SANCTUARY CITY LITIGATION

Challenges To The Sanctuary City Executive Order

And New Grant Conditions

The International Municipal Lawyers Association
October 14-18, 2017
Niagara Falls, Canada

What is a Sanctuary Jurisdiction?





Sanctuary Cities Are Jurisdictions That Do Not Use Local Resources To Assist Federal Immigration Enforcement.

- For instance, in San Francisco:
  - Chapter 12H: City funds generally may not be used to assist in enforcing federal immigration law
  - Chapter 12I: Local law enforcement may not detain an individual solely on the basis of an ICE detainer
- More than 600 cities, counties and local governments have some "sanctuary" policies (i.e., policies that limit their involvement in federal immigration enforcement efforts).

The Executive Order Link "Sanctuary Jurisdictions" to 8 U.S.C. Sec. 1373

- "I have determined that, for purposes of enforcing the Executive Order, the term 'sanctuary jurisdiction' will refer only to jurisdictions that 'willfully refuse to comply with 8 U.S.C. 1373.'" Attorney General Sessions, May 22, 2017



What is Section 1373?

- Section 1373 provides: "Notwithstanding 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 Service information **regarding the citizenship or immigration status, lawful or unlawful, of any individual**."
- Plain language prohibits only restrictions on sending/receiving "citizenship or immigration status" information.
- The Executive Branch has taken an expansive view of Section 1373. Officials have repeatedly stated that jurisdictions violate Section 1373 where they "have some sort of policy where they don't honor detainers or allow us access to the jails."

Uncertainty about Section 1373 = Uncertainty about meaning of "Sanctuary Jurisdiction"



- Former DHS Secretary Kelly stating, with respect to the meaning of "sanctuary cities," "[f]rankly, I don't really know what it means. I don't think anyone out there knows what it means . . ."
- DHS Secretary Kelly stated that he does not "have a clue" how to define "sanctuary city"

Why be a Sanctuary City?

- We need all of our community members to report crimes, serve as witnesses, and assist in investigations and prosecutions.
- The health of our communities depends on residents being willing to access government health services – including vaccinations, prenatal care, etc.
- Communities are economically and socially stronger when all children, including undocumented persons, attend school.







A district court judge in Texas recently concluded "there is **overwhelming evidence**" that requiring local jurisdictions to participate in immigration enforcement "will **erode public trust** and **make many communities and neighborhoods less safe**." *City of El Cenizo v. State of Texas*

The Trump Administration/Attorney General Disagree.

"As the attorney general of the United States, I have a duty to **protect public safety and uphold our nation's rule of law**. 'Sanctuary city' policies harm both…I want San Francisco and other cities to re-evaluate these policies."

Jeff Sessions – April 7 Op-Ed



Who gets to decide?

The disagreement over sanctuary city policies raises the question of who gets to decide – local officials, Congress or the Executive Branch?







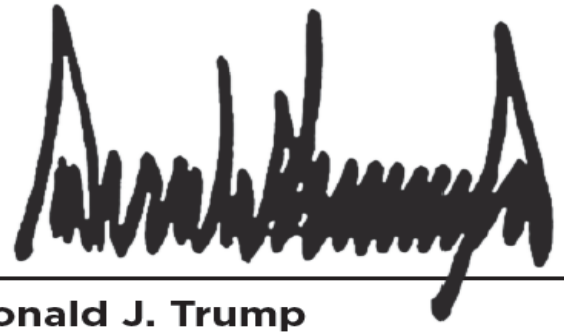
EXECUTIVE ORDER: ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED STATES (EO # 13768)

- On January 25, 2017, the President issued an Executive Order that threatened to strip federal funds from "Sanctuary Jurisdictions"
- The Order carried out the President's longstanding vow to put an "end" to sanctuary cities, like San Francisco, by ensuring that "[c]ities that refuse to cooperate with federal authorities will not receive taxpayer dollars." See Trump's Aug. 31, 2016 speech.

Donald Trump's Contract with the American Voter

What follows is my **100-day action plan to Make America Great Again**.

★ **THIRD**, cancel all federal funding to sanctuary cities.



Donald J. Trump

Your signature

Executive Order Funding Restriction

To ensure that "sanctuary jurisdictions" "do not receive Federal Funds," (§ 2), Section 9(a) of the Executive Order provides:

> [T]he Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that **jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants**, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.

Executive Order Enforcement Directive

"The Attorney General shall take ***appropriate enforcement action against any entity that violates 8 U.S.C. 1373***, or which has in effect a statute, policy, or practice that prevents or ***hinders the enforcement of Federal law***."

The Coercive Effects of the Executive Order

The threat to remove federal funding terrified local jurisdictions. Nearly all "sanctuary cities" rely on federal funds for critical programs and services.

