Center for Immigration Studies

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Analysis of S.2146, the "Stop Sanctuary Policies and Protect Americans Act"

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Sen. David Vitter (R-La.) and several cosponsors have introduced a bill, S.2146, designed to block state or local governments from enacting or continuing sanctuary laws or policies that protect aliens from the reach of federal immigration authorities, most especially with regard to aliens arrested and convicted for criminal offenses.[1]

We at the Center for Immigration Studies have written long and often about the harm caused by sanctuaries.[2] We also have written on how the Davis-Oliver Act, a version of which has passed out of the House Judiciary Committee, but which subsequently has gone nowhere, would remedy many of the current enforcement-related problems — both local sanctuary policies *and* the Obama administration's deliberate suppression of enforcement.[3] Sen. Vitter's bill does not speak to the other critical immigration enforcement issues that are addressed by both the House and Senate versions of the Davis-Oliver bill, and for that reason, we believe Davis-Oliver is a better option.

However, it is important to examine S.2146 in the context of more narrowly focused sanctuary legislation to determine whether it contains what we believe represent the key elements of any successful anti-sanctuary bill, without which failure is likely — or worse, that might invoke the "rule of unintended consequences" and actually feed fuel to the sanctuary fire.[4] The key elements are these:

- Encourage state and local cooperation with federal immigration enforcement efforts through grants, information sharing, exchange programs, or other innovative means.
- Conversely, provide clear disincentives for state or local governments to obstruct federal immigration efforts by establishing monetary or other sanctions if they initiate sanctuary policies.
- Inhibit third-party attempts to impede state or local law enforcement officers from cooperating with federal immigration efforts by providing immunity to officers when engaging in such cooperative efforts, including complying with detainers or providing information.

This is an analysis of Sen. Vitter's bill, viewed through the lens of those key elements.[5]

Section 1

Articulates the short title of the bill, the "Stop Sanctuary Policies and Protect Americans Act".

Section 2

Establishes the statutory definition of a sanctuary jurisdiction, as a state or local government with laws, rules, or practices that either:

1. Violate the provisions of Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[6] which forbids federal, state, or local government entities, officials, persons, or agencies from "prohibit[ing], or in any way restrict[ing], any government entity or official from sending

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to, or receiving from, the Immigration and Naturalization Service [now ICE] information regarding the citizenship or immigration status, lawful or unlawful, of any individual";[7] or

2. Prohibit any government entity or official from complying with a detainer or a request to notify the Department of Homeland Security about the release of an alien that has been made pursuant to the Immigration and Nationality Act (INA) or regulations issued pursuant thereto.

Section 3

SCAAP and COPS Grants

Subsection (a)(1) renders sanctuary jurisdictions ineligible for funding under two important law enforcement programs: the State Criminal Alien Assistance Program (SCAAP) and the Community Oriented Policing Services Program (COPS), both administered by the Justice Department. Clause 3(a)(1)(C) of the bill requires the attorney general (AG) and Department of Homeland Security (DHS) secretary to terminate funding 30 days after notifying an agency that it has been placed on the sanctuary jurisdictions list required by Subsection 3(d) (described below) unless a determination is made that the jurisdiction is no longer a sanctuary — presumably because it has mended its ways after receiving a notification.

This funding debarment is a welcome and long-overdue development. Rewarding sanctuary jurisdictions that obstruct national immigration enforcement efforts (and in the process render their own communities less safe) by providing hefty federal grant monies is the height of absurdity.

In federal fiscal year 2014, the federal government disbursed more than $322 million in SCAAP and over $162 million in COPS funds,[8] including substantial amounts to various sanctuary jurisdictions. At last count, the number of such jurisdictions had risen to 340, up from a count of 276 just a year ago.[9] Though the increase in sanctuaries can be laid at the doorstep of an out-of-control chief executive willing to tolerate any amount of defiance of federal immigration enforcement efforts from state and local jurisdictions (even while suing those states that attempt to *aid* in such enforcement on the grounds that immigration is a federal preserve), the fact remains that, under our Constitution, the power of the purse is a distinctly congressional prerogative, and yet Congress has been shockingly loath to use its fiscal muscles to curb this flouting of federal law.

