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**THE HONORABLE JOSEPH F. MURPHY, JR. LEGAL
WRITING COMPETITION
WINNING STUDENT COMMENT***

**HOW MARYLAND'S SANCTUARY POLICIES ISOLATE
FEDERAL LAW AND THE CONSTITUTION WHILE
UNDERMINING CRIMINAL JUSTICE**

By: Douglas R. Sahmel

After the September 11, 2001 ("9/11") terrorist attacks, some have clamored for greater involvement from local police in immigration law enforcement, largely on the ground that immigration reform is critical to homeland security.¹

A debate has ensued, however, as to whether state and local law enforcement authorities can, or could be required to, enforce federal immigration laws.² Within this debate, two notable trends are: (1) efforts by the White House and Congress to expand the role of local police to voluntarily enforce federal immigration law³; and (2) the resurgence of state and city "sanctuary" policies opposed to such a role expansion.⁴ Maryland has drawn national media attention with

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1. Lisa M. Seghetti, Stephen R. Viña, and Karma Ester, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, CONGRESSIONAL RESEARCH SERVICE 1 (Oct. 13, 2005) (Order Code RL32270); Michael M. Hethmon, *In The Aftermath Of September 11: Defending Civil Liberties In The Nation's Capital: The Treatment Of Immigrants: THE CHIMERA AND THE COP: LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAW*, 8 D.C. L. REV. 83 (2004).
2. SEGHETTI, *supra*, note 1, at 4.
3. Michael J. Wishnie, 22nd Annual Edward V. Sparer Symposium: *Terrorism and the Constitution: Civil Liberties in a New America: State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).
4. SEGHETTI, *supra*, note 1, "Summary", and at 22-23.

such policies in effect in the cities of Baltimore, Takoma Park, and Greenbelt, and in Montgomery and Prince George's Counties.⁵

Congress squarely took aim at sanctuary policies in two federal statutes well before 9/11—in 1996—but some localities nationwide continue to ignore these laws.⁶ Several bills pending in the 109th Congress would in part undermine these non-cooperation policies and clarify that they are violative of federal law.⁷ In Maryland, the General Assembly last session saw heated battles over immigration⁸—which is increasingly becoming an election issue—and could see more of the same in 2006. Indeed, the results of the coming immigration debate on Capitol Hill and in Annapolis could have profound implications for Maryland's criminal justice system.

This essay will argue that Maryland's sanctuary ordinances violate both federal law and the U.S. Constitution, while undermining our criminal justice system. Part I identifies the problem; Part II discusses the need for change; Part III discusses alternatives for addressing the problem; and Part IV advocates one or more proposals.

I. THE PROBLEM: SANCTUARY LAWS' DEFIANCE OF FEDERAL AND CONSTITUTIONAL LAW CREATES A LEGAL FOG THAT UNDERMINES OUR CRIMINAL JUSTICE SYSTEM AND SECURITY

A. *Background: The 1996 Laws and Maryland's Contrary Sanctuary Ordinances*

Section 642(a) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 (8 U.S.C. 1373(a)) provides that, “[n]otwithstanding 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

5. See Alex Meneses Mivashita, *Maryland Communities Protest Patriot Act*, Fox News, Oct. 13, 2003, <http://www.foxnews.com/story/0,2933,99927,00.html> (last visited Jan. 27, 2006).

6. SEGHETTI, *supra* note 1, at note 76.

7. Andorra Bruno, Ruth Ellen Wasem, Alison Siskin, and Blas Nuñez-Neto, Michael John Garcia, Stephen R. Viña, and Karma Ester, *Immigration Legislation and Issues in the 109th Congress*, CONGRESSIONAL RESEARCH SERVICE, 5 (Oct. 17, 2005) (Order Code RL33125).