For instance, last year, San Francisco's annual operating budget included $1.2 billion in yearly federal funds, and approximately $800 million in multi-year grants, for a total of $2 billion (approximately 13 percent of San Francisco's total budget).

President Trump– Feb. 5 Interview

"I'm very much opposed to sanctuary cities…If we have to, **we'll defund.** We give tremendous amounts of money to California…If they're going to have sanctuary cities, we may have to do that. Certainly that would be a **weapon**."



Sean Spicer – Feb. 8 Press Briefing

"Counties and other institutions that remain sanctuary cities don't get federal government funding."



Jeff Sessions – March 27 Press Briefing

"Failure to remedy violations could result in withholding grants, termination of grants and disbarment or ineligibility for future grants."



Miami-Dade “Drops Sanctuary Policy”



The Litigation Challenging the Executive Order

- San Francisco v. Trump, filed January 31, 2017
- Santa Clara v. Trump, filed February 2, 2017.
- Chelsea and Lawrence v. Trump, filed February 8, 2017.
- Seattle and Portland v. Trump, filed March 20, 2017.
- Richmond v. Trump, filed March 21, 2017.

The Causes of Action

- The Executive Order's Funding Restriction is unconstitutional because its violates the:
  - Separation of Powers structure,
  - Spending Clause, and
  - Tenth Amendment
- The Executive Order's Enforcement Directive violates the Tenth Amendment.
- Some jurisdictions – including San Francisco – also have sought declaratory judgment that the jurisdiction's laws comply with Section 1373.

Separation of Powers Argument

- **The Constitution grants Congress—not the President—the federal spending power -- including the power to impose conditions on federal funds.** See U.S. Const. art. I, § 8, cl. 1; see also South Dakota v. Dole, 483 U.S. 203, 206 (1987) ("Incident to [the spending power], Congress may attach conditions on the receipt of federal funds . . . .") (emphasis added); *see also Clinton v. City of New York*, 524 U.S. 417, 438 (1998). Nor may the President withhold funds that Congress has appropriated. *Train v. City of New York*, 420 U.S. 35, 41 (1975).
- **The Executive Order violates these constitutional principles by conditioning the receipt of federal funds on a jurisdictions' willingness to abandon sanctuary policies.**

Congress Has Not Chosen to "Defund" Sanctuary Jurisdictions

- Congress has repeatedly rejected legislation that would defund or impose funding restrictions on sanctuary jurisdictions.
- Thus, the Executive Order seeks to take measures "incompatible with the expressed or implied will of Congress," leaving the President's power "at its lowest ebb . . . ." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). In these situations, the President can act only when the executive's power is "exclusive" and "conclusive." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015).
- Because the President does not have the spending power—let alone any "exclusive" or "conclusive" power over federal spending – the Executive Order's Funding Restriction is unconstitutional.

Spending Clause Argument

The Executive Order is also unconstitutional because it purports to exercise the spending power in ways that even Congress could not.

Congress's spending power is not unlimited. Rather, the Constitution provides that Congress may only enact spending conditions that

- (1) are unambiguous and clearly stated in advance,
- (2) relate to Congress's purpose in spending the funds,
- (3) are not unduly coercive,
- (4) do not compel local governments to engage in unconstitutional conduct, and
- (5) promote the general welfare.

Unambiguous Requirement

Restrictions on funding must be stated unambiguously and in advance so that states and local jurisdictions can "exercise their choice" about whether to accept the funds "knowingly, cognizant of their participation." *Dole*, 483 U.S. at 203 (internal quotation marks omitted). The "legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts" Congress's terms. *Id.*

But here the Executive Order imposes conditions –

1) **Retroactively** – The Executive Order seeks to impose a retroactive funding restriction that did not exist when San Francisco and other jurisdictions agreed to accept the federal funds it is currently slated to receive.
2) **Ambiguously.** The Funding Restriction does not make clear what conduct will subject a jurisdiction to defunding. Even the government officials charged with enforcing the Executive Order cannot explain what jurisdictions need to do to avoid defunding.

Nexus Requirement

- Conditions imposed on federal grants must be "reasonably related to the purpose of the expenditure." *New York v. United States*, 505 U.S. 144, 172 (1992)
- **No reasonable relationship between the vast majority of federal funds received by cities/counties and sanctuary city policies**. The majority of federal funds received by San Francisco and other jurisdictions each year are through programs such as Medicare, Medicaid, Temporary Assistance to Needy Families, and Supplemental Nutrition Assistance Programs, transportation/capital improvement projects, FEMA, etc.

