

Opposing Immigration Detention: What Can States Do?

Abstract

Four states adopted laws in 2021 limiting or ending the operation of public and private immigration detention facilities in their states. California led the way in 2019, but its attempt to prohibit private detention facilities from entering into contracts with the federal government to house immigration detainees was struck down by the U.S. Court of Appeals for the Ninth Circuit in *Geo Group v. Newsom* in October 2021. By contrast, the Illinois Way Forward Act prohibiting state and local governments from entering into or extending contracts with the federal government to house immigrant detainees was upheld by the U.S. District Court for the Northern District of Illinois in December 2021. Maryland, New Jersey, and Washington also enacted variations of these laws seeking to limit or end immigration detention in their states, raising questions about which ones may survive.

Lawsuits challenging these state laws have raised issues of federalism, preemption, the anticommandeering doctrine, and intergovernmental immunities. States are asserting their sovereign right to control local governments and regulate detention facilities in their states, while the federal government and private detention contractors argue that these types of state laws interfere with the federal government's ability to execute congressional purposes set forth in the Immigration and Nationality Act with respect to immigration detention and removal. Given the circuit split that already appears to be developing, the issue of how much sovereignty states have to prohibit immigration detention versus the scope of the federal government's power over immigration detention will likely end up at the U.S. Supreme Court for final resolution. This presentation will explore the similarities and differences between these new state laws and how that may affect the courts' decisions in this area under the different legal theories that have been offered.

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