8. See David Abrams, *Security and Hospitality Fuel Immigration Debate*, THE CAPITAL (Annapolis, MD), March 18, 2005.

Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”⁹

Using nearly identical language, Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 states that, “[n]otwithstanding 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.”¹⁰

In sharp contrast to this language, however, Maryland’s local sanctuary laws expressly impede government employees from cooperating and communicating with federal immigration authorities. For instance, a 2003 Baltimore City Council resolution—entitled the ‘Preservation of Civil Liberties Resolution – USA Patriot Act’—directs the Baltimore City Police Department to “[r]efrain from enforcing immigration matters, which are entirely the responsibility of the Department of Homeland Security.”¹¹ A Prince George’s County Council resolution directs “the Chief of Police and each member of the Prince George’s County Police Department” to “[r]efrain from enforcing immigration matters that are the responsibility of the Department of Homeland Security.”¹² Resolutions passed by the Takoma Park City Council, the Greenbelt City Council, and the Montgomery County Council contain analogous language.¹³

Proponents of sanctuary laws generally assert that the local authority for enacting these directives is grounded in the states’ Tenth Amendment sovereignty right, and on the view that the “[p]ower to

9. 8 U.S.C.S. § 1373(a) (2005).

10. 8 U.S.C.S. § 1644 (2005).

11. Baltimore City Council Resolution 03-1046(1)(a), American Civil Liberties Union, Baltimore, MD City Council Resolution, <http://www.aclu.org/safefree/resources/17260res20030519.html> (last visited Jan. 30, 2006).

12. Prince George’s County Council Resolution No. CR-78-2003, American Civil Liberties Union, Prince George’s County, MD, <http://www.aclu.org/safefree/resources/16982res20031215.html> (last visited Jan. 30, 2006).

13. See American Civil Liberties Union, Takoma Park City Council Resolution on Protecting Civil Liberties, <http://www.aclu.org/safefree/resources/17656res20021029.html> (last visited Jan. 30, 2006); Maryland Latino Coalition for Justice, Resolution to Protect Civil Liberties in Greenbelt --- presented by Greenbelt Bill of Rights Defense Coalition, http://www.latinosinmaryland.org/tool_kitresolutiongreen.htm (last visited Jan. 30, 2006); American Civil Liberties Union, Montgomery County, MD Resolution, <http://www.aclu.org/safefree/resources/17711res20031001.html> (last visited Jan. 30, 2006).

regulate immigration is unquestionably exclusively a federal power."¹⁴ Sanctuary policy critics, however, maintain that local non-cooperation ordinances violate federal law and the Constitution as they are preempted by the 1996 statutes under the Supremacy Clause.¹⁵

B. Non-Cooperation Laws Create A Legal Fog That Undermines Criminal Justice And Our Security

A major problem posed by sanctuary laws' defiance of federal law is that they create a legal fog that undermines our criminal justice system and security. As a police officer from sanctuary city Houston, Texas, told the House Judiciary Committee in 2003:

When local agencies around the country enact a "sanctuary law" type of policy, society at large is placed at risk. Sanctuary laws undermine the authority and effectiveness of street level officers and completely render them ineffective to prevent potential further criminal activity. With this type of policy, authorities may never know if an individual is in the United States illegally and if they could have been removed before they had the opportunity to commit a criminal act.¹⁶

The legal fog and hamstringing of law enforcement that sanctuary laws engender present real dangers to not only Marylanders, but to all Americans.

C. Sanctuary Laws' Invalidity

Sanctuary laws are invalid for three reasons: first, sanctuary supporters' Tenth Amendment claim turns federalism on its head while violating federal and Constitutional law. Second, the IIRIRA and PRWORA provisions are legitimate federal enactments that preempt contrary local law under the Supremacy Clause. Third, by brazenly violating statutory and Constitutional law and defying Congress's will, sanctuary policies are incongruous with both our

14. *DeCanas v. Bica*, 424 U.S. 351, 354 (1976).

15. SEGHETTI, *supra* note 1, at 23.

16. New York City's 'Sanctuary' Policy and the Effect of Such Policies on Public Safety, Law Enforcement, and Immigration, Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the House Comm. on the Judiciary, 85-287 PDF, 108th Cong. 19 (Feb. 27, 2003) (Prepared Statement of John Nickell).

general governmental framework, and with the deference traditionally given to the federal immigration power.

