



# SESSIONS' MEMO INTERPRETING TRUMP'S EXECUTIVE ORDER ON SANCTUARY CITIES

*How the Executive Order May be Applied*

## Introduction

On January 25, 2017, President Trump issued an Executive Order on immigration enforcement, directing that sanctuary cities would not be eligible to receive federal funds.<sup>1</sup> For an explanation of the contents of this order, see [www.ilrc.org/faq-trump's-executive-order-sanctuary-cities](http://www.ilrc.org/faq-trump's-executive-order-sanctuary-cities).

Following a lawsuit challenging the legality of this Executive Order, a federal judge enjoined Section 9(a) of the order—the section regarding sanctuary jurisdictions—on April 25, 2017.<sup>2</sup> For more information on this litigation, see [www.ilrc.org/lawsuits-against-trump's-threat-defund-sanctuary-cities](http://www.ilrc.org/lawsuits-against-trump's-threat-defund-sanctuary-cities).

In response to the ongoing legal dispute, the Trump administration tried to clarify the effect of the Executive Order and its intended meaning with regard to federal funding going to sanctuary cities. To this end, U.S. Attorney General Jeff Sessions released a Memorandum—a directive which serves as official guidance—on May 22, 2017, explaining how the Department of Homeland Security (DHS) and the Department of Justice (DOJ) should apply the Order.<sup>3</sup>

On July 20, 2017, in the latest development of the litigation, a federal judge rejected DOJ's request to reconsider the injunction in light of Sessions' memo, and denied the government's motion to dismiss the case.<sup>4</sup> The judge found that Sessions' Memo was merely a plan for implementation, not a legally binding analysis of the Executive Order.

## How did Sessions' Memo Interpret the Executive Order?

The Memo issued by Attorney General Sessions on May 22, 2017 reiterated the administration's goal of withholding federal funding from jurisdictions that fail to comply with the Executive Order, but it clarifies that the scope of the order is narrow. The Memo tied the definition of "sanctuary jurisdiction"—which the Executive Order had left unclear—to the language of 8 USC § 1373, and it made clear that only DOJ and DHS funds are at stake for those jurisdictions determined to be sanctuary jurisdictions. However, the memo did not clarify the process by which the Secretary of Homeland Security might make a sanctuary determination. As a document from the Department of Justice, directed to "All Department Grant-Making Components," it also left unclear whether, and how, DOJ's interpretation binds other federal agencies, and the court found that it did not.

## How did the Memo define a Sanctuary jurisdiction?

In the Memo, Attorney General Sessions stated that "for purposes of enforcing the Executive order, the term 'sanctuary jurisdiction' refers only to jurisdictions that 'willfully refuse to comply with section 1373.'" This refers to 8 USC § 1373, a federal statute that prohibits local policies that limit communication with DHS about a person's citizenship or immigration status.

## What is 8 USC § 1373?

8 USC § 1373 is a federal statute that prohibits local and state governments and agencies from enacting laws or policies that limit communication with DHS about "information regarding the immigration or citizenship status" of individuals. The statute does not require any

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<sup>1</sup> Executive Order: Enhancing Public Safety in the Interior of the United States, President Donald Trump, January 25, 2017, available at <https://www.whitehouse.gov/the-pressoffice/2017/01/25/presidential-executive-order-enhancing-publicsafety-interior-united>.

<sup>2</sup> See Order Granting Plaintiffs' Motion to Enjoin, *Santa Clara v. Trump*, No. 3:17-cv-00574 ECF Doc. 113 (N.D. Cal. Apr 25, 2017).

<sup>3</sup> Memorandum for all Department Grant-Making Components, Attorney General Jeff Sessions, May 22, 2017, available at <https://www.justice.gov/opa/press-release/file/968146/download>.

<sup>4</sup> See Order Denying the Government's Motions for Reconsideration and to Dismiss, *Santa Clara v. Trump*, No. 3:17-cv-00574 ECF Doc. 145 (N.D. Cal. July 20, 2017).

action from local governments, nor does it mandate any cooperation with DHS or ICE. It only prohibits policies that limit the sharing of *immigration status*. 8 USC § 1373 is extremely narrow; sanctuary policies have generally been crafted carefully in order to comply with this statute. For more information about 8 USC § 1373, see [www.ilrc.org/fact-sheet-sanctuary-policies-and-federal-funding](http://www.ilrc.org/fact-sheet-sanctuary-policies-and-federal-funding).

## Does this mean jurisdictions who comply with 8 USC § 1373 are safe?

Since the Memo's definition of a sanctuary definition is narrow, and is just "used for the purpose of enforcing the Executive Order," it is likely that jurisdictions who comply with 8 USC § 1373 will not see their funding affected. Since 8 USC § 1373 is already federal law, most jurisdictions already comply with it.

The Memo also said that the Department of Justice can still consider *other* enforcement actions — separate from those mandated by the Order — against state and local jurisdictions for "undermining our lawful system of immigration" or having "state or local practices [that] violate federal laws, regulations, or grant conditions." Nonetheless, it appears that the funding sanctions outlined in the Order are limited to violations of 8 USC § 1373.

## According to the Memo, what federal grants are affected by the Order?

In the Memo, Attorney General Sessions stated that Section 9(a) of the Executive Order "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*." Jurisdictions seeking federal funds from DOJ's Office of Justice Programs and Office of Community Oriented Policing Services will need to "certify their compliance with federal law, including 8 U.S.C. § 1373, as a condition for receiving such awards."

The Memo mentioned that this certification will apply to "any existing grant administered by the Office of Justice Programs and the Office of Community Oriented Policing Services that expressly contains this certification condition," as well as "to future grants for which the

Department [of Justice] is statutorily authorized to impose such a condition." Currently, the DOJ has imposed a certification requirement for the SCAAP, Byrne/JAG, and COPS grants programs.<sup>5</sup> No specific DHS grants have yet been identified as being at stake.

This presented a significant shift in tone from the statements previously made by President Trump, Attorney General Sessions, and other administrative officials who had claimed sanctuary jurisdictions would not receive *any* federal grants. Instead, the Memo stated that the Department of Justice's position is to require certification of compliance with 8 USC §1373 to obtain a few specific DOJ and DHS grants, and where the administration believes a jurisdiction is in violation of 8 USC § 1373, they may deny those grants.

## Takeaways.

It remains true that the federal government cannot commandeer state and local resources (such as police officers and detention cells) to enforce a federal regulatory program. Likewise, it cannot condition federal grants in a way that violates the Constitution. With DOJ requiring certification of compliance with 8 USC § 1373 in order to receive certain law enforcement grants, localities may want to consider challenging the legality of this new condition that has been imposed without clear Congressional approval or authorization.

Despite revising their stance in response to the legal battle over the Executive Order, it is clear that the Department of Justice and Department of Homeland Security will continue to push back against sanctuary jurisdictions. An appeal to the Ninth Circuit of the denial of their motion to reconsider the injunction and dismiss the case altogether, is likely DOJ's next step. Still, the Executive Order is unlikely to be able to force localities who do not wish to assist in immigration enforcement to change their policies, because they have no legal obligation to do so.

<sup>5</sup> For more information about the Edward Byrne Memorial Justice Grant Assistance Program (JAG), see <https://www.bja.gov/jag/>. For more information about the State Criminal Alien Assistance Program (SCAAP),

see [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=86](https://www.bja.gov/ProgramDetails.aspx?Program_ID=86). For more information about the Community Oriented Policing Services (COPS) grants, see <https://cops.usdoj.gov/grants>.