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Legal Sidebar

Immigration Enforcement & the Anti-Commandeering Doctrine: Recent Litigation on State Information-Sharing Restrictions

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Although the federal government is vested with exclusive power to regulate the entry and removal of non-U.S. nationals (aliens), the impact of immigration is acutely felt in local communities. Some states and local governments have agreed to assist in the enforcement of immigration laws, such as by identifying and apprehending aliens for removal. Others have chosen not to assist in immigration enforcement efforts. In some cases, these states and localities have adopted measures—sometimes labeled "sanctuary" laws and policies—that limit cooperation between state or local law enforcement and federal immigration authorities. For instance, California's SB-54 generally prohibits law enforcement agencies from using agency money or personnel to investigate, interrogate, detain, detect, or arrest persons for the purpose of immigration enforcement.

State laws and policies restricting participation in immigration enforcement have come under scrutiny following the January 25, 2017 issuance of Executive Order 13768, which seeks to strengthen immigration enforcement. Section 9(a) of the Executive Order directs the Attorney General and the Secretary of the Department of Homeland Security to withhold federal grant funds to states and localities that fail to comply with 8 U.S.C. § 1373 (Section 1373). Section 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, . . . [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual."

After the issuance of the Executive Order, then-Attorney General Jeff Sessions announced new conditions on the receipt of federal funds under the Edward Byrne Memorial Justice Assistance Grant Program (Byrne JAG Program) for Fiscal Year 2017, including that recipients certify compliance with Section 1373. The Byrne JAG Program grants federal funds to states, the District of Columbia, and territories for non-federal criminal justice initiatives. For Fiscal Year 2018, the Department of Justice added further new conditions on grant recipients, including certifying compliance with 8 U.S.C. § 1644 (Section 1644), which contains similar requirements to Section 1373 (Fiscal Year 2019 also requires grant recipients to certify their compliance with Sections 1373 and 1644).

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In opposition to these new conditions, several states and localities sued, challenging the withholding of federal funds based on states and local governments allegedly failing to comply with Sections 1373 and 1644. The plaintiffs claim Sections 1373 and 1644 unconstitutionally restrain states and localities from prohibiting law enforcement entities from sharing information with federal immigration authorities, reasoning that these statutory provisions constitute impermissible state coercion. Congress may be interested in this conflict between sanctuary policies and Sections 1373 and 1644 because it raises questions as to the extent that Congress, consistent with anti-commandeering principles, can facilitate information-sharing by states and localities with the federal government.

The Supremacy Clause and the Anti-Commandeering Doctrine

The Constitution establishes a system of dual sovereignty between the federal and state governments, including by providing for a national Congress with enumerated powers and, by way of the Tenth Amendment, expressly reserving those powers to the states that were not delegated to the federal government. But the Constitution's Supremacy Clause declares that federal law is "the supreme Law of the Land." Accordingly, when Congress exercises its enumerated powers, it may render unenforceable (preempt) otherwise valid state laws. The Supreme Court has repeatedly recognized that federal law preempts a broad range of state or local activities addressing immigration-related matters, though not every state enactment "which in any way deals with aliens is a regulation of immigration and thus *per se* preempted."

But there are constitutional constraints on the federal government's ability to influence state or local activity, including under the anti-commandeering doctrine. The doctrine, rooted in the Tenth Amendment and the Constitution's enumeration of Congress's powers, instructs that "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts" on behalf of the federal government. For example, in its 1992 decision *New York v. United States*, the Supreme Court struck down a federal law that required states to either (1) enact legislation disposing of radioactive waste generated within their borders; or (2) take title to and possession of the waste. And in 1997, *Printz v. United States* expanded on *New York*, holding that Congress's command for state officials to implement a federal scheme of background checks on prospective handgun purchasers contravened anti-commandeering principles.

More recently, in 2018, the Supreme Court addressed the anti-commandeering doctrine in *Murphy v. National Collegiate Athletic Association*. The Court struck down the Professional and Amateur Sports Protection Act (PAPSA)—which prohibited state and local governments from allowing gambling on sports activity—on the basis it was an impermissible coercion of state government. The Court reasoned that PAPSA compelled state legislation in violation of the Tenth Amendment by preventing state legislatures from rescinding existing gambling restrictions. Writing for the majority, Justice Alito described any distinction between a federal law directly instructing a state to take an affirmative act and one prohibiting state legislative activity as "empty," explaining "[t]he basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event."

States and Local Governments' Challenges to Sections 1373 and 1644

In their challenges to the federal government's withholding of the Byrne JAG Program funds, the state and local government plaintiffs generally raise three arguments: (1) the Attorney General lacks statutory authority to place conditions on the receipt of Byrne JAG Program funds; (2) the executive branch

usurped Congress's spending power by dictating additional conditions beyond those imposed by Congress, thereby violating the principle of separation of powers; and (3) requiring compliance with Sections 1373 and 1644 commandeers state involvement in federal immigration enforcement in violation of the Tenth Amendment.