(1) *Sanctuary Supporters' Tenth Amendment Claim Turns Federalism On Its Head To Violate Federal And Constitutional Law*

In order to evade rightful federal preemption, sanctuary supporters argue that states and localities have a sovereignty right under the Tenth Amendment to not participate in the federal enforcement of immigration law. This claim fails because it is inconsistent with basic federalism principles and is inapposite where the federal government merely invites, rather than requires, local involvement.

Interestingly, this very issue was litigated before the U.S. Second Circuit Court of Appeals in *City of New York v. United States*.¹⁷ There, a unanimous court struck down New York City's controversial sanctuary law and roundly rejected the city's Tenth Amendment challenge of federal preemption. The court wrote that this claim "asks us to turn the Tenth Amendment's shield against the federal government's using state and local governments to enact and administer federal programs into a sword allowing states and localities to engage in passive resistance that frustrates federal programs."¹⁸ Moreover, the Second Circuit explained that states "do not retain under the Tenth Amendment an untrammelled right to forbid all voluntary cooperation by state or local officials with particular federal programs."¹⁹ The City of New York rightly asserted that under *Printz v. United States*,²⁰ the Tenth Amendment is a bar to federal commandeering of state resources to enforce immigration law.²¹ However, as the Second Circuit noted, the Tenth Amendment offers no protection when, as here, the federal government *invites* states to enforce federal law.²²

Sanctuary supporters, then, turn federalism on its head in claiming the authority to violate federal law and the Supremacy Clause through naked legislative overreach. This power grab reflects a contempt for federal authority and Congress's will, as well as an erroneous view of

17. 179 F.3d 29 (1999).

18. *Id.* at 35.

19. *Id.* at 36.

20. 521 U.S. 898 (1997).

21. Huyen Pham, *The Inherent Flaws In The Inherent Authority Position: Why Inviting Local Enforcement Of Immigration Laws Violates The Constitution*, 31 FLA. ST. U. L. REV. 965, 975 (2004).

22. *City of New York*, *supra* note 17, at 36; Pham, *supra* note 21, at 975.

Tenth Amendment sovereignty. However noble its motives or convincing the guise of 'federalism,' a local government unmoored from superseding law and its constitutional responsibilities could cause much chaos, conflict, and confusion indeed.

(2) *Maryland's Sanctuary Laws Are Preempted By Sections 642 and 434 Under the Supremacy Clause*

IIRIRA § 642(a) and PRWORA § 434 trump contrary local laws under the Supremacy Clause of the U.S. Constitution.²³ Under the Supremacy Clause, "[w]henver the constitutional powers of the federal government and those of the state come into conflict, the latter must yield."²⁴ The resultant and overriding "Law of the Land"²⁵ is "as much a part of the law of each State, and as binding upon its authorities and people, as its own local constitution and laws."²⁶ Further, under Article 2 of the Declaration of Rights to the Maryland Constitution,

The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding.²⁷

The determinative question in this Supremacy Clause analysis is whether the application of the local law under review "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."²⁸ Here, Sections 642 and 434 state that localities "may not prohibit, or in any way restrict" employees from sharing immigration information with federal authorities. In 1996, Congress intended to undermine sanctuary ordinances, facilitate local government employees in voluntarily providing immigration

23. U.S. Const. art. VI, cl. 2.

24. *Florida v. Mellon*, 273 U.S. 12, 17 (1927).

25. U.S. Const., Art. VI, cl. 2.

26. *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 35 (1875).