The debarment provision relating to COPS grants at Clause 3(a)(1)(B) contains an interesting exemption for law enforcement agencies: They are only ineligible for these funds if the rules, practices, policies, or operating procedures that impede information exchange or compliance with detainers come from within — that is, from the sheriff's office or police department itself. If, on the other hand, their inability to cooperate is the result of external directives, laws, or ordinances (as with California county sheriffs who need only point to that state's TRUST Act as the basis for their inability to honor detainers[10]), the bill provides them safe haven from withholding of grant monies under the program. This would appear to be counter-intuitive for a bill designed to curb sanctuary jurisdiction abuses, but many sheriffs and police chiefs (who are powerful political figures in their own right) have noted the dilemma they face when confronted with diametrically opposing sets of rules.

The bill combats this external interference by aiming directly at the offending governmental body that has passed the law forbidding cooperation with immigration authorities by withholding community block grants (see immediately below).

CDBG Grants

Paragraph 3(a)(2) prohibits listed sanctuary jurisdictions from access to community development block grants (CDBGs). It does this by amending the federal statutes that establish and control the CDBGs (42 U.S.C. § 5301 et seq.),[11] including among other things, by inserting directly into those statutes the same definition of a sanctuary jurisdiction found earlier in the bill that controls SCAAP and COPS grants. CDBGs are administered by the secretary of Housing and Urban Development (HUD).

Debarring state or local sanctuary jurisdictions from receipt of CDBG grants should be a significant disincentive against impeding immigration enforcement efforts. Federal appropriations for CDBGs in FY 2014 amounted to $3.1 billion, no small amount, but if one includes carryover monies from prior FY appropriations, an eye-popping total of $6.37 billion in outlays to state and local governments were provided in 2014 alone through this grant program.[12]

The amended language in the CDBG statutes established by this bill includes a requirement that grant recipients certify to the satisfaction of the HUD secretary that they are not, and will not become during the period in which grant funds are received, sanctuary jurisdictions as defined by law.

The language added into 42 U.S.C. § 5304 by Section 3 of this bill also includes a new subsection (n) that requires remission of unobligated CDBG funds by identified sanctuary jurisdictions back to the HUD secretary for the period during which they have engaged in the proscribed conduct. These funds may thereafter be redistributed among eligible, non-sanctuary CDBG governments. This provision acts as both powerful disincentive to sanctuary jurisdictions and incentive to compliant jurisdictions, which can hope to obtain any funds returned to HUD by noncompliant governments.

The amended language of the bill does not, however, require reimbursement of funds inappropriately obligated by such jurisdictions despite identification and listing as sanctuaries. It should, and so in order to be consistent with various existing federal audit acts and regulations.[13]

Section 3 of the bill also adds a new subsection (o) to 42 U.S.C. § 5304. This subsection establishes the procedures for notification to debarred sanctuary jurisdictions and enforcement of the debarment, including return of unobligated grant funds. It does so by requiring the HUD secretary to verify on a quarterly basis that CDBG grantees are not enumerated in lists promulgated by the DHS secretary and AG pursuant to Subsection 3(d) of the bill (described below). Should a grantee be found on a sanctuaries list, the HUD secretary then notifies the state or local government of its ineligibility for CDBG funding.

Subsections 3(c) and 3(d) of the bill address "housekeeping" issues with relation to lists of identified sanctuary jurisdiction.

Subsection 3(c) obliges the DHS secretary to notify Congress within five days of any decision to terminate or refuse a grant to a state or local government based on its status as a sanctuary jurisdiction. But it is unclear what grant program this requirement applies to since, technically, the DHS secretary has no grant-making authority for any of the three programs identified in this legislation.

Subsection 3(d) requires the DHS secretary and AG, within 60 days and quarterly thereafter, to compile a list of sanctuary jurisdictions within the definition of the law; to notify each such jurisdiction of the determination; and to publish lists of these jurisdictions on the websites of their respective departments, along with pertinent details laying out their failures to cooperate.

The obligation to publish the information is particularly important and desirable from a public perspective given the opacity with which the current administration has comported itself.