Not Unduly Coercive Requirement

- While the federal government "may use its spending power to create incentives for States," the spending power may not be used to "exert a power akin to undue influence." *Sebelius*, 132 S. Ct. at 2602 (opinion of Roberts, C.J.) (internal quotation marks omitted). While "mild encouragement" is permitted, **a spending condition is unconstitutional where it amounts to "a gun to the head**." *Id.* at 2604.
- The threat in the Executive Order "crosse[s] the line distinguishing encouragement from coercion" by threatening all federal funds and a substantial portion of sanctuary cities' budgets. *Sebelius*, 132 S. Ct. at 2603.

No Unconstitutional Conditions Requirement

- Congress's spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional." *Dole,* 483 U.S. at 210.
- The Executive Order has that effect by coercing jurisdictions to comply with all ICE detainer requests – regardless of whether there is probable cause to believe detained person committed a crime.
- Because ICE detainer requests need not—and often do not—establish probable cause for a local jurisdiction to detain an individual, **"blindly honoring" ICE detainer requests risk violating the Fourth Amendment rights of detainees**. *Morales v. Chadbourne*, 793 F.3d 208, 215–217 (1st Cir. 2015); *see also Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *9–11 (D. Or. Apr. 11, 2014); *Trujillo-Santoyo v. United States*, No. 5:16-cv-855-OLG, 2017 WL 2896021, at *13 (W.D. Tex. June 5, 2017).

General Welfare Requirement

- "In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress." *Dole*, 483 U.S. at 207.
- Congress has repeatedly rejected attempts to defund sanctuary jurisdictions or condition receipt of federal funds on compliance with Section 1373, and the President cannot impose funding restrictions that are contrary to the will of Congress.

Tenth Amendment Argument

- The Tenth Amendment embodies the basic principle that the "Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188.
- The Executive Order violates the Tenth Amendment by
  - **conscripting local officials** to serve federal interests
  - **interfering with local governments' autonomy** to legislate for themselves based on local conditions and priorities

San Francisco and Santa Clara Sought Preliminary Injunctions





DOJ Opposition Brief

- Argued that San Francisco and Santa Clara lack standing to challenge the Executive Order and that the claims were not ripe.
- Also argued lack of irreparable harm
- Offered no response on the merits





Narrow Construction of the Executive Order Offered at Hearing

- At the hearing, the DOJ argued that the Executive Order should be read narrowly to apply only to federal grants administered by the Departments of Justice and Homeland Security that already have conditions requiring compliance with 8 U.S.C. 1373.
- Based on that narrow construction, the DOJ argued that the hearing that the Executive Order does not violate the Constitution because it does not impose spending conditions not authorized by Congress and concerns only a small amount of money.

Court Issued Nationwide Preliminary Injunction -- April 25

"The Counties' motions for a nationwide **preliminary injunction, enjoining enforcement of Section 9(a), are GRANTED**. The defendants (other than the President) are enjoined from enforcing Section 9(a) of the Executive Order against jurisdictions they deem as sanctuary jurisdictions."

The Court rejected the DOJ's standing/ripeness arguments, and concluded that San Francisco and Santa Clara have a likelihood of prevailing on the merits of all of the legal claims challenging the Executive Order.

Court's PI Order Rejected Narrow Construction of Executive Order

- Court held that DOJ's construction of the Executive Order "renders the Order toothless" and is "is not legally plausible."
- The Court explained that "Section 9(a), by its plain language, attempts to reach all federal grants, not merely the three mentioned at the hearing. And if there was doubt about the scope of the Order, the President and Attorney General have erased it with their public comments."

AG Memorandum – May 22



AG Memorandum Adopted "Narrow Construction" Offered At Hearing

- **Defines Sanctuary Jurisdiction**: "I have determined that, for purposes of enforcing the Executive Order, the term 'sanctuary jurisdiction' will refer only to jurisdictions that 'willfully refuse to comply with 8 U.S.C. 1373.' A jurisdiction that does not willfully refuse to comply with section 1373 is not a "sanctuary jurisdiction" as that term is used in section 9(a)."
- **Applies only to DOJ/DHS Grants:** "In accordance with my duties as Attorney General, I have determined that section 9(a) of the Executive Order, which is directed to the Attorney General and the Secretary of Homeland Security, will be applied solely to federal grants administered by the Department of Justice or the Department of Homeland Security, and not to other sources of federal funding."
- **Relies on Statutory Authorization to Impose Conditions**: Promises to impose requirement of Section 1373 compliance only where "the Department is statutorily authorized to impose such a condition."

Court Rejects Interpretation of the Executive Order in the AG Memorandum

- Relying on the AG Memorandum, the DOJ sought **reconsideration** of the Preliminary Injunction Order, and **moved to dismiss** the complaints.
- On July 20, 2017, the Court denied both motions, concluding again that the "narrow construction" is not plausible.



SF and Santa Clara Are Seeking Permanent Nationwide Injunction

- On August 30, 2017, San Francisco and Santa Clara filed motions for summary judgment seeking to make the preliminary injunction permanent.
- San Francisco also seeks declaratory judgment that its laws comply with Section 1373.