While this litigation raises numerous legal questions, this Legal Sidebar focuses on anti-commandeering challenges to Sections 1373 and 1644. Specifically, the plaintiff states and localities claim the condition requiring certification of compliance with Sections 1373 and 1644 is unlawful because (1) these statutory provisions constitute commandeering; and (2) the availability of federal funds cannot be conditioned on complying with unconstitutional laws. Relying on *Murphy*, they contend Sections 1373 and 1644 unconstitutionally dictate what a state legislature may not do—limit state and local officers from sharing immigration-related information with the federal government. To counter, the DOJ argues the anti-commandeering doctrine does not apply to voluntary grant programs for which states and localities may decline to participate. Additionally, the DOJ argues that Sections 1373 and 1644 do not violate the doctrine because the statutory provisions are laws of general applicability and, alternatively, they fall within an information sharing exception that was arguably suggested by the Supreme Court in a few pre-*Murphy* decisions.

This conflict between these federal statutory provisions and state and local policies limiting information sharing raises questions of whether Sections 1373 and 1644 unconstitutionally dictate state legislative activity by barring states and localities from passing legislation restricting the voluntary exchange of information by local law enforcement and federal immigration authorities. In all six cases listed in **Table 1**, the respective district courts held that Section 1373 is unconstitutional and therefore cannot serve as an applicable federal law to condition funds for purposes of the Byrne JAG Program. In the two cases that include a challenge to the FY 2018 condition requiring compliance with Section 1644, the district courts concluded Section 1644 was unconstitutional for the same reason. Regarding the other conditions, all six cases also held that the Attorney General lacked statutory authority under the Byrne JAG Program statutory scheme to impose additional conditions on the receipt of funds.

Of special note, in some of these cases, the reviewing court considered the continuing import of the Second Circuit's decision in *City of New York v. United States*, which rejected an anti-commandeering challenge to Section 1373. But post-*Murphy*, some courts have called into question the appellate decision's continued viability. Indeed, the U.S. District Court for the Southern District of New York concluded in 2018, in *States of New York v. Department of Justice* that "*City of New York* cannot survive *Murphy*." The district court explained that the Second Circuit's holding rested on a distinction between "affirmative obligations and proscriptions"—the "empty" distinction rejected by the Supreme Court in *Murphy.* The outcome of current litigation may provide critical insight into the constitutionality of Sections 1343 and 1644.

In total, six district courts have issued permanent injunctions against the challenged statutes and funding conditions. In addition, five courts have granted mandamus relief, thereby compelling the Attorney General to distribute withheld Byrne JAG Program funds. These decisions have been appealed to their respective circuit courts. One circuit so far—the Third Circuit—has issued a ruling, affirming the lower court's ruling on different grounds and declining to address the anti-commandeering question. The other appeals remain pending.

Table 1. Current Litigation: Tenth Amendment Challenges to Sections 1373 and 1644

State and Local Government Challenges Byrne JAG Program Conditions

Case	Holding and Reasoning	Remedy	Procedural Posture	Status
City and County of San Francisco v. Sessions Nos. 17-cv-4642, 17-cv-4701 N.D. Cal. City and County of San Francisco v. Barr Nos. 18-17308, 18-17311 9th Cir.	District court held that § 1373 violated Tenth Amendment as commandeering and therefore cannot serve as an applicable federal law for funding. Relied on *Murphy*.	District court granted permanent nationwide injunction and mandamus relief compelling distribution of funds; but stayed nationwide scope of injunction pending appeal.	On appeal to 9th Cir.	Argument heard on Dec. 2, 2019. Waiting for ruling.
City and County of San Francisco v. Sessions No. 18-cv-5146 N.D. Cal. City and County of San Francisco v. Barr No. 19-15947 9th Cir.	District court held that §§ 1373 and 1644 were unconstitutional under the Tenth Amendment's anti-commandeering principles. Incorporated reasoning from case above.	District court granted permanent nationwide injunction and mandamus relief compelling distribution of funds; but stayed nationwide scope of injunction pending appeal.	On appeal to 9th Cir.	Stayed pending completion of appeal in case above.
City of Philadelphia v. Sessions No. 17-cv-3894 E.D. Pa. City of Philadelphia v. Attorney General of the United States No. 18-2648 3d Cir.	District court held that § 1373 violated the Tenth Amendment's anti-commandeering principles. Relied on *Murphy*. 3d Cir. affirmed on different grounds, reasoning the conditions were imposed without statutory authority. Did not address anti-commandeering.	District court granted permanent injunction enjoining the challenged conditions and granted injunction requiring Immigration and Customs Enforcement (ICE) to comply with city policy requiring ICE to seek a judicial warrant in order for the City to hold an alien temporarily; issued declaratory judgment declaring the city complied with § 1373; and granted mandamus relief compelling distribution of funds. 3d Cir. affirmed, but vacated judicial warrant injunctive relief.	3d Cir. ruled on appeal and issued an opinion on Feb. 15, 2019. Request for circuit panel rehearing denied.	Supreme Ct. granted extension until Nov. 21, 2019 to file a petition for a writ of certiorari. As of Dec. 17, 2019, no petition has been filed.
City of Chicago v. Sessions No. 17-cv-5720 N.D. Ill. City of Chicago v. Barr No. 18-2885 7th Cir.	District court held that the Attorney General cannot impose compliance condition because § 1373 violates the Tenth Amendment as commandeering. Relied on *Murphy*.	District court issued permanent nationwide injunction; but stayed nationwide scope of permanent injunction.	On appeal to 7th Cir.	Case was argued and taken under advisement by Panel on Apr. 10, 2019. Waiting for ruling.

