



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.¹ For an explanation of the contents of this order, see 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, 2017.² For more information on this litigation, see 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 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.³

How does Sessions' Memo Interpret the Executive Order?

The Memo issued by Attorney General Sessions on May 22, 2017 reiterates 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 ties the

definition of “sanctuary jurisdiction”—which the Executive Order had left unclear—to the language of 8 USC § 1373, and it makes clear that only DOJ and DHS funds are at stake for those jurisdictions determined to be sanctuary jurisdictions. However, the memo does 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 remains unclear whether, and how, DOJ's interpretation binds other federal agencies.

How does the Memo define a Sanctuary jurisdiction?

In the Memo, Attorney General Sessions states 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 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*. For more information about 8 USC § 1373, see 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.

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¹ 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-public-safety-interior-united>.

² See Order Granting Plaintiffs' Motion to Enjoin, *City of Santa Clara v. Donald J. Trump, et al.*, and *City and County of San Francisco v. Donald J. Trump*, April 25, 2017, available at <https://assets.documentcloud.org/documents/3677977/32c4feb6-e11c-4457-8c7d-faae1670117a.pdf>.

³ 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>.

The Memo also says 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 states 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 mentions 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.⁴ No specific DHS grants have yet been identified as being at stake.

This presents 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, this Memo suggests 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 if the

administration believes a jurisdiction is in violation of 8 USC § 1373, they may be denied those grants.

DOJ may be violating the injunction

Because the Executive Order was enjoined in its entirety, it is unclear whether DOJ’s current certification requirements are lawful or in violation of the injunction. The Court wrote: “This injunction does not impact the Government’s ability to use lawful means to enforce existing conditions of federal grants or 8 U.S.C. 1373, nor does it restrict the Secretary from developing regulations or preparing guidance on designating a jurisdiction as a “sanctuary jurisdiction.”⁵ Because it is unclear whether compliance with 8 USC § 1373 is a lawful condition of any grants, cities and counties applying for these grants may find it appropriate to object to the certification requirement entirely, even if they are in compliance with 8 USC § 1373.⁶

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. On the basis of the Attorney General’s Memorandum, the DOJ asked for the preliminary injunction to be reconsidered. The court has not yet ruled on this request.

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. Therefore even if the interpretation of the Executive Order is modified, it may still be found to exceed the President’s authority and remain enjoined.

⁴ 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. For more information about the Community Oriented Policing Services (COPS) grants, see <https://cops.usdoj.gov/grants>.

⁵ See Order Granting Plaintiffs’ Motion to Enjoin, *Santa Clara v. Trump*, No. 3:17-cv-00574 ECF Doc. 113 at 49 (N.D. Cal. Apr 25, 2017).

⁶ See Brief in Opposition to Defendants’ Motion to Reconsider, *Santa Clara v. Trump*, No. 3:17-cv-00574 ECF Doc. 114 at 20 (N.D. Cal. Apr 25, 2017).