Byrne JAG Funding Restrictions Litigation

(Sanctuary City Litigation, Round 2)

Byrne JAG Program

A formula grant providing the leading source of federal justice funding to state and local jurisdictions

The Byrne JAG funds are provided to each state, and certain local jurisdictions, to (among other things):

- Support law enforcement programs
- reduce recidivism
- conduct prevention and education programs for at-risk youth
- support programs for crime victims and witnesses.

Restrictions Imposed by DOJ

- 48 Hour Release Notice Requirement
- Access to Jails Requirement
- Compliance with Section 1373 Requirement



The Litigation Challenging the Byrne JAG Funding Conditions

- Chicago v. Sessions – filed August 7, 2017, sought PI at hearing on September 11, 2017
- San Francisco v. Sessions – filed August 11, 2017
- The State of California v. Sessions – filed August 14, 2017
- The City of Los Angeles has also sought intervene in the *SF v. Sessions* case – filed August 22, 2017
- Philadelphia v. Sessions, filed August 30, 2017

Chicago Moved For National-Wide Preliminary Injunction



Motion argued that the Notice and Access Conditions:

- Lack Statutory Authorization, and thus are ultra vires and violate separation of powers
- Violate the Spending Clause

Chicago also challenged the constitutionality and applicability of Section 1373.

Separation of Powers

- Congress has the power to control and impose conditions on federal spending, and Congress can under some circumstances delegate discretion to executive branch to impose reasonable conditions consistent with the Congress' spending power.
- The question then is – **Has Congress delegated power to the DOJ to impose the Bryne JAG conditions?**

DOJ Argument

DOJ says it has the authority to impose conditions on **all federal grant programs** under 34 U.S.C. Section 10102(a)(6) (formerly 42 U.S.C. Section 3712(a)(6)), which provides:

"The Assistant Attorney General shall . . . exercise such other powers and functions **as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation** of the Attorney General, **including placing special conditions on all grants, and determining priority purposes for formula grants**."

Chicago's Response

- A provision specifying the "Duties and Functions of the Assistant Attorney General" cannot reasonably be read to provide a broad, limitless grant of authority to impose new conditions on all federal grants.
- Section 3712, by its terms, does not itself grant authority, but rather allows the Assistant AG to exercise authority as "may be vested" in him/her through some other source.
- Unlike other statutes that authorize executive branch discretion to impose conditions, the Byrne JAG statute does not contain any delegation.

Spending Clause – Nexus Requirement

Are Notice and Access conditions germane to the purpose of the Byrne JAG program?

- Chicago says no – Congress designed Byrne JAG program to allow flexibility to local jurisdictions. The DOJ is attempting to remove that flexibility. Nothing in the Byrne JAG statute relates to immigration or suggested Congress has any immigration-related goals.
- DOJ argues that the Notice and Access conditions are "germane" because they share the same purposes as the Byrne JAG grants – to reduce crime and provide resources to support criminal justice.
- Question for Court– how close must the nexus be?

Spending Clause – Unconstitutional Conditions Argument

- Byrne JAG solicitation stated that funds would be conditioned on a jurisdiction's agreement to provide "at least 48 hours notice" of release date.
- Chicago argued that the conditions would violate the 4th Amendment if jurisdictions are required to hold individuals beyond their release date to comply with "at least 48 hours" notice requirement.
  - In response to Chicago's PI, the DOJ asserted that the final conditions language would not require "at least 48 hours" notice, but instead would require advanced notice where "practicable." Thus, jurisdictions will not be required to detain any individual beyond the time they would be released absent the condition.

Chicago Obtained Nationwide Preliminary Injunction

On September 15, 2017, the Court granted in part, and denied in part, Chicago's motion for a Preliminary Injunction.

- Court issued a nationwide injunction against the Notice and Access Conditions, after concluding that Congress has not authorized the Attorney General to impose such conditions.
- Court declined to issue an injunction against the Section 1373 requirement.



Proposed Laws on the Horizon



H.R.3003 - No Sanctuary for Criminals Act

- Would replace 8 U.S.C. Section 1373(a) to broadly prohibit state and local governments from restricting assistance/cooperation with enforcement of immigration laws.
- Provides that state and local governments that do not comply shall not be eligible to receive federal funds under the COPS program, Byrne JAG program or "any other grant administered by the Department of Justice or the Department of Homeland Security that is substantially related to law enforcement, terrorism, national security, immigration, or naturalization."
- **Status:** Passed the House on June 29, 2017. No action to date in the Senate.

H.R.3004 – “Kate's Law”

- Would enhance penalties for convicted and deported criminals who reenter the United States illegally.

- **Status**: Passed the House on June 29, 2017. No action in the Senate. The law was previously introduced in 2015 but failed to advance in the Senate.