27. Md. Const., Decl. of Rights art. 2.

28. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); See Seth P. Waxman and Trevor W. Morrison, What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause, 112 *YALE L.J.* 2195, 2215 (2003); See also, Bradford R. Clark, The Supremacy Clause as a Constraint on Federal Power, 71 *GEO. WASH. L. REV.* 91, 93 (2003).

information to federal authorities and, more broadly, foster local enforcement of immigration law.²⁹ Legislative history confirms that these were Congress's objectives in passing the 1996 provisions. The Conference Report to PRWORA states that:

The conferees intend to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens. This provision is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS. The conferees believe that immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the United States undetected and unapprehended.³⁰

Support for these Congressional purposes is also found in the fact that sanctuary laws have long been a Congressional target³¹ and, as some legislation now pending in Congress expressly states, that local non-cooperation laws violate Sections 642 and 434. For example, Section 4(a) of S. 1362, the Homeland Security Enhancement Act of 2005, provides that:

A statute, policy, or practice that prohibits a law enforcement officer of a State, or of a political subdivision of a State, from enforcing Federal immigration laws or from assisting or cooperating with Federal immigration law enforcement in the course of carrying out the law enforcement duties of the officer or from providing information to an official of the United States Government regarding the immigration status of an individual who is believed to be illegally present in the United States is in violation of section

29. Craig B. Mousin, *A Clear View From The Prairie: Harold Washington And The People Of Illinois Respond To Federal Encroachment Of Human Rights*, 29 S. ILL. U. L. J. 285, 304-305 (Winter, 2005) (explaining that "Congress sought to counter...local [non-cooperation] responses").

30. H.R. CONF. REP. NO. 104-725, at 383 (1996), reprinted in 1996 U.S.C.C.A.N. 2649, 2771.

31. David Firestone, *Giuliani to Sue Over Provision on Welfare*, N.Y. TIMES, Sept. 12, 1996, Section B, Page 1, Column 5.

642(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1373(a)) and section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. 1644).³²

(a) Maryland's sanctuary laws directly conflict with the 1996 provisions and are therefore preempted by those federal statutes

Maryland's sanctuary laws are in direct conflict with Sections 642 and 434 by requiring local police to "refrain" from the very conduct—the sharing of immigration information with federal authorities—that Congress says localities "may not prohibit, or in any way restrict" under Sections 642 and 434. Both the federal and local laws target local authorities, but federal law promotes precisely what the local law inhibits. In so doing, non-cooperation laws constitute a 'restriction' or 'prohibition' within the plain meaning of the federal statutory prohibitions, and present a blatant 'obstacle' to the goals of the 1996 laws. Toward this end, some sanctuary ordinances even brashly state their disapproval of Congress' goal of local immigration enforcement, thus laying bare the fact that they directly oppose the federal objectives at issue here. The Montgomery County Council Resolution, for instance, opines that:

[I]n addition to the passage of the Patriot Act, the federal government has taken a number of other steps in the aftermath of September 11 that threaten to undermine the fundamental rights and liberties guaranteed by the Constitutions of the State of Maryland and the United States, as well as Community Policing and other law enforcement strategies designed to build trust between the police and communities, such as encouraging local law enforcement to enforce provisions of federal immigration law that historically have been an exclusive province of the federal government. . . .³³

This issue, then, is not a case of a federal statute being silent or ambiguous, but merely disagreeable to certain local authorities' policy and political preferences. States are bound under the Supremacy Clause by the entire law of the land, not just to those laws in line with

32. S. 1362, 109th Cong. (2005) (Emphasis added).

33. Montgomery County Resolution No. 107-56 (2003) (Emphasis added).

the policy or political preferences of the local governing majority. Local disapproval of certain federal laws, moreover, does not justify manifesting that dislike through uncooperative local legislation.

Further, with respect to sanctuary laws' hindrance of the "full purposes and objectives of Congress," some observers argue that non-cooperation ordinances interfere with the Constitutional objectives of the federal government. Under this view, non-cooperation policies impede the United States' Constitutionally-conferred "guarantee" to protect the states from both "invasion" and "domestic violence" under Article IV, § IV.³⁴ When the local police who interact most closely with the illegal alien population do not assist the more-removed federal authorities, the federal government's ability to protect the states is significantly diminished than had that cooperation occurred. This sort of impediment, one could argue, is a particularly flagrant "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."³⁵

Therefore, as Maryland's sanctuary laws frustrate both the Congressional and Constitutional objectives of the federal government, they are preempted by the 1996 statutes under the Supremacy Clause.

