concealing, harboring, shielding from detection, or attempting to shield from detection persons known to be unqualified aliens.

Participation in the S-Comm program potentially puts local law enforcement at risk because inquiry hits trigger an official proceeding. For instance, if a Chicago police officer, in furtherance of the Welcoming City Ordinance denies ICE access to persons or information, or lock ups once such a proceeding is initiated, such action may be characterized as "influencing, obstructing, or impeding" the proceeding. Withholding access to records may be deemed "concealment" or a "cover up" with the intent to impede, obstruct, or influence an investigation. Ignoring or rejecting an ICE administrative hold request (typically 48 hours past the time the person would normally be released absent immigration status issues) may be deemed to be "aiding and abetting…concealing, harboring, shielding from detection or attempting to shield from detection, persons known to be unqualified aliens." Any of the above acts, if done by two or more persons triggers a conspiracy violation under 18 U.S.C. § 371.

Not surprisingly, sanctuary jurisdictions have attempted to opt out of the S-Comm program since 2014, when the Obama administration discontinued the program. However, prior to 2014, S-Comm was initiated through a series of bilateral agreements between ICE and local jurisdictions. However, ICE is no longer observing such agreements. Since the Executive Order, ICE is likely to consider program participation by local agencies to be mandatory. Therefore, the ability of a jurisdiction to opt out of S-Comm will need to be addressed via the federal courts. [23]

The Second Sword: The threat of removing all federal funding from sanctuary cities

The Executive Order, in another attempt to shut down sanctuary cities, directed Attorney General Jeff Sessions and the Secretary of Homeland Security to ensure that "sanctuary jurisdictions" not receive ***any*** "federal funds."[24] Immediately, Santa Clara and San Francisco counties and the city of San Franciscofiled suits challenging the Executive Order, both moving for Californian injunctive relief to bar its enforcement.[25] The preliminary injunctions were granted on the same or similar grounds, that Santa Clara and San Francisco were likely to succeed on their claims, that the Executive Order violates separation of powers principles, the Spending Clause, and the Fifth and Tenth Amendments to the Constitution.[26] As of today the Executive Order remains enjoined.[27]

Blocked from cutting off *all* funding to sanctuary jurisdictions, Sessions shifted to blocking off specific grants to sanctuary cities. The most notable grant targeted is the Edward Byrne Memorial Justice Assistance Grant, commonly known as the Byrne JAG program ("Byrne JAG"). [28] Byrne JAG is a formula grant allowing federal funds to support many areas, including local law enforcement, local prosecution, and local courts.[29] Sessions and the DOJ imposed three new conditions on Byrne JAG namely: "'(1) certify compliance with [8 U.S.C.] section 1373'[30], which prohibits restrictions on the sharing of citizenship and immigration status information [compliance condition]; (2) 'permit personnel of [DHS] to access any detention facility in order to meet with an alien and inquire as to his or her right to be or remain in the United States' ('access condition'); and (3) 'provide at least 48 hours advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien' ('notice condition')."[31] These three conditions—compliance, access, and notice—were swiftly challenged in the courts by a number of cities, including the city of Chicago.[32]

In *City of Chicago v. Sessions*, the Northern District of Illinois granted the City's motion for "…a preliminary injunction against the attorney general's imposition of the notice and access conditions on the Byrne JAG grant. The city of Chicago established a likelihood of success on the merits as to these two conditions and irreparable harm if an injunction does not issue." [33] However, the City was denied on the granting of the compliance condition.[34] The court found that the compliance condition in 8 U.S.C. § 1373, had both Congressional authorization and was Constitutional under the Spending Clause and the Tenth Amendment. Three motions later, the city of Chicago filed a motion to reconsider to get the compliance condition enjoined but was denied.[35] Additionally, the United States Conference of Mayors' motion to intervene as of right was also denied.[36] To date, enforcement of the compliance condition seems an effective tool to target and eliminate formula grants to sanctuary cities.

This is likely to be an ongoing approach used by the current administration to bring to heel sanctuary cities that will not comply with administration's approaches on immigration enforcement.

For now, both federal obstruction and harboring statutes and the denial of specific federal funding grants remain a modern-day sword of Damocles hanging above the heads of local sanctuary jurisdiction officials. This threat is conceivably not outside of the reach of local courts which are given the power from the state government to ensure due process and the Constitutional rights of the individuals appearing before them on routine domestic, traffic or misdemeanor matters for example. In practice, the Executive Order can use the local law enforcement and local courts as their investigators and jailors for undocumented persons in ways not originally intended or authorized by immigration enforcement laws. The Executive Order arguably significantly compromises state sovereignty applicable to local courts by removing their respective jurisdiction over such individuals appearing before them and therefore depriving their authority to ensure due process—to which undocumented persons are also entitled—and when applicable hold them accountable to the local community. Consequently, the upcoming 2018 local and nationwide elections will be the most influential with respect to the polarizing issue of immigration enforcement and implicated federal and state civil rights and notions of due process. ■

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