Case	Holding and Reasoning	Remedy	Procedural Posture	Status
States of New York v. Department of Justice Nos. 18-cv-6471, 18-cv-6474 (consolidated) S.D.N.Y. State of New York v. Department of Justice Nos. 19-267, 19-275 (consolidated)	District court held that §1373 was facially unconstitutional under anti-commandeering doctrine of Tenth Amendment. Relied on *Murphy*.	District court granted permanent injunction limited to parties in suit and mandamus relief compelling distribution of funds.	On appeal to 2d Cir.	Argument heard on June 18, 2019. Waiting for ruling.
State of Oregon v. Trump No. 18-cv-01959 D. Or. State of Oregon v. Trump No. 19-35843 9th Cir.	District court held that §§ 1373 and 1644 are unconstitutional under the Tenth Amendment's anti-commandeering principles. Relied on *Murphy*.	District court granted permanent injunction limited to parties in suit and mandamus relief compelling distribution of funds.	On appeal to 9th Cir.	Opening brief by defendant due Jan. 13, 2020.

Source: Congressional Research Service

Preemption Challenge to State Information-Sharing Restrictions

The litigation surrounding Sections 1373 and 1644 also includes a challenge by the United States to SB-54, which regulates California's participation in immigration enforcement by prohibiting involvement by law enforcement agencies. In particular, the information-sharing proscription in California's SB-54, codified in Cal. Gov't Code § 7284.6, prohibits local law enforcement from providing information regarding an individual's release date from custody, as well as providing personal information, such as a home or work address. The United States requested the U.S. District Court for the Eastern District of California to enjoin SB-54's prohibition on information sharing, claiming it contravenes Section 1373. In opposition, California maintained that Section 1373 is unconstitutional under *Murphy* because it dictates state legislative activity. The United States claimed *Murphy* is not governing precedent, arguing that the Tenth Amendment's anti-commandeering principles do not hinder sharing information between the federal government and state and local governments. Although the district court remarked that the constitutionality of Section 1373 is "highly suspect," it denied the United States' requested relief on SB-54's information-sharing prohibition on the ground that it does not directly conflict with Section 1373. The district court observed that Section 1373 addresses the exchange of information on immigration status in contrast to SB-54's prohibition on sharing release dates and personal information.

The United States is also challenging three California laws governing the state's regulation of private and public employers' involvement in immigration enforcement, as well as measures requiring the state attorney general to inspect the circumstances and conditions in detention facilities housing aliens. Although the district court generally upheld the California sanctuary measures, the United States prevailed in arguing that two provisions unlawfully discriminate against employers who voluntarily cooperate with federal immigration authorities.

On appeal to the Ninth Circuit, the United States argued Section 1373 prohibits SB-54's information-sharing provisions, claiming Section 1373 impliedly applies to information beyond immigration status. The Ninth Circuit panel affirmed the denial of injunctive relief on SB-54, agreeing with the district court that Section 1373 and SB-54 do not conflict. While the circuit court generally affirmed the district court's holdings on the other challenged state provisions, the United States prevailed in its argument that the

district court erred when it denied the United States's request to enjoin the AB-103 provision—codified in Cal. Gov't Code § 12532—that requires the state attorney general to review the circumstances surrounding the apprehension and transfer of immigration detainees.

Following the Ninth Circuit's decision, the United States filed a petition for a writ of certiorari. A response to the petition is expected no later than December 23, 2019.

Table 2. Current Litigation

United States's Challenge to SB-54's Information-Sharing Restriction as Preempted

Case	Holding and Reasoning	Remedy	Procedural Posture	Status
United States v. California No. 18-cv-490 E.D. Cal. United States v. California No. 18-16496 9th Cir.	District court held that § 1373 does not conflict with SB-54. 9th Cir. affirmed, agreeing section SB-54 does not conflict with § 1373.	District Court denied request for preliminary injunction on SB-54. 9th Cir. affirmed the denial of motion for a preliminary injunction as to SB-54's information-sharing restrictions.	9th Cir. ruled on appeal and issued opinion on Apr. 18, 2019.	Petition for writ of certiorari filed with Supreme Court on Oct. 22, 2019.

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