(3) Sanctuary Laws are Inconsistent with Both Supreme Court Precedent and the General Deference Given to the Federal Government in Immigration Matters

(a) Sections 642 and 434 are valid Congressional enactments pursuant to the long-recognized federal immigration power

IIRIRA § 642(a) and PRWORA § 434 are plainly valid enactments by Congress pursuant to its long-recognized 'plenary' power over immigration matters.³⁶ The Supreme Court "without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'"³⁷ Notably, the Court in the 19th century

34. Bill O'Reilly, Politicians Failing To Protect and Serve, *The Sun-Sentinel*, Jan. 11, 2003, at 19A.

35. HINES, *supra* note 28, at 67.

36. See Note, The Constitutional Requirement of Judicial Review for Administrative Deportation Decisions, 110 HARV. L. REV. 1850, 1851 (1998) (explaining Congress's "plenary power in the [immigration] field").

37. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (quoting *Boutilier v. INS*, 386 U.S. 118, 123 (1967)).

struck down various state efforts to regulate immigration—and affirmed Congressional authority to do so—in seminal decisions such as *The Passenger Cases* (1849),³⁸ the *Head Money Cases* (1884),³⁹ and *The Chinese Exclusion Case* (1889)⁴⁰. This precedent helped establish Congress's well-settled authority over immigration matters.⁴¹

(b) Sanctuary laws are inconsistent with deference given to the federal immigration power.

Finally, sanctuary laws are inconsistent with the deference generally given to the federal government in immigration matters. As the Supreme Court explained in *Mathews v. Diaz*, "[f]or reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."⁴² When states and localities enact their own immigration policies, it contradicts this fundamental principle and harkens back to the immigration policies of the early American states, which Congress eventually harmonized by asserting its national power over immigration.⁴³

In sum, sanctuary policies violate federal laws, the Constitution, and are inconsistent with both our general federal framework and with the deference traditionally given to the federal government in immigration matters. They find no support in the Constitution, statutory law, or Supreme Court precedent, and are antithetical to our federalist system.

II. THE NEED FOR CHANGE

There is an urgent need to eliminate Maryland's sanctuary laws and ensure the uniform enforcement of immigration law in the State. Non-cooperation policies are unlawful and unconstitutional, undermine law enforcement and criminal justice, and imperil our domestic and

38. 48 U.S. 283 (1849).

39. 112 U.S. 580 (1884).

40. 130 U.S. 581 (1889).

41. Stephen L. Legomsky, *Immigration and Refugee Law and Policy* (4th ed. 2005), at 104-5, 108.

42. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

43. LEGOMSKY, *supra* note 41, at 14-15; See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993); see also *Developments in the Law -- Jobs and Borders, v. The Constitutionality of Immigration Federalism*, 118 HARV. L. REV. 2247, 2268 (2005).

national security. Moreover, the dangers of these illegitimate policies are significantly heightened in the post-9/11 era.

Sanctuary laws hinder the administration of criminal justice by, among other things, sowing confusion—and perhaps conflict—among local law enforcement, citizens, and noncitizens. Today, immigration law in Maryland is enforced differently across various cities and counties. This is inconsistent with our fundamental notions of a national immigration system and of a “supreme Law of the Land.”⁴⁴

For example, a Prince George's County police officer, under that jurisdiction's sanctuary policy, is barred from sharing immigration information with the U.S. Department of Homeland Security; his counterpart across the county line in Anne Arundel County, however, is free to do so. Should that Prince George's County officer wish to enforce immigration law in accordance with the 1996 laws, is he bound by the local Resolution? Should this officer be punished for violating one law, though he followed another? Further, how would a highly mobile illegal criminal alien fare in the state's differing jurisdictions if, say, local and municipal law enforcement were collaborating to apprehend him?