Subsection (e) clarifies that state and local authorities are under no obligation to transmit information to immigration authorities relating to alien victims or witnesses of crimes. (It's worth noting, however, that there are times when transmission of such information is in the best interests of both the victim/witness and prosecuting authorities and there are a number of ways in which immigration law can be invoked to assist in providing such aliens lawful status to protect them and to assist in ensuring their availability to testify against the perpetrators.)

Section 4

Provides to state and local law enforcement officers immunities commensurate with those of federal immigration officers when complying with detainers or providing information under provisions of the Immigration and Nationality Act.

Significantly, this section relieves state and local governments from liability for the actions undertaken by their officers while engaged in cooperative efforts such as complying with federal immigration detainers and specifies that the United States shall be the defendant in legal actions, consistent with the provisions of 28 U.S.C. § 1346(b) as sole remedy for alleged tort wrongs. However, it would have been desirable if the bill also specifically required U.S. Attorney's Offices to immediately start proceedings to remove lawsuits to federal court should any legal action be filed in state courts based on state or local government actions in complying with detainers, holding aliens, or providing information relating to aliens. Such proceedings are found in a separate section of Title 28 not presently referenced in the bill.[14]

Section 5

Incorporates and builds on the language of a prior standalone bill from Sen. Ted Cruz (R-Texas) relating to criminal penalties for the federal crime of reentry after deportation.[15] As suggested by the section title, "Increased Penalties for Reentry of Removed Alien", there are a variety of penalty and sentencing enhancements. For instance, as presently constituted the section of law criminalizing illegal reentry provides for imprisonment of up to two years for a first, non-aggravated offense.[16] This section increases the maximum sentence to five years.

In addition, the section creates a new subsection in the reentry offense that establishes a maximum 10-year prison sentence for aliens caught reentering after having been removed three or more times previously.

Finally, for aliens who have either been convicted of aggravated felonies or convicted at least twice previously for the crime of reentry after deportation, Section 5 of the bill establishes new mandatory minimum sentences of between five and 20 years. (The existing reentry statute provides for a maximum possible 20-year sentence for aggravated felons, but requires no mandatory minimum. The existing statute also has no comparable proviso to that in the bill requiring mandatory minimum sentences for aliens convicted at least twice previously of reentry after deportation.)

The clear intent of the bill is to ensure, through use of mandatory minimum sentences against violent criminals and recidivist reentrants, that incarceration penalties are commensurate with the crimes and that they act as a deterrent against removed aliens, especially convicted aggravated felons, who may be dissuaded from reentering if they know unambiguously that, when caught, they will face significant jail time in a federal penal institution.

Section 6

Contains a "severability" provision that ensures that, should any portion of the enacted law be held invalid by the courts, the other provisions remain in full force and effect.

Conclusion

S.2146 meets the three-pronged test for anti-sanctuary legislation laid out in the beginning of this analysis:

- First, it creates powerful disincentives by rendering sanctuary jurisdictions ineligible for significant grants in a range of areas.

- Second, it establishes incentives by ensuring that grant funds prohibited to sanctuary jurisdictions are redistributed to governments that cooperate with federal immigration enforcement efforts. While the incentives do not go as far as those found in the Davis-Oliver Act bills, they are a good beginning in the context of a limited focus anti-sanctuary bill.

- Third, it provides state and local officers with immunities to the same extent enjoyed by federal immigration agents while engaged in cooperative enforcement efforts. In fact, it goes further by also transferring liability from state and local governments to the federal government under the provisions of the Federal Tort Claims Act.

It will undoubtedly be argued that the disincentivizing provisions in this bill are coercive in nature. That is self-evidently true, but not unduly so, and certainly appropriate. It is ironic and disturbing to contemplate how long state and local sanctuary governments have been thumbing their noses so vigorously at federal immigration programs with one hand, while extending the other to Congress in the internationally recognized symbol of "gimme".