These and other problems create significant uncertainty for all involved, and could conceivably spark conflicts between the State's counties and cities. The local governments who brazenly enacted sanctuary laws would do well to recall James Madison's Federalist No. 10, where he observed: “The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished.”⁴⁵

Non-cooperation policies primarily endanger our national security by, as the name suggests, requiring that local police refuse to cooperate in immigration law enforcement. This audacious flouting of federal law—that was passed by elected representatives to promote public safety and the general welfare, among other things—is particularly troubling in a post-9/11 world.

Sanctuary laws seem especially hazardous in light of the broad trends—namely terrorism, crime, and illegal immigration—significantly impacting today's society. First, with respect to terrorism, the National Commission on Terrorist Attacks Upon the

44. U.S. Const., Art. VI, cl. 2.

45. The Federalist No. 10 (James Madison), http://thomas.loc.gov/home/histdox/fed_10.html (last visited Jan. 29, 2006).

United States (“Commission”), in chilling detail, uncovered the many security-related failures of our immigration system before 9/11; the Commission consequently made immigration reform a dominant theme in its recommendations.⁴⁶ Also, as journalist and author Michelle Malkin noted in her 2004 testimony before the Senate Judiciary Committee:

More than half of the 48 Islamic radicals convicted or tied to recent terrorist plots in the United States over the past decade either were themselves illegal aliens or relied on illegals to get fake IDs. Immigration violators participated in the first attack on the World Trade Center, the Los Angeles Millenium bombing plot, and the New York subway bombing conspiracy. Three of the 9/11 hijackers were here illegally; two had previous immigration violations . . . Three 9/11 hijackers—Mohammed Atta, Hani Hanjour, and Ziad Jarrah—came into contact with state and local police before the attacks for speeding. Atta and Hanjour were visa violators.⁴⁷

In fact on September 9, 2001, a Maryland state trooper stopped 9/11 hijacker Ziad Jarrah in rural Cecil County; the speeding ticket was later found in his rental car’s glove compartment at Newark Airport.⁴⁸

Second, and beyond the terrorism context, sanctuary laws endanger Marylanders’ domestic security by ignoring ever-rising immigration levels and crime, as well as their occasional intersection. Regarding immigration, the number of illegal aliens in Maryland doubled to 250,000 between 2000 and 2004, according to the Pew Hispanic Center.⁴⁹ The explosion of legal and illegal immigration in the state is

46. Michael John Garcia and Ruth Ellen Wasem, *9/11 Commission: Current Legislative Proposals for U.S. Immigration Law and Policy*, Congressional Research Service, 1 (Oct. 18, 2004) (Order Code RL32616).

47. State and Local Authority to Enforce Immigration Law: Evaluating a United Approach for Stopping Terrorists, Hearing Before the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary 108th Cong. (April 22, 2004) (statement of Michelle Malkin).

48. Sheila MacVicar and Caroline Faraj, *September 11 Hijacker Questioned In January 2001*, CNN, Aug. 1, 2002, <http://archives.cnn.com/2002/US/08/01/cia.hijacker/index.html> (last visited Jan. 27, 2006).

49. Jeffrey S. Passel, *Estimates of the Size and Characteristics of the Undocumented Population*, Pew Hispanic Center, March 21, 2005, at 7; S.A. Miller, Ehrlich says Duncan wrong on illegal aliens; Calls rival's accepting attitude 'divergent', THE WASHINGTON TIMES, Aug. 19, 2005, at A01.

creating a major political issue in the run-up to the 2006 gubernatorial election. As CNN commentator Lou Dobbs observed, “the numbers have grown so fast [in Maryland], it's now shaping into a campaign theme.”⁵⁰

With respect to immigration and crime, illegal immigration has become the number one federal crime in the United States, with one-third of federal prosecutions in Fiscal Year 2004 relating to immigration—the largest share of all such prosecutions.⁵¹ The United States is also home to more than “400,000 alien absconders and more than 85,000 criminal illegal aliens,” as Congressman Charles F. Bass noted on the House Floor last year.⁵²

In sum, sanctuary ordinances, in addition to lacking valid legal justification, impede criminal justice and endanger Marylanders in a variety of ways. Given the interplay between terrorism, crime, and soaring immigration levels, an approach that brazenly ignores federal law and Congressional intent should not be tolerated, particularly with respect to security matters. Sanctuary laws should no longer be seen as the harmless political protest of a few “progressive” councils (Montgomery and Prince George’s Counties together have 1.7 million people, while Baltimore City has 630,000),⁵³ and it is imperative that these policies be abolished.

III. ALTERNATIVES FOR ADDRESSING THE PROBLEM

Various alternatives have been put forth, many in legislation introduced in Congress, for remedying the problem of sanctuary policies. Among these numerous suggestions are:

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50. Lou Dobbs, Lou Dobbs Tonight: Official English?; Terrorists Target Navy Ships; Illegal Aliens in Maryland; Merck Loses Vioxx Case; Secretary Rice Changes China Rhetoric; Safety vs. Privacy in Airports (Television Broadcast, Aug. 19, 2005), <http://transcripts.cnn.com/TRANSCRIPTS/0508/19/ldt.01.html> (last visited Jan. 28, 2006).
 51. Le Templar, Illegal Entry Tops Crime List, EAST VALLEY TRIBUNE, Aug. 24, 2005, <http://www.eastvalleytribune.com/index.php?sty=46710> (last visited Jan. 27, 2006); Transactional Records Access Clearinghouse, Prosecution Of Immigration Cases Surge In U.S.; Sentences Slump; Massive Jump Found In One Judicial District (2005), at <http://trac.syr.edu/tracins/latest/current/> (last visited Jan. 29, 2006).
 52. 151 Cong. Rec. H11956 (Dec. 16, 2005) (statement of Rep. Bass).
 53. U.S. Bureau of the Census, State & County Quickfacts, <http://quickfacts.census.gov/qfd/states/24/24031.html> (Montgomery County); <http://quickfacts.census.gov/qfd/states/24/24033.html> (Prince George’s County); <http://quickfacts.census.gov/qfd/states/24/2404000.html> (Baltimore City) (last visited Jan. 27, 2006).

First, Congress could withhold federal funds from local governments that refuse to enforce immigration law.⁵⁴

Second, the federal government, groups, or individuals could mount legal challenges in sanctuary cities, counties, or states. Fox News commentator Bill O'Reilly has suggested that "embarrassing lawsuits" against a locality and its officials might be effective as "[p]olitical pressure does not seem to be working."⁵⁵ Interest groups such as the Friends of Immigration Law Enforcement (FILE) have been suing sanctuary localities for years.⁵⁶

Third, Congress could pass legislation—such as S.1438, the Comprehensive Enforcement and Immigration Reform Act of 2005—clarifying that states possess 'inherent' authority to enforce federal immigration law; in such a measure, Congress could expressly declare that these sanctuary laws violate federal law.⁵⁷

Fourth, Congress more generally could enact legislation—such as H.R. 3137, the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2005—to broaden the local role in immigration law enforcement in various ways.⁵⁸

Also, Congress could pass legislation providing various kinds of immunities and reimbursement to localities assisting in enforcing federal immigration law.⁵⁹

IV. SUGGESTED ALTERNATIVES

Regarding these various proposals, enacting federal legislation that would withhold funds from sanctuary cities and counties has the advantage of being a quick way to punish and deter defiant localities. Its disadvantages, however, are that it somewhat circumvents the fact that sanctuary policies are illegal, and it does not guarantee compliance. A worst-case scenario, moreover, is that such a policy

54. BRUNO, *supra* note 7, at 5; See PHAM, *supra* note 21, at note 56 (observing that the CLEAR Act "requires states who receive federal reimbursement under section 241(i) of the Immigration and Nationality Act . . . or who want to receive additional federal funds available under the CLEAR Act to pass laws permitting local enforcement of immigration laws").

55. Bill O'Reilly, The O'Reilly Factor: Talking Points Memo and Top Story (Television Broadcast, Jan. 3, 2003).

56. Jerry Seper, Illegal Criminal Aliens Abound in U.S., THE WASHINGTON TIMES, Jan. 26, 2004, at A01.

57. SEGHETTI, *supra* note 1, at 19.

58. *Id.*

59. BRUNO, *supra* note 7, at 5.

might endanger citizens by depriving a locality of needed homeland security funding that later experienced a terrorist attack.