It's also important to recognize that the provisions of this bill do not mandate that state and local governments do anything; rather, they only require that these governments *refrain* from doing something, that "something" being, in this case, obstructing and impeding the statutory scheme for immigration enforcement which has been enacted pursuant to the unique authority granted the United States Congress by the Constitution.[17]

Finally, the bill also has the added benefit of establishing enhanced sentencing penalties for aliens who choose to defy the law by returning illegally after having been removed. While this has no direct effect on sanctuary jurisdictions, it is certainly an important deterrent against removed aliens who may be contemplating illegal return to the United States after deportation.

All in all, not a bad package.

End Notes

[1] Analysis of S.2146, the "Stop Sanctuary Policies and Protect Americans Act" is based on the October 7, 2015, version of the bill found at Govtrack.us.

[2] Jessica Vaughan, "Point: Sanctuary Policies Mainly Protect the Predators", op-ed, InsideSources.com, July 31, 2015.

[3] Dan Cadman, "Analysis of the Davis-Oliver Act", Center for Immigration Studies, July 2015.

[4] For examples embodying the rule of unintended consequences, see W. D. Reasoner, "The Rule of Unintended Consequences: Executive Order May Put Illegal Alien Youths at Risk", Center for Immigration Studies blog, June 18, 2012; and Dan Cadman, "Congress's Proposed Cure for Sanctuary Cities Must Not Be Worse Than the Disease", Center for Immigration Studies blog, July 20, 2015.

[5] As drafted, the alphanumerical structuring of the different sections in this bill appears to be internally inconsistent — compare, for instance, Sections 2 and 3. This may be amended as a part of the internal legislative review process. There is also an error in the bill text, as shown on Govtrack, relating to Section 5, in that the "box" surrounding amendments to be inserted in the reentry statute (8 U.S.C. §1326) does not extend as far as it should, to encompass the altered subsections (b) and (c) of that provision of law.

[6] Section 642 of IIRIRA is codified within Title 8 (which governs aliens and nationality in the federal code) at 8 U.S.C. § 1373.

[7] Note that this bill does not change the out-of-date reference to the now-defunct Immigration and Naturalization Service that is contained in § 1373. Note also that, for reasons not clear to the author, there is a second statutory provision in Title 8 that reads nearly verbatim to that of § 1373. See 8 U.S.C. § 1644. In light of its existence, perhaps S.2146 should also include reference to that provision in the definition of sanctuary jurisdictions.

[8] FY 2014 SCAAP disbursements by state or local jurisdiction can be found on the Bureau of Justice Assistance website and grant disbursements for the various components of the COPS program, along with an interactive map, can be found at the DOJ website. The most cursory cross-comparison of identified sanctuaries (see the map referred to in end note 9) with SCAAP and COPS grant award data will reveal exactly how cavalier the administration has been about providing funds to law enforcement agencies that gladly take such funds even as many rail that they should not be expected to cooperate with federal immigration initiatives.

[9] Jessica Vaughan, Bryan Griffith, and Marguerite Telford, "Updated Map: Sanctuary Cities, Counties, and States — 340 sanctuaries release 9,295 criminals", Center for Immigration Studies, October 8, 2015.

[10] See Jessica Vaughan, "California Senate Advances Sanctuary Bill, Ignoring Lessons of Triple Murder Case", Center for Immigration Studies blog, June 13, 2012; and Jessica Vaughan, "Rounding Up Criminal Aliens, The easy way and the hard way", Center for Immigration Studies blog, September 3, 2015.

[11] See 42 U.S.C. § 5301 et seq.

[12] See the HUD website.

[13] See, for example, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards", a final rule of the Office of Management and Budget (OMB) published in the *Federal Register* on December 26, 2013.

[14] Despite 28 U.S.C. § 1346(b) specifying that jurisdiction for claims against the United States rests solely with the federal district courts, there is a distinct procedure that must be invoked to have civil tort cases removed from state or local judicial systems into the federal district courts. It can be found at 28 U.S.C. § 1441.

[15] As a standalone, the short title of the bill was the "Establishing Mandatory Minimums for Illegal Reentry Act of 2015" or "Kate's Law".

[16] See 8 U.S.C. § 1326(a).

[17] "The *Congress* shall have Power ... To establish an uniform Rule of Naturalization... ." Article I, Section 8, Clause 4, United States Constitution. (Emphasis added.)