With respect to the notion of challenging sanctuary policies in court, this approach could provide a strong incentive for local officials to rethink and perhaps abolish their sanctuary policies, as some observers have noted. Such litigation would also enjoy extensive media coverage that could raise public awareness of the issue. Some disadvantages of this approach, however, are that it might be difficult to find plaintiffs with standing, and the possibility of a legal setback looms.

As to the idea of federal legislation clarifying that states possess inherent authority to enforce immigration law, this approach would help clear up the significant confusion and ongoing academic debate as to whether states do possess this authority.⁶⁰ Mere statements on inherent authority and sanctuary laws' illegality, however, would be unlikely to prompt localities to abolish their sanctuary policies; such a statement would be more effective as part of a broader package.

The various proposals to broaden local involvement in immigration matters could play a significant role in spurring localities to voluntarily enforce immigration law in concert with federal authorities. (These proposals, and their ramifications and justifications, are well beyond the scope of this paper.) As with declarations about states' inherent authority, however, they alone would probably not provide enough of a 'stick' to prompt localities to rethink or abolish their sanctuary laws.

Finally, with regard to legislation providing various kinds of immunities and reimbursements to cooperative localities, such legislation would be helpful but should similarly be part of a broader package of reforms. One disadvantage is that these benefits to localities would still not get at the problem of existing sanctuary laws.

In light of the strengths and weaknesses of these various proposals, the best approach would likely be to employ a patchwork of these suggestions:

First, Congressional withholding of funds to sanctuary cities and counties could provide the strongest 'stick' to modify these localities' conduct. By depriving these cities of money, a local government's shrinking coffers might cause officials to rethink what is primarily political opposition to enforcing immigration law.

60. See HETHMON, *supra* note 1, at 89-92.

Second, initiating litigation challenging a sanctuary policy is also advisable, particularly because the federal government would likely prevail on the merits in the vast majority of courts. These legal challenges could conceivably be brought by the federal government—such as the Homeland Security Secretary or by the Attorney General—by groups, or by a private citizen with standing.⁶¹ As to Maryland’s sanctuary policies specifically, one could imagine that should such litigation reach the generally conservative Fourth Circuit, that court would reach a conclusion similar to that reached in *City of New York*. Further, should the issue of Maryland police enforcing federal immigration law arise in litigation, plaintiffs could rely on *Department of Public Safety and Correctional Services v. Berg*,⁶² where the Court of Appeals expressly held that “state and local law enforcement officials may appropriately enforce federal law.”⁶³

Third, Congress should pass a comprehensive package that: declares states’ inherent authority and the illegality of sanctuary policies; provides various ‘carrots’ to reward cooperative local governments; and expands and encourages local immigration law enforcement. Increasing local involvement might help change the current, muddled paradigm in immigration law enforcement such that sanctuary cities would be viewed as tremendously unhelpful in the homeland security effort. Several bills currently pending in the 109th Congress would do many of these exact things.⁶⁴ Legislative efforts in the Maryland General Assembly could complement Congress’ objectives in this area as well.

Finally, these efforts should be complemented by a well-organized lobbying effort, at both the so-called ‘grassroots’ and ‘grasstops’ levels, to influence the Maryland governments with sanctuary laws to repeal them. At the ‘grassroots’, this effort could involve, among other things, public opinion polling and airing local advertisements and editorials to gin up public support for eliminating sanctuary policies. At the ‘grasstops’, various organizations such as the U.S. Conference of Mayors, the National Association of Counties, and the National Governors’ Association—along with state- and national-level criminal justice organizations such as the National Sheriffs’ Association—should be enlisted in this effort, which should be coupled with pressure from state public officials.

61. HETHMON, *supra* note 1 at 95-96.

62. 342 Md. 126 (1996).

63. *Id.* at 139.

64. SEGHETTI, *supra* note 